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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 04.08.2021

% **Judgment delivered on: 17.11.2021**

+ W.P.(C) 6046/2021 & CM APPL. 19132/2021

SABRE GLBL INC. ..... Petitioner

Through: Mr. Sandeep Sethi and Mr. Gopal Jain, Sr. Advs. with Mr. Dheeraj Nair, Mr. Manish K. Jha, Mr.Akshit Mago and Ms. Vishrutyi Sahni, Advs.

versus

AIR INDIA LIMITED & ANR. ..... Respondents

Through: Mr. Dayan Krishnan, Sr. Adv. with Ms. Padma Priya, Mr.Dhruv Nayar, Mr.Tavinder Sidhu, Mr.AP Singh, Mr.Sukrit Seth, Mr.Sanjeevi Seshdhari, and Ms.Shreya Sethi, Advs. for R-1 (Air India)

Mr. Rajshekhar Rao, Sr. Adv. with Mr. Sanjeev Kapoor, Ms. Saman Ahsan, Ms. Srijata Majumdar and Ms. Swastika Chakravarti, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

JASMEET SINGH, J.

1. The present writ petition has been filed by the Petitioner seeking substantially the following prayers:

a) *"Issue a writ of certiorari or mandamus and/or any other appropriate writ, order or direction, declaring and* ***setting aside the award of Tender No: AIL/21-22/PSS/01 dated 31.03.2021 issued by the Respondent No.1 for Appointment of a Service Provider for providing Integrated Passenger Services Systems to Respondent No.2, as invalid and non-est;***

b) *Issue a writ of certiorari or mandamus and/or any other appropriate writ, order or direction* ***setting aside the LOI or the contract, if any, entered between the Respondents for Appointment of a Service Provider for providing Integrated Passenger Services Systems for Air India Limited, pursuant to the award of the Tender No: AIL/21- 22/PSS/01 dated 31.03.2021 issued by the Respondent No.1 to Respondent No.2;***

c) *Issue a writ of certiorari or any other appropriate writ, order or direction, quashing the Respondent No.1's decision dated June 8, 2021, as communicated to the Petitioner vide e-mail of the even date, declaring Petitioner unsuccessful for award of Tender No: AIL/21- 22/PSS/01 dated 31.03.2021, as illegal, invalid and non-est in the eyes of law;*

d) *Issue a writ of mandamus or any other appropriate writ, order or direction, declaring the Petitioner as Successful Bidder and directing the Respondent No. 1 to formalise and award the contract for Appointment of a Service Provider for providing Integrated Passenger Services Systems for Air India Limited to Petitioner in Tender No: AIL/21-22/PSS/01 dated 31.03.2021;*

e) *Issue a writ in the nature of Certiorari commanding the Respondent No.1, to produce the entire records of the award of Tender No: AIL/21-22/PSS/01 dated 31.03.2021 to Respondent No.2, including, the records containing evaluation of the technical and financial bids by the Respondent No.1, the technical and financial scores received by the Petitioner and the Respondent No.2, and all other relevant records/ file noting containing the basis of formation of opinion for issuing the Tender to Respondent No.2*

f) *Issue a writ of prohibition, prohibiting the Respondent No.1, during the pendency of the present Writ Petition, from giving*

Letter of Intent or executing any contract or proceeding with and/or taking any steps pursuant to their decision to award Tender No: AIL/21-22/PSS/01 dated 31.03.2021 to Respondent No.2…….” *(emphasis supplied)*

2. The Petitioner claims that it is a leading software and technology company that powers the global travel industry, serving a wide range of travel companies including airlines, hoteliers, travel agencies and other suppliers. The Petitioner is headquartered in Southlake, Texas, USA and serves in more than 160 countries around the world and is a leading technology solutions provider. It is further submitted that the Petitioner has pioneered online travel agencies, corporate booking tools, revenue management, and web and mobile itinerary tools, amongst others.

3. It has further been submitted that the Petitioner's technology platform manages more than USD 260 Billion worth of global travel spend annually and is one of the world's largest providers of airline and hotel technology. The customer base of the Petitioner includes American Airlines, LATAM Airlines, Aeroflot, Lion Group etc. The Petitioner has serviced various airlines in India such as Jet Airways, Kingfisher and also has a successful 20 years' relationship with Respondent No.1. The Petitioner has a development, delivery and support center Bengaluru providing customer care and support, implementation and consulting services.

4. Respondent No.1 is Air India Limited (hereinafter referred as '**AIL**'), a company incorporated under the Companies Act, 1956 and is the national flag carrier airline of India. AIL is fully owned by the Government of India and is under the administrative control of Ministry of Civil Aviation and operates with the brand name, "Air India" within India, and in the

international market. It has further been stated in the petition that Respondent No.1 is in a bad financial position and is facing financial crisis due to Covid-19. In fact, from the information in public domain, it is derived that the Respondent No.1 has never made net profit ever since its merger with Indian Air Lines in 2007, and has posted losses of Rs. 7,982.83 crores (provisional figures) in 2019-20, losses of Rs. 8,556.35 crores in 2018-19 and losses of Rs. 5348.18 crores in 2017-18, and a net loss of Rs. 2,750 crores in the first quarter of 2021. It has been stated in the petition, that Respondent No.1 is staying afloat on a bailout package extended by the Government in 2012, as part of a turnaround plan and a financial restructuring plan, wherein Respondent No.1 is to receive a budgetary support of Rs.30,231 crore over a period of 10-year ending in March, 2021. The Respondent No.1 has also conducted a cost-cutting drive which included a reduction in salary for pilots and sending around 600 employees on furlough. It has further been averred that the independent auditor of Respondent No.1, in its audit of standalone financial statements for the financial year 2019-20, has recorded that AIL's current liabilities exceeded its current assets by Rs. 5,42,591.7 million and it has accumulated losses of Rs. 7,08,759.8 million.

5. The Respondent No.2 is a Spanish IT provider for the global travel and tourism industry, and is the successful bidder of the tender floated by Respondent No.1, which is the subject matter of this petition.

6. On 31.03.2021, the AIL floated a tender bearing No. AIL/21-22/PSS/01 for Appointment of a Service Provider for providing Integrated Passenger Services System (defined as "PSS"). Through the said tender,

AIL was seeking eligible, reputed, competent and professional organizations who met the minimum eligibility criteria as specified in the Tender for Appointment of a Service Provider for PSS to AIL. The term of the contract under the tender is for a period of 7 years, extendable for a further period of 3 years on the same terms and conditions.

7. The purpose of the tender, as mentioned in the tender document, is the AIL's need for services of a PSS, available on 24x7x365 basis to support AIL's operation, including but not limited to the objectives *viz.,* for carrying out its marketing and sales activities to generate maximum revenue from the sale of AIL's products and services, improve market share and yields, serve traveler needs, with extra focus on premium customers. The tender's requirements cover core PSS technology, digital platforms like a Web booking engine, mobile applications, etc. The tender also included a hybrid segment-based Revenue Management System with migration to Origin & Distribution Network Revenue Management.

8. The tender required sealed quotations to be submitted in a Two-Bid system (Technical Bid and Price/ Commercial/ Financial Bid separately). Bids were to be submitted in two separate sealed envelopes, one for the Technical Bid and the other for the Price/ Commercial/ Financial Bid. The first stage of the bidding process involved opening of the technical bid, and second stage involved the opening of the financial bid after technical bid evaluation.

9. The envelope marked as "Technical bid" was required to contain bidder's response consisting of Annexure -E, F, G, H & M. Each criteria was mandatorily required to be fulfilled by the Bidders and in case, any of

the eligibility criteria was not fulfilled, the bid was liable to be disqualified. The second envelope of the bidders was to contain the "Price Bid," as per Annexure-K, and was to be inclusive of all requirements. The bids were required to be delivered to the office of Air India from 1000 Hrs on 29.04.2021 till 1500 Hrs on 30.04.2021. The technical bids were to be opened at 1100 Hrs on 03.05.2021 at the same venue.

10. On petitioner's expression of interest to Respondent No.1 in providing PSS to Respondent No.1, the Respondent No.1 shared a copy of the notice for the tender with the petitioner *vide* email dated 01.04.2021 and further invited the Petitioner to the Pre-bid conference scheduled on 16.04.2021.

11. A Pre bid conference was also held with prospective bidders on 16.04.2021, which included the Petitioner. All the Pre-bid questions of Petitioner to Respondent No.1 were addressed by the AIL, by responses dated 19.04.2021, uploaded on Respondent No.1's website, along with the minutes dated 19.04.2021 of the pre-bid meeting dated 16.04.2021. The Petitioner submitted its bid on 30.04.2021.

12. On 03.05.2021, the technical bids were opened.

13. The Petitioner states that the results and scoring of the technical bids were not shared with the bidders.

14. Clause 9 of the Tender Document provided for evaluation criteria for the technical and financial bids. The financial bid score was to be added to the technical bid score and the successful bidder would be the one having the highest combined score. The technical and financial requirements were given weightage ranging from 1 to 10 and the point scored against each requirement was to be taken into consideration for evaluating the score of

the technical bid. The tender was premised on the Quality-Cum-Cost Based Selection (QCBS), assigning a maximum of 80 % marks to technical assessment, and 20 % marks to financial assessment.

15. On 24.05.2021, the financial bids were opened in the presence of representatives of the Petitioner. As per the Petitioner, the price quoted by Respondent No.2 was almost 47% higher compared to the Petitioner's price quote. Based on Petitioner's evaluation, the combined score of the Petitioner should have been higher than that of Respondent No.2, and hence, the Petitioner should have been the L-1 tenderer.

16. The Petitioner submits that the AIL had issued an earlier tender in August 2020 for the same/ similar product/ services, wherein the Petitioner had complained regarding the weightage assigned to certain requirements, which resulted in giving unfair competitive advantage to Respondent No.2. Since AIL refused to revise the weightages, the Petitioner elected not to proceed with the bid of the earlier tender.

17. The Petitioner further submits that since Respondent No.2 was the only bidder in the erstwhile PSS tender, in accordance with the Indian Government Procurement Policy, AIL had to re-issue the PSS tender. The Respondent No.1 made no significant changes in the present Tender and, as per Petitioner, the technical requirements continued to be heavily skewed in favour of Respondent No.2. Despite this, the Petitioner decided to offer Respondent No.1 a favorable proposal, in an effort to win the present Tender.

18. The Petitioner submits that some of the weightages have been arbitrarily fixed to favour Respondent No.2, so that the Respondent No.2

scored higher in technical evaluation. Some of the requirements were given a weightage of 10, even though the same were not to be of any benefit to Respondent No.1's operations.

19. As per the Petitioner, few blatant examples of favoritism and bias towards Respondent No.2 are as under:-

(i) Clause 2.2 of the Tender Document gives weightage to large airlines migrated from SITA- (the existing service provider, which operates passenger processing systems for airlines) to Petitioner's or Respondent No.2's system in the last 3 years. As per the Petitioner, Respondent No.2 is the only vendor who has migrated a large airline in the last 3 years. In fact, the Petitioner has migrated many airlines larger than AIL, but not in the last 3 years.

(ii) System's ability to host several airlines belonging to the same group within a single partition, while sharing a common host and a single PNR for passenger servicing across the group. The requirement specifically defines the functional architecture of Amadeus (single partition and single PNR). Petitioner has the ability to host several airlines within a single reservation environment (but not in a single partition) subject to sales being under a single carrier code. This again unjustly favours Respondent No.2, since this particular requirement does not deserve a weightage of 10 points, and further restricts the way the business objective can be achieved.

20. On 08.06.2021, AIL informed that Respondent No.2 was the successful bidder and the technical and financial bid of the Petitioner scored second highest aggregate score.

21. It is the case of the Petitioner that for a financially precarious airline, such as AIL to spend an additional Rs. 900 crores, is not only shocking but completely imprudent, especially when the product of the Petitioner is as good, if not superior than Respondent No.2. The Petitioner has been seeking the technical bid scores of the bidders from AIL, but the same has not been provided which itself smacks of mala fide, favoritism and lack of transparency in matters of public tenders.

22. The Petitioner submits that the 80 - 20 weightage given to technical and financial bid in the present Tender, is also a clear departure from the normal government tenders (where weightage given is 70:30) and the same has again been done only to favour Respondent No.2.

23. The AIL has filed a detailed counter affidavit through its Deputy General Manager (Commercial). As per AIL, the final score earned by both the bidders as per tender conditions is as follows:-

Bidder	Technical Bid			Financial Bid		Consolidated Score (Out of 100)
	Absolute Marks (out of 1514)	% Marks	Technical Bid Marks (on scale of 80)	Total Bid Cost (in Rs. Crore) incl. of tax	Financial Bid Marks (out of 20)	

Sabre	935.86	61.81%	49.45	Rs. 1143.56	20.00	69.45
Amadeus	1436.58	94.89%	75.91	Rs.1956.30	11.69	87.60

24. Since the Petitioner did not take into account the tax component, it was added later, but this did not change the financial bid score of the Petitioner, which remained at 20 on account of its financial bid remaining the lower compared to that of Respondent No.2.

25. The Petitioner claims that the scores given during technical evaluation were based on assumptions and beliefs, and not on facts and reality.

26. The Respondent No.1 further submits that for a high impact and technology complex procurement, like that of PSS, AIL chose Quality-cum-Cost Based Selection (QCBS) which, according to AIL, is the most appropriate and balanced process. Weightage of 80- 20 was assigned to technical bid and financial bid evaluation respectively. The Respondent No.1 has sought to justify acceptance of the bid of Respondent No.2, even though it is more expensive than that of the Petitioner by an amount of Rs. 900 crores, on the ground that the system of Respondent No.2 is more advanced, scalable and enables the Respondent No.1 to provide an edge to its user which, in turn, will help in growth of business in the form of opportunity costs. The Petitioner cannot to dictate Respondent No.1 to settle for a system, which with less than optimum and advanced features, would result in unnecessary expenditures.

27. Out of total of 774 technical requirements, only 39 requirements were assigned a weightage of 10 points, constituting mere 5.04 % of the total. It

has further been stated by the Respondent, that the Petitioner accepted the QCBS procedure and, now after having participated in the tender, it cannot challenge the tender process or tender conditions.

28. The evaluation of technical bids was carried transparently and objectively as per the terms of the conditions of the tender. Subsequently, the evaluation scores of each bidder were duly approved by the topmost management of Respondent No.1.

29. The AIL has advanced the following legal submissions:

I. THE PETITIONER CANNOT BE PERMITTED TO CHALLENGE THE TENDER CONDITIONS/BID DOCUMENTS AFTER HAVING PARTICIPATED AND LOST IN THE TENDER PROCESS.

II. IN TECHNICAL MATTERS, THE EVALUATION COMMITTEE'S DECISION CANNOT BE INTERFERED WITH, AS THE EMPLOYER IS BEST JUDGE OF HIS REQUIREMENTS.

III. SCOPE OF JUDICIAL REVIEW IN CASES OF COMMERCIAL TRANSACTION IS LIMITED.

30. The Respondent No. 2, i.e. the successful bidder has also filed a counter affidavit wherein the submissions of Respondent No.2 are more or less on the same lines of Respondent No.1. As regards the background of Respondent No.2, it is submitted that Respondent No.2 is a pioneer and world leader in providing search, pricing, booking, ticketing and other processing services in real-time to travel providers and travel agencies through its Amadeus CRS distribution business. Respondent No. 2 also offers computer software that automates processes such as reservations, inventory management software and departure control systems. In the year

2020 itself, Respondent No. 2 was bestowed with numerous prestigious awards and accolades in recognition of its excellence in services including Best Technology Provider by Globe Travel Award, Winner of Best Technology Provider by Irish Travel Industry and the Vakantie Award for Innovation.

31. Respondent No.2 is a global leader in PSS industry and believes that it has 27.3% of all airlines on its Altea platform and an additional 17.3% of all airlines on its Navitaire platform. This is compared to an estimated of only 14.6% of all airlines being on the Petitioner's PSS platform, a far cry from the total of 44.6% on Amadeus Group's platforms. In fact, there have been several notable customers that have moved from the Petitioner's PSS to Respondent No. 2's PSS in recent years, and these include Southwest Airlines, Philippine Airlines and Bangkok Airways.

32. The market presence of the Amadeus Group can also be gauged from the fact that two thirds of all Global Alliance member airlines have selected Respondent No. 2's PSS, and as many as 18 out of the 26 Star Alliance members are currently hosted on the Respondent No. 2's Altéa PSS, including airlines such as Lufthansa, Air Canada, Austrian Airlines, Aegean Airlines, All Nippon Airways, Asiana, Avianca, Brussels Airlines, Croatia Airlines, Egyptair, EVA Air, LOT Polish Airlines, SAS Scandinavian Airlines, Swiss Airlines, South African Airways and TAP Portugal. Airlines hosted on the Altéa PSS carried as many as carried 372,272,759 passengers in the year 2019 alone.

33. After hearing the Parties, we on 14.07.2021, directed AIL to place true copies of the complete tender evaluation process in a sealed cover.

34. On 22.07.2021, we observed as under:-

> *"2. The technical evaluation is in* ***respect of highly technical aspects. From the technical evaluation, we find that the concerned Committee has awarded marks to both the petitioner and respondent No. 2 against each technical feature of which assessment is to be made in terms of the tender in question****. The technical features were set out in NIT itself.*
>
> *3. We are conscious of the fact that* ***we cannot step into the shoes of the Technical Evaluation Committee. Therefore, the marks awarded against each of the feature to either the petitioner, or respondent No. 2 cannot be called in question.***
>
> *4. We are only concerned with the process adopted by the respondents while undertaking the technical evaluation for awarding marks. Since the petitioner has serious grievance with regard to the evaluation process, we are inclined to direct the respondent No. 1/Air India Ltd. to share the same set of documents – as has been placed before us, to both the petitioner and the respondent No. 2 so that submissions may be advanced with regard to compliance of the process undertaken during the technical evaluation and award of marks.*
>
> *5. At the same time, we make it clear that we shall not hear any argument on the relative merit, or demerit in respect of any particular feature either by one, or the other party……"*

35. On 03.08.2021, the Respondent No.1 placed, on record, copy of chain of emails relevant for consideration of the matter.

36. We have heard learned Sr. counsels appearing for the Petitioner and Respondent Nos.1 and 2.

37. We have gone through the Minutes of the Technical Evaluation Committee (TEC) as well as the complete chain of emails exchanged

between various officers of AIL. The submissions of the learned Sr. counsel for the Petitioner are as under:-

(i) **The TEC had no authority to evaluate the technical bids of the bidders.** To substantiate this argument, Mr. Sandeep Sethi, Sr. Advocate has taken us through the Air India's Material Management Department Procurement Manual for Non-Aircraft Materials and Services (hereinafter called Air India Manual). The relevant Clauses which have been relied upon by the Petitioner are Clause 25.12 read with 33.3, to argue that the TEC, for a contract over Rs. 24 crore (present contract being more than Rs. 2000 crore), as per the Air India manual should have comprised of EDs of Materials Management Department (MMD), Finance Department and Commercial Department.

In the present case, the TEC comprised of GM and DGM level officials, and evaluation of the present tender was well beyond their scope of authority. The learned counsel for the Petitioner has argued that the executive authority must be rigorously held to the standard by which it professes its actions to be judged, and it must scrupulously observe those standards *(Ramana Dayaram Shetty v. The International Airport Authority of India & Ors., (1979) 3 SCC 489)*. It is submitted that the EDs have not evaluated the bids of the Petitioner and, EDs of MMD, Finance Department and Commerce Department have merely signed the Financial Bid Evaluation dated 28.05.2021, prepared by their subordinates. The inter-departmental communication placed before us, showed that Commercial Director had circumvented the process laid down in the Air India Manual, and exerted pressure on Director (Finance) to agree to the illegal procedure adopted to evaluate the bids. It has been argued that Director (Finance) in his note of 03.06.2021 had questioned their methodology adopted for technical evaluation.

(ii) **The Tender Evaluation Committee (TEC) followed an arbitrary and whimsical procedure for evaluating the technical bids, which makes the entire exercise tainted with illegality and mala fide.** It has been submitted that the Technical Evaluation Report (TER) followed the procedure of splitting 14 areas between different Departments for evaluation of different aspects on their own, without there being any such directions or instructions of the Management. It has been submitted that the Passenger Service System (PSS) for which the tender was floated is a Technology Complex Procurement. But in the present case, the Commercial Department evaluated areas, which comprise of a score of 1459 out of a maximum of 1514, being 96.4 % of the total evaluation. 159 marks were evaluated by Commercial and Finance Department personnel, comprising of 10.5% of the evaluation. Even though the tender was a Technology Complex Procurement, the IT Dept. evaluated only 55 marks i.e. 3.6%. Hence, it is argued that the Commercial Dept. has favoured Respondent No.2 at each stage of the tender process i.e. formulating tender conditions to constitution of an unauthorized TEC, to arbitrariness and splitting the areas of evaluation, to unfair evaluation of the technical bids.

(iii) The Petitioner has further cited arbitrariness even in evaluating the Petitioner's technical bids.

(iv) It is further submitted that, the AIL tailored the terms and conditions of the tender and assigned weightage to certain technical and functional requirements, to unjustly favour Respondent No.2 so that Respondent No.2 scored higher marks in technical evaluation and, as a result, there was no competition in the bidding process. The 80:20 allocation (Technical vis-à-vis Financial) had the result that despite scoring full 20 marks in the financial bid, the Petitioner was rejected.

(v) It has also been argued that AIL failed to consider that despite it being in financial doldrums, it did not keep public interest in mind, as the bid of the Petitioner was almost Rs. 900 crores lower than that of Respondent No.2. In fact, ED (MMD) and ED (Finance) have even advised ED (Commerce) to negotiate with Respondent No.2 and after negotiation, the bid of Respondent No.2 is still Rs. 760 crore higher than that of the Petitioner. It has been argued that since AIL is in the process of disinvestment, there was no reason for the AIL to go into the present tender at such a huge expense.

(vi) The QCBS selection criteria was adopted for the PSS tender and was a departure from Air India's usual practice and was only adopted to favour Respondent No.2. The QCBS selection criteria were never used by Air India prior to the 2020 tender.

38. Mr. Dayan Krishnan, learned Sr. counsel appearing for Respondent No.1, in response and at the outset, has relied upon the order dated 22.07.2021 to submit and argue that the process of scoring and evaluation, falls in the exclusive domain of the Tender Evaluation Committee (TEC). The scope of judicial review in respect of tender matters is very limited, and the Court should refrain from doing so, until and unless the decision-making process of the Tender Floating Authority is tainted with mala fide, arbitrariness, or Wednesbury principle of unreasonableness

39. He has further argued that mere suspicion has no role in the matter of judicial scrutiny of tender matters, and has raised preliminary objections to state that having participated in the tender, and having been declared unsuccessful, the Petitioner, now, cannot challenge the tender conditions. On merits, learned counsel for the Respondent has drawn our attention to Clause 9.1.2.1(iv) & (v) to highlight the procedure for scoring for compliant, partial compliant, compliant in future, and non-compliant aspects. They read as follows:

"9.1.2 The response to the technical and functional requirements of the technical bid will be evaluated as follows:
1.
i. The Bids will be evaluated as per the Quality-cum-Cost Based Selection (QCBS) procedure with weightage of 80:20 to be given to the Technical and Financial Bids, respectively.

ii. Each of the individual requirements (around 775 in number) mentioned in the RFP Technical and Functional Requirements document have been given a weightage ranging from 1 to 10.

iii. For each of the individual requirements mentioned in the RFP Technical and Functional Requirements document, the Bidder's response shall have two components, namely "Compliance status" and "Justification and description"

iv. Compliance status: The Bidder has to evaluate his product against each technical and functional requirement mentioned in the RFP Technical and Functional Requirements document and rate its product and choose a compliance status from among the four namely 'compliant', 'partially compliant', 'compliant in future 'or 'not compliant'. These four compliance statuses shall carry marks as detailed below:-

Compliance Marks = 1	*Partially Compliant Marks = 0.5*	*Compliance in future Marks= 0.25*	*Non Compliance Marks = 0*

v. Wherever the Bidder is rating his product as Partially Compliant or compliant in future, the non-compliant portion or the gap in requirement must be delivered/fulfilled within a time period of 1 year from the cutover of Day 1/Phase -1 or Day 2 /Phase – 2, depending upon in whichever Day/Phase the said requirement falls into." *(emphasis supplied)*

40. He has also drawn our attention at the Notice Inviting Bids to Tender to argue that the Commercial Dept. of AIL had floated the tender and not the MMD. He has further drawn our attention to Clause VII of the Air India Manual under the heading *"Major contract not under the purview of the MMD"* to show the contracts which are not under the purview of MMD. He

further submits that despite the contract being outside the purview of MMD, the ED (MMD) has approved and signed the Technical Evaluation Report (TER).

41. Mr. Krishnan, learned counsel has submitted that the PSS system is required on urgent basis, since the existing service provider SITA has already intimated to AIL that it would stop providing services from June, 2022 and the transition to a new service provider will take approximately 12 months. He submits that even though the AIL is looking at disinvestment, the PSS system is required to remain competitive in the market.

42. Mr. Krishnan has further argued that one of the responsibilities of MMD is to ensure correct reflection of the TER in the Tender Committee (TC). As regards the arguments of the Petitioner that the TEC has not been properly constituted, the learned senior counsel for the Respondent has drawn our attention to Clause 25.4 of Air India manual which reads as under:-

> *"25.4. A convener of the user department would be responsible for carrying out technical evaluation of the bids. The Technical Evaluation Report (TER) would be submitted to the Materials Management Department duly approved by the Tender Committee (TC) member of the user department as per the delegation of the financial powers as per Annexure A - Column 2 or by an officer not less than a rank of Manager or equivalent level for non-TC cases. The TER should clearly identify the qualified and non-qualified bidders with justifications thereof."*

43. As regards the financial powers as per Annexure A, Mr. Krishnan has sought to draw a distinction between the Tender Processing Level/ Composition of Tender Committee, and Tender Evaluation Report. The

financial requirements of **<u>upto Rs. 12 crores and above Rs. 24</u>** crores is for composition of TC, and not for TER.

44. He submits that the TER is to be as per the rigors of Clause 25.4 of Air India Manual. The opening of financial and technical bids was in accordance with the rigors of Clause 25.4 of Air India Manual. Mr. Krishnan has further taken us through the Minutes of the Meeting to show that all EDs of the Departments have approved the bid of Respondent No.2 and the same has also been approved by the CMD. Hence, it is the submission of the Respondent that the evaluation process was in terms of the Air India manual, the evaluation and marks were assigned by the TER as per the process and documents before the TER.

45. It is submitted that TEC comprised of subject experts of areas which included representatives from Commercial, Financial and IT Dept. respectively. The TEC, in fact, comprised of

Name	Post
Mr. Murlidhar Vidhakapet,	GM (IT),
Ms. Archana Sareen,	DGM (Finance),
Mr. Niket Garg	DGM Commercial,
Mr. Girish Kumar,	DGM (O)-Commerce
Mr. Naveen Chhabra	Sr. AGM Commercial

46. It is further submitted that as per Clause 25.4 of the Air India Manual, there is no requirement for the TEC to comprise of ED level officers. The requirement of ED level officer is only applicable to the composition of

Tender Committee and not Tender Evaluation Committee. Assuming without admitting that the TEC was to comprise of ED level officers, there is tacit approval by ED (Finance), ED (MMRD) and ED (Commercial) with certain observations and noting. The concerns of ED (Finance) and ED (MMRD) were also addressed, and thereafter the entire evaluation process was approved by the Director (Commercial), Director, (Finance) and lastly by the CMD. The split in evaluation in 14 areas was raised by the Director (Finance) which was clarified to his satisfaction. The issues raised by the Director (Finance) (Mr. Vinod Hejmadi) as to how evaluation should be done.

47. It has further been the submission of the learned counsel for the Respondent that in judicial scrutiny, the Constitutional Court should refrain from comparing the marks granted to the Petitioner and Respondent No.2 during technical evaluation.

48. Lastly, the Respondent has argued that it is the Tender Floating Authority which is the best suited to interpret the terms of the Tender. The lawfulness of a decision can only be looked into if it is arbitrary, irrational, unreasonable, mala fide or biased. In matters of public interest, the Courts will not, in exercise of power under judicial review, interfere even if there is a procedural aberration or error in awarding the contract.

49. We have heard the learned counsels for the parties and gone through the documents placed on record.

A. The pivotal point argued by the learned Senior counsel for the petitioner is that the Technical Evaluation Committee had no authority to evaluate the technical bids of the bidder.

(i) The relevant Clauses of the Air India Manual are extracted as under:-

"25. EVALUATION OF TECHNICAL BIDS

25.12. For multi user items the major user departments (preferably 2) may be associated for carrying out the technical evaluation of the bids in addition to a non-purchase Materials Management Department representative, who would be the convener. The level of the Technical Evaluation Committee would be as per the financial powers given in Annexure A - Column 2.

...

33. COMPOSITION OF TENDER COMMITTEE

*33.1. Tender Committee will consist of appropriate level officers as given in **Annexure A - Column 2** from MMD, Finance, and the user department.*

33.2. The Tender Committee (TC) will evaluate the bids/response of tenders whose estimated value is ₹ 10.00 lakh and above.

33.3. Representation in the Tender Committee from the respective departments should be strictly as per the levels as specified at Annexure A - Column 2 and the same should not be diluted.

ANNEXURE A – FINANCIAL POWERS

Estimated value of contract in INR or its equivalent in any foreign currency	*Tender processing level/ Composition of TC*	*Authority Level for Final Award*	*Authority Level for signing PO*
Column 1	***Column 2***	***Column 3***	***Column 4***

Upto Rs. 1 Lakhs	*Asst. Manager/ No TC*	*Asst. Manager*	*Asst. Manager*
Upto Rs. 2 Lakhs	*Asst. Manager/ No TC*	*Dy. Manager*	*Asst. Manager*
Upto Rs. 5 Lakhs	*Dy. Manager/ No TC*	*Manager*	*Dy. Manager*
Upto Rs. 10 Lakhs	*Manager/ No TC*	*Sr. Manager*	*Manager*
Upto Rs.35 Lakhs	*MMD: Manager Finance: Manager User Dept. Equiv. Level*	*Sr. Manager*	*Manager*
Upto Rs. 50 Lakhs	*MMD: Sr. Manager Finance: Sr. Manager User Dept. Equiv. Level*	*AGM*	*Sr. Manager*
Upto Rs. 1 Crores	*MMD: AGM Finance: AGM User Dept. Equiv. Level*	*Sr. AGM*	*AGM*
Upto Rs. 3 Crores	*MMD: Sr. AGM Finance : Sr. AGM User Dept. DGM/ADGM*	*DGM*	*Sr. AGM*
Upto Rs. 6 Crores	*MMD: DGM Finance: DGM User Dept. Equiv.*	*General Manager*	*DGM*

	Level		
Upto Rs. 12 Crores	*MMD: GM* *Finance: GM* *User Dept. Equiv. Level*	*Executive Director*	*GM*
Upto Rs. 24 Crores	*MMD: ED* *Finance: ED* *Head of User Dept.*	*Director – Finance/ Functional Director*	*Executive Director*
Above Rs. 24 Crores	*MMD: ED* *Finance: ED* *Head of User Dept.*	*Concurrence by Director – Finance* *Approval by Chairman & Managing Director*	*Executive Director*

(ii) A bare perusal of Clause 33 of the Air India Manual clearly shows that the Tender Committee will consist of appropriate level officers, as given in Annexure A - Column 2, from MMD, Finance, and User Department. As per Annexure A – Column 2, the Tender Committee is to compromise of all officers of the level of ED.

(iii) In the present case, the Committee which evaluated the bid comprised of:

Name	Post
Mr. Murlidhar Vidhakapet,	GM (IT),
Ms. Archana Sareen,	DGM (Finance),
Mr. Niket Garg	DGM Commercial,

Mr. Girish Kumar,	DGM (O)-Commerce
Mr. Naveen Chhabra	Sr. AGM Commercial

(iv) We have no hesitation that the same is a clear departure from the Air India manual. The arguments sought to be raised by the learned counsel for Respondent No. 1 that there is a difference in TEC and TC, seems to us to be a misnomer. The whole purpose of a Tender Committee is to evaluate bids/ responses of the tender. Clause 33.2 reads:

"33.2. The Tender Committee (TC) will evaluate the bids/response of tenders whose estimated value is ₹ 10.00 lakh and above."

(v) The distinction sought to be drawn by the learned Counsel for the Respondent No.1, that the TEC comprised of subject experts in their respective domain areas, and there is no requirement for TEC to comprise of ED level officers, is misconceived. In this regard, it will be relevant to reproduce certain portions of emails exchanged between Director (Commercial)-Meenakshi Malik & Director (Finance) - Mr. Vinod Hejmadi. The operative portions of the emails reads as under:

"From: "Girish Kumar" <girish.kumar@airindia.in>
To: "V Hejmadi" <v.hejmadi@gmail.com>
Sent: Wednesday, May 19, 2021 12:00:56 PM
Respected Sir (Director Finance) & Ma'am (Commercial Director),
....
...

Three departments namely IT, Finance and Commercial were involved in the evaluation process, through their authorized nominees.
IT department completed the evaluation for Technical areas namely (i) System Administration, (ii) Date Extraction, (iii) Integration and (iv) Support and SLA.
Ms. Lata Gupta, GM-IT, the nominee in the evaluation committee was supported in the evaluation by the following IT officials:

1. Muralidharan Vadakkepat – GM
2. Vippan Dutt – AGM
3. Mukesh Kumar – DGM
4. Ritesh Kumar – AGM
5. Mini Krishnan – DGM

FIN Department: Mrs. Archana Sareen, DGM-Finance carried out the evaluation for Revenue Accounting Support requirement of the tender. She was supported in the process by following Finance personnel.

1. Ajit Karmarkar – DGM
2. Vineeta Warikoo – Sr.AGM
3. Vrushali Dandekar – Sr.AGM
4. Mini Nair – Staff

Commercial Dept. the main business user of the services was represented by Niket Garg-DGM, Girish Kumar-DGM (Offg.) and Naveen Chhabra-Sr.AGM

The evaluation for core requirement modules namely, (i) Company History, (ii) PSS General Information, (iii) PSS Functional Req. (iv) E-Commerce, (v) Revenue Management and (vi) Loyalty Management was carried out by the above three committee members.

Furthermore, given the shared and overlapping nature of requirements under the said module between Finance and Commercial, ***Girish Kumar also did the evaluation for Revenue Accounting Support representing Commercial****.*
Maintenance & Enhancement and Governance modules with few requirements was evaluated by Girish Kumar alone.
………

……

…

Submitted plz, for approval expeditiously, to open the FINANCIAL BID, as we are extremely constrained by tight time lines, one due to Disinvestment n secondly SITA product valid till June, 22. Migration on to new system has to start and finish as soon as possible and completing the same under the covid pandemic in itself is going to be a challenge.

Regards

Girish Kumar

RMMA

Commercial Dept.

"From: "V Hejmadi" <v.hejmadi@gmail.com>
To: "Girish Kumar" <girish.kumar@airindia.in>
Sent: Thursday, May 20, 2021 9:24:36 AM

Dear Girish,

………………………

Annexure A to the said manual states that for contracts above Rs 24 crores the composition of the tender committee would be ED MM, ED Finance and the Head of the user Department. Under column 2 of Annexure A, the authority for final award has to be concurred by Director Finance and Approved by CMD.

The PSS tender is a multi user product with Commercial, Finance and IT departments involved, as evident from the fact that the task of technical evaluation has been split between Commercial Finance and IT departments. As per para 25.12 of the MMAO 715, the Technical Evaluation Report approved by all the three subject matter experts of the respective user departments is required to be submitted to the appropriate level – EDs of the user department/ ED MM and ED Finance, as the PSS tender is over Rs 24 crores.

Further, you are aware that the PSS tender is based on a QCBS system of evaluation.

I also find that while individual departments have given marks and evaluated their respective areas, the Passenger Revenue Accounting Support module has been evaluated by two departments individually. I also understand that except for you, as the convener, none of the other

members know the marks awarded by the other tender committee members. How the two sets of marks given by you and finance representative for Revenue accounting will be used to reach the final score is not known.

Therefore, the marks awarded by the Tender Committee to ***each of the bidders have to be frozen and agreed to by all****, before we go to the next stage of the tender.*

……….

It is necessary that, the Technical Evaluation Report (TER) ***duly agreed by all is finalized, signed and frozen, we move to the next stage****.*

-

………..

However, we must follow all the rules as laid down in our manuals and it is essential that the entire process is transparent in all aspects and the MMD procedures are followed in letter and spirit.

I also see that you have concluded that on submission of the evaluation report on the Revenue Accounting Support by the Finance representative, the Finance department's role in technical evaluation comes to an end. This is not correct.

The role of the finance nominee in the technical evaluation process ends only after the Technical Evaluation Report (TER) is signed and accepted by the appropriate level of officer (in this case the ED Finance, ED MM and ED Comm).

As such, it is requested that in compliance of the laid down rules and regulations on tender, you urgently send the TER duly signed/ approved by the members of the Technical Evaluation Committee, along with the technical score arrived at for each bidder, to the Executive Director – Finance, MM, IT and Commercial for their approval and take the process further.

Regards,
Vinod Hejmadi

From: "Commercial Director" <cd@airindia.in>
To: "V Hejmadi" <v.hejmadi@gmail.com>
Sent: Thursday, May 20, 2021 11:52:16 PM

Subject: Fwd: PSS Tender: AIL/21-22/PSS/01 dated 31.03.2021 Technical Evaluation and Financial Bid Opening

Dear Vinod

……………

4. PSS Tender is a highly sensitive tender and we have seen 8 months ago when the tender was first uploaded last, how one interested party tried to influence the process by attempting to change our requirements through multiple petitions and letters to top management, even going to the extent of questioning and requesting change in the very basis of evaluation methodology of Quality cum Cost Basis (QCBS).

5. In this back drop and the need to take the process forward without further delay, we propose a date of Monday, 24th May, 21 at 1000 hrs in Board Room, Airlines House where all committee members can come together physically and view all the papers and sign in the presence of all Executive Directors of Finance, Commercial and MM. It will be ensured that nobody will be in a position to take copies of document leading to any leakage of information. Following this, we two departmental heads (Commercial and Finance Department) can give our consent to open Fin Bid (though my consent has already been given yesterday). The same day, the two bidders who have submitted the bids, can be called and financial bids be opened in their presence.

………………….

Regards,

Meenakshi Mallik

Director Commercial

From: "V Hejmadi" <v.hejmadi@gmail.com>

To: "Commercial Director" <cd@airindia.in>

Sent: Thursday, May 20, 2021 12:44:34 PM

Dear Meenakshi,

In my TM, I have just asked Girish to follow the laid down procedures.

……..

I am of the opinion that we must follow the process laid down in our own manuals in all cases.

Therefore, I recommend that as per the laid down guidelines, the Tender Evaluation Committee comprising of 'subject matter experts' must first finalize and sign the Technical Evaluation Report and put it up to the appropriate level as laid down in the guidelines, which is the level of Executive Director for their approval. As we are following the QCBS method of evaluation, the marks awarded to each bidder by the Technical Evaluation Committee, must be finalized at this stage itself.
Once the TER is approved by the EDs, the financial bids can be opened and bidders can be invited.

As per procedure, the EDs i.e. EDs of MMD, Finance and the user department can approve the opening of the financial bids.

……..
Regards
Vinod Hejmadi
Director – Finance

From: "Commercial Director" <cd@airindia.in>
To: "V Hejmadi" <v.hejmadi@gmail.com>
Sent: Thursday, May 20, 2021 2:13:58 PM

Dear Vinod
1. We stand guided by the fact in your trailing mail, that after getting the technical evaluation report signed from the technical committee, EDs of concerned departments namely Commercial, Finance and MM can give consent for opening of Financial bid.

2. Accordingly, we will follow the timelines/ procedure mentioned in para 5 of my earlier mail of date (Time 1152 AM), with EDs giving approval to open fin bids.
3. Instructions will be passed on to the Commercial and IT representatives to be present on Monday, 24th May, 21 at 1000 hrs in Board Room at Airlines House, New Delhi, ED-Commercial will be present in office too.
4. Request suitable instructions are passed on to nominees on the Committee representing Finance and ED-Finance to be there at the above stated time.
The presence of MMD Committee member & ED-MM to be there at Airlines house (24th May 2021 – 1000 hrs) is also requested so that

final consent be taken from them to open the financial bid, on 24th May, 2021.

……

6. Request all concerned Committee Members and EDs to be present on 24th May, 2021 1000 hrs, Airlines House, New Delhi.

..

Regards,
Meenakshi Mallik
Director Commercial

From: "SK Singh <sk.singh@airindia.in>
To: "Commercial Director" <cd@airindia.in>
Sent: Thursday, May 20, 2021 5:01:56 PM
Subject: Re: PSS Tender: AIL/21-22/PSS/01 dated 31.03.2021 Technical Evaluation and Financial Bid Opening

Dear Madam,

As you are aware, ***till now ED level committee has not seen any documents/*** *report of the working group.*

We do not want to miss out any important aspect and also want to ensure that the given task is completed at the earliest. ***Subject tender is a very complex tender which needs time to finalise report. We also understand that working group has not finalized the Technical Evaluation Report (TER) until now.***

Considering above, to expedite the process, we suggest following:

1) Let the working group meet online immediately to finalise the TER to be put up to ED level committee.

2) The TER of working group is given to ED level committee at the earliest by email, so that ED level committee come prepared for discussion for early morning meeting on 24th May, 2021.

3) Respective Department working group member to consult their ED for any guidance that they may need to finalise the TER latest by May 22, 2021.

4) Bidders should not be in the room when ED level committee is finalizing their report. Financial Bid to be opened only after all members of ED level committee has signed the report.

Undersigned is available in my office at CAO today and can also be available tomorrow for any further requirement of Finance Department to expedite the process.
Understand Mr. Girish Kumar is in Mumbai. He can visit my office to shown show any papers that he may want to show on the subject tender.
Above schedule will help in ensuring ED level committee's active participation on May 24, 2021 for finalizing TER.

Regards
Sangeeta K. Singh
Executive Director – Finance
Finance Department

From: "Commercial Director" <cd@airindia.in>
To: "V Hejmadi" <v.hejmadi@gmail.com>
Sent: Thursday, May 20, 2021 6:25:43 PM

Dear Vinod
1. We plan to go ahead with the process as detailed in my last mail sent to you. That mail had incorporated your suggestions on the Technical Evaluation Committee finalizing and signing the report after which the EDs of respective departments connected with the tender can provide their consent and approval for opening the financial bids.

2. ***There was a Tender Committee formed to carry out the PSS tender and a Technical Evaluation Committee to evaluate the submitted bids. Surprised to hear about a new ED level committee as suggested in the mail from ED-Finance.***

3. Technical Evaluation Committee consisted to subject matter experts of their respective domain areas and you don't expect cross functional knowledge/ expertise possessed by them which would make them eligible to evaluate and judge bid responses of requirements of areas/ departments other than theirs. ***Therefore a finance nominee is expected to evaluate bid responses for requirements coming under revenue accounting support and after finishing same is expected to share it with his / her ED or department head. Commercial nominee did the evaluation for revenue accounting support only because of the shared***

nature of these requirements between Finance and Commercial. But the Commercial nominee didn't do any evaluation of requirement falling under the purview of IT Department as he is not fit to do that same. IT Department evaluated those requirements consisting of System administration, Data extraction, integration and support & SLAs and submitted the report to its department head.

4. ***These individual reports, which have been shared with respective department heads will be collated and presented for signatures to the Technical committee on Monday, 24th May 21 at 1000 hrs where they can see all the papers, not from the point of view of evaluating what others have done for which they don't possess functional expertise but just to see there are no discrepancies and everything is in order. Same then will be given to the EDs of Finance, Commercial and MM for seeking consent to open the Financial bids as advised by you.***

The idea of an ED Level committee existing to whom all papers ***have to be given well in advance for their evaluation therefore is without purpose for the reasons stated*** *above and it will only create opportunities of confidential papers leaking out and falling in wrong hands.*

Regards,
Meenakshi Mallik
Director Commercial

From: >"V Hejmadi" <v.hejmadi@gmail.com
To: >"Commercial Director" <cd@airindia.in
Sent: Thursday, May 20, 2021 7:59:51 PM
Dear Meenakshi,
….

Any committee formed to evaluate the technical bid submitted is jointly responsible for the evaluation. So the committee members are required to apply their mind on the entire report whether they are experts in that field or not*. The report is debated upon and then agreed.* ***You have rightly said that the committee members have to ensure that there are no discrepancies and everything is in order, while finalizing the TER****.*
……..

There is no new ED level committee formed. Since as per the MMAO manual any contract above Rs 24 crores needs to be approved by ED level officers the Technical Evaluation Report finalized by the Junior level officers needs to be approved by EDs. The Annexure A states that ED MMD, ED Finance and ED of the user department are authorized for contracts above this value. Hence the TER has to be approved by these ED level officers, as was done in the last exercise. It is just the approval process wherein the applicable level of officer has to finally approve the report.

It is expected that the ED level officers would apply their minds and read the report placed before them and it is also possible that they may find discrepancies in the TER which would need to be corrected or resolved. After the approval of EDs, the next stage of opening of Financial bids is reached. It is at this stage that the bidders can participate in the opening of bids.

The bidders will need to be suitably advised of the timings considering that initially the TER has to be finalized by the committee, signed by them and then placed before the EDs for their perusal deliberations and approval.

……….

Regards
Vinod Hejmadi
Director – Finance

From: "Commercial Director" <cd@airindia.in>
To: "V Hejmadi" <v.hejmadi@gmail.com>
Sent: Friday, May 21, 2021 12:44:40 PM

Dear Vinod,

1. ***We will go ahead, as per the earlier detailed plan, of technical evaluation committee members congregating on Monday, 24th May in Airline's House at 10am and signing the report.***

This will be in line with the laid down guidelines of an evaluation committee comprising of "subject matter experts" finalizing and signing the TER.

2. The Technical Evaluation Report can then be approved, same day, by ED level officers of the departments involved in the process.
In this connection reference is drawn to PSS file NS-43, N-3 where there are notings from ED-MM dated 29th Jul, 20 on the question of role of his department in the technical evaluation process and are being quoted below:
"The technical evaluation is not within the scope of MMD & hence would be carried out by Commercial Dept., IT Department and Finance Team. This is as per the MMD manual.
The Final contract would have to be executed by CD/ED-Commercial with the successful bidder.

3. The above clears the air about the composition of EDs required to provide the go ahead for opening the Financial Bid which is restricted to those representing Commercial, IT and Finance.
ED-Commercial and ED-IT (represented by GM-IT) will be there to approve the report this Monday *(presence confirmed)*
Request presence of ED-Finance also, to approve and provide the go head.
……..
Meenakshi Mallik
Director Commercial"

(vi) Concerns were flagged by the Director (Finance), Mr. Vinod Hejmadi and ED (Finance), Ms. Sangeeta K. Singh as taken note of hereinabove, with regard to the Committee of competent officers viz. ED (MM), ED Finance, and Head of the User Department not evaluating the bids. It appears to us that the issues were correctly flagged and evaluation of the Tender was not as per the Air India Manual. A bare perusal of the above-mentioned clauses clearly dictates that it is ED level officers who are to evaluate the Tender.

The emails reproduced hereinabove show that there was no satisfactory response given to the issues highlighted by Mr. Vinod Hejmadi, Director (Finance) in his email of 20.05.2021, sent at 9:24:36 AM. The responses of the Commercial Director of the same day sent at 11:52:16 PM, 2:13:58, and 6:25:43 PM show that the endeavour was merely such to complete the formality of having the approval of the ED level officers recorded on the file. We can only say that the tone and tenor of the Director, Commercial in her emails to Mr. V. Hejmadi, Director (Finance) shows that it was pre-decided that the TER prepared by the subordinate officers would be approved by the ED level officers. As if, there was no scope for any discussion or dissent. Even when Mr. Vinod Hejmadi, Director (Finance) sent the subsequent email at 7:59:51 PM on 20.05.2021, **the emphatic response of the Director Commercial contained in her email sent at 12:44:40 PM on 21.05.2021 is that "We will go ahead as per detailed plan of TEC members congregating on 24.05.2021 at 10 AM and signing the report."** Thus, it appears to us, that the independent evaluation by the ED level officers never took place, and the endeavour of Mr. Vinod Hejmadi, Director (Finance) to flag the issues of the competence of the Committee of subordinate staff to evaluate the tenders was stomped, rather dictatorially.

(vii) In the present case, the evaluation of the tenders has been done by:

Name	Post
Mr. Murlidhar Vidhakapet,	GM (IT),

Ms. Archana Sareen,	DGM (Finance),
Mr. Niket Garg	DGM Commercial,
Mr. Girish Kumar,	DGM (O)-Commerce
Mr. Naveen Chhabra	Sr. AGM Commercial

(viii) Although the ED level officers have agreed with their findings, there has been no independent appreciation by the ED level officers of Finance, MMD and the User Department i.e., Commercial, of the bids submitted by the bidders; the analysis of the literature supplied by the bidder; the responsiveness to the bid requirement, and, the marking. The evaluation by the ED level officer, at best, can be described as a tacit supervisory evaluation, and not, original evaluation as required by the Air India Manual. The Respondent Air India was obliged to follow the standards laid down by it for maintaining transparency and objective assessment of the bids for such high stake tenders.

(ix) Having said so, the next question arises for our determination is, whether at this stage, we should quash the tender for violation of Air India Manual and direct Respondent No.1 to go for a re-tender. To this, our answer is a "No," for the following reasons:

a) The scope of the Court's jurisdiction under Article 226 of the Constitution of India is, in essence, a discretionary. This Court has to be satisfied that the facts of a particular case warrant this Court to exercise its extraordinary writ jurisdiction to correct a perversity, bias or malafides. It is, thus, a settled a position of law that courts ought to exercise their discretionary powers with caution and only in furtherance of public interest.. In *Michigan*

Rubber (India) Ltd. v. State of Karnataka and Ors, (2012) 8 SCC 216, the Supreme Court, laid down the principles for when the interference under Article 226 is called for as follows:

"23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

24) Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and

(ii) Whether the public interest is affected.

If the answers to the above questions are in negative, then there should be no interference under Article 226."

In *Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617, the Court examined the ambit of Judicial review:*

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

found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

In *Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517,* the Supreme court specified that even if a procedural aberration or error in assessment is present, as long as the decision of contract is bona fide, the court will not exercise the power of judicial review.

> *"22…Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides.* ***Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'****. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance.* ***If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out.*** *The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes…."*

From the above, we can gather that the court would exercise the power of judicial review if the decision-making process, or the decision, is perverse and not merely irregular or incorrect or erroneous. The threshold of malafide, arbitrariness, perversity or favouritism must be met before this court can interfere with the action of the decision-making authority. Furthermore, there must also be room given by the court to the owner/ employer to give an interpretation to the tender, that though not acceptable to the constitutional courts, but is still a plausible view.

b) As far as there was the departure in the evaluation process of the tender, the same was nevertheless duly approved by ED (Finance), ED (MM) and ED (Commercial) with certain observations and notings. Note sheet Nos.2,5 & 7 read as under:-

N-2 *"AIR INDIA*
24th May, 21

Headquarters, Commercial Dept.
Air India

<u>Sub</u>: PSS Tender : AIL/21-22/PSS/01 dated 31.03.2021- Technical Evaluation Report N-2

1. Given below are the technical evaluation scores of both Sabre and Amadeus

<u>SABRE:</u>

S. No.	Areas	Maximum Marks	Girish Kumar	Niket Garg	Naveen Chhabra	Murlidharan	Archna Sareen	Marks (Avg.)
1	Company History	7	7	7	7			7.00
2	PSS General Information	88	41.5	49.5	49.5			46.83
3	PSS Functional Req.	496	323.25	327.25	325.75			325.42
4	E-Commerce	174	114.5	115	120			116.50
5	Revenue Management Revenue Accounting	333	234	224.5	222.5			227.00
6	Support	159	56.75				126.25	91.50
7	Loyalty Management	156	74.5	74.5	77			75.33
8	System Admin	14				4		4.00
9	Data Extraction	19				0.5		0.50
10	Integration	9				6		6.00
11	Support and SLA	13				4.5		4.50
12	Maintenance & Enhancement	3	3					3.00
13	Migration	40	25.28					25.28
14	Governance	3	3					3.00
		1514						935.86

Out of maximum possible marks of 1514, Sabre in the technical evaluation has earned total of 935.86 marks which represent meeting 61.81% of total technical and functional requirements.
On a scale of 80, these marks get translated into a score of 49.4.

<u>AMADEUS</u>

S. No.	*Areas*	*Maximum Marks*	*Girish Kumar*	*Niket Garg*	*Naveen Chhabra*	*Murlidharan*	*Archna Sareen*	*Marks (Avg.)*
1	*Company History*	*7*	*7*	*7*	*7*			*7.00*
2	*PSS General Information*	*88*	*82.5*	*82.5*	*82.5*			*82.50*
3	*PSS Functional Req.*	*496*	*479.25*	*481.75*	*479.75*			*480.25*
4	*E-Commerce*	*174*	*164*	*164*	*163.5*			*163.83*
5	*Revenue Management*	*333*	*326.25*	*325.25*	*325.75*			*325.75*
6	*Revenue Accounting Support*	*159*	*158.5*				*152*	*155.25*
7	*Loyalty Management*	*156*	*150*	*149*	*146.5*			*148.50*
8	*System Admin*	*14*				*6.5*		*6.50*
9	*Data Extraction*	*19*				*9.5*		*9.50*
10	*Integration*	*9*				*6*		*6.00*
11	*Support and SLA*	*13*				*5.5*		*5.50*
12	*Maintenance & Enhancement*	*3*	*3*					*3.00*
13	*Migration*	*40*	*40*					*40.00*
14	*Governance*	*3*	*3*					*3.00*
		1514						*1436.58*

Out of maximum possible marks of 1514, Amadeus in the technical evaluation has earned total of 1436.58 marks which represent meeting 94.89% of total technical and functional requirements.
On a scale of 80, these marks get translated into a score of 75.91.

2. The summary of marks earned by both bidders is again given below:

Summary

Bidder	*Absolute marks (out of 1514)*	*% Marks*	*On scale of 80*
SABRE	*935.86*	*61.81%*	*49.45*
AMADEUS	*1436.58*	*94.89%*	*75.91*

3. Both the bidders will carry the above score into the next round of Financial Bid opening. Marks earned in the financial bids (out of 20) will be added to the individual marks scored by the bidders on the scale of 80 to get the aggregate score.
4. ***The Technical Evaluation Committee hereby submits its Technical Evaluation Report (TER) N-2 and recommends opening of the Financial Bids of the two bidders****.*

(sign) *(sign)*

Murlidharan Vadakkepat GM-IT (on mail)	*Archna Sareen DGM-Finance*	*Niket Garg DGM-Commercial*
(Sign) Girish Kumar DGM-Commercial (O)	*(Sign) Naveen Chhabra Sr.AGM-Commercial*	

~~ED-Commercial~~	*ED-Finance*	*GM-IT* *~~ED-IT~~*

The committee has given the TER score in order to open the financial bid of the qualifying persons.

N-5
Headquarters, Commercial Dept.
Air India

28th May, 21

Sub: PSS Tender : AIL/21-22/PSS/01 dated 31.03.2021- Financial Bid Evaluation

1. The technical bids were evaluated and marks allotted, by Commercial IT and Finance departments in their respective domains and compiled as per the evaluation criteria given in the tender document. The consolidated report was submitted to EDs of Commercial and Finance Dept. for approval and ED-MM for procedural approval. The report was approved and permission granted to open the Financial Bids as detailed in N-1, N-2 and N-3. The procedural approval from ED-MM confirming that the technical evaluation exercise was carried out by the respective domain members as per the tender criteria was received vide email dated 24th May, 21 (N-4).

2. The Financial Bids were accordingly opened on 24th May, 21 evening. Board Room-Airlines House in the presence of the PSS Tender Committee Members. Mr. A. Thirunavukkarasu, member tender committee from MM Department joined the financial bid opening through video conferencing (Webex). All the representatives of two bidders joined through Webex.

3) Mr. Anil Oberoi from Mm Department is being associated as a stop-gap arrangement post opening of the Financial bids in view of the urgency of the subject tender, since Mr. A. Thirunavukkarasu is confined to his home town and not in a position to attend the meeting on account of health grounds and medical emergency associated with himself and family members. (reference mail dated 26th May, 21 from ED-MM)

………………..

5)... Details of calculations are tabulated and attached as ***Annexure 1. Both the bidders have confirmed acceptance to all other terms and conditions of the tender in the financial bid.***

Total bid cost as per the price bid of M/s Sabre, inclusive of implementation and usage cost, over the seven-year period works out to ***USD 13,86,13,542.79*** *(see* ***Annexure 1*** *for details)*

Total bid cost as per the price bid of M/s Amadeus, inclusive of implementation and usage cost, over the seven-year period works out to ***USD 26,08,40,009.03*** *(see* ***Annexure 1*** *for details)*

....M/s Sabre's total cost works out to be ***$ 13,86,13,542.79 (Rs. 1039.60 crore).*** *As a result of their being the lowest cost bidder they get awarded 20 marks.*

M/s Amadeus the second lowest cost bidder had put a financial bid costing ***$ 26,08,40,009.03 (Rs. 1956.30 crore).*** *Hence Amadeus gets 10.63 marks as calculated below:*

($ 13,86,13,542.79/ $ 26,08,40,009.03) x 20 = 10.63

Table for calculation of Financial Bid marks:

Bidder	*Implementation Fee*	*Usage Fee*	*Total Bid Cost*	*Total Bid Cost (in Rs. Crore)**	*Financial Bid marks (out of 20)*
M/s Sabre	*$ 24,87,000*	*$ 13,61,26,542.79*	*$ 13,86,13,542.79*	*Rs. 1039.60*	*20.00*
M/s Amadeus	*$ 47,00,000*	*$ 25,61,40,009.03*	*$ 26,08,40,009.03*	*Rs. 1956.30*	*10.63*

**Exchange rate of Rs. 75 to USD is taken for conversion from SAP for May, 21.*

6) Total Bid score after considering both the marks achieved by individual bidders in their technical (as per N-2 dated 24th May, 21) and financial bids are as follows:

Bidder	*Technical Bid Marks (out of 80)*	*Financial Bid Marks (out of 20)*	*Total Bid score under QCBS process*
M/s Sabre	*49.45*	*20.00*	***69.45***
M/s Amadeus	*75.91*	*10.63*	***86.54***

The bid received from M/s Amadeus has scored more marks than that submitted by M/s Sabre.

7) The estimated projected cost of contract for entire seven (7) years period was taken as Rs 2450/- crore (refer N-37 dated 24th Jul, 20). The cost of the bid received from M/s Amadeus, the bidder with the highest aggregate score under the QCBS process, is computed as Rs. 1956.30 crore and the cost bid received from Sabre is computed as Rs. 1039.60 crore.

8) As per the terms of the Tender M/s Amadeus has scored the highest marks based on QCBS model of evaluation and is eligible Bidder for award of contract, subject to management's approval.

(sign)	*(sign)*	*(sign)*	*(sign)*
Anil Oberoi	*Lata Gupta*	*Archna Sareen*	*Girish Kumar*
GM-MM	*GM-IT*	*DGM-Finance*	*DGM-Commercial (C*

~~ED- Commercial~~	*(As per Annexure 1)*
ED-MM	*Based on the QCBS model as per approved portion, the committee recommendation 'A' is recommended for approval. However, we may advise commercial to negotiate further with M/s Amadeus…*
~~ED-Finance~~	*The eligible bidder has been identified as M/s Amadeus based on the evaluation criteria specified in the Tender. However, if cost flow is seen.* ***There is a vast difference between L-1 and L-2 bidders. Hence, negotiation is proposed to be carried out with M/s Amadeus.*** *User Dept. should also preparer a separate note specifying the score at work and functional requirements fulfilled by SITA in the current contract. In comparison, the details of w/o scope & functions included in the current tender be also spelt out clearly, so that on apple to apple comparison is brought out for clear understanding ..* *Please see N-6*
Commercial Director	
Director Finance	

N-6 *AIR INDIA*
June 2, 2021

ED-Finance

……

5) Other observations:

- *The difference between the marks of the technical evaluation of Sabre and Amadeus is 26.46.*
- *The technical Bid carries 80% weightage and financial bid carries only 20% weightage i.e. the bidder can score maximum 20 marks in the Financial Bid.*
- *Hence in the present case the Financial Bid has practically no relevance.*

6) Even after adding 10% towards withholding tax to the Bid of Sabre, Bid of Amadeus if higher by over 70%. Air India will not be able to get any benefit of lower bid of Sabre in view of them scoring less marks in technical evaluation on account of specifications in technical bid.

7) PRA support as required by Finance Department is provided by PSS service provider, as mentioned in Annexure "A" and Annexure "C" of the Bid. The scope of PRA/ PRA support asked in the bid is much higher to meet the requirement of User Department. ***At present this requirement of User Department is covered under a separate PRA contract. For this requirement Amadeus quote is USD 16.4 Mill. i.e. Rs. 123 crore. Considering critical financial condition of AI, management needs to take a call whether AI need to incur this additional cost and whether this or any other requirement can be deferred/ dropped till financial condition improves.***

Sangeeta K. Singh
02/06/2020
Executive Director- Finance

N-7 *AIR INDIA*

Director- Commercial

……

M/s Amadeus has achieved the highest aggregate score under the Quality-cum-Cost Based Selection (QCBS). They are meeting over 94% of our technical and functional requirements and have given

individual rate quotes for each subsystem/ module, as per tender terms and conditions, in their financial bid.

As requested by ED-MM in his notings about a comparison between scope and functional requirements met by SITA in the existing PSS contract and those which have been requested in the current PSS Tender, the same is provided below. It is to be noted that

> *i. Work scope and functional requirements met by SITA across various subsystems/ modules in use today were formulated 10 years ago. These modules haven't undergone upgradation during the course of their usage by Air India. Whatever little upgradation took place was paid by Air India over and above the normal rates charged by SITA. Technology on the other hand has evolved tremendously and similar subsystems/ modules available in the market today capture these changes. They are advanced versions with enhanced capabilities than those currently used by Air India.*
>
> *ii. The PSS Tender technical and functional requirements have captured the product evolution both in case of subsystems/ modules already in use with SITA PSS and new subsystems/ modules presently not provided by SITA but globally used by major airlines.*
>
> ….

The offer by M/s Amadeus who has scored the highest aggregate score under the QCBS selection process, is 42.62% less than what Air India is paying currently to vendors and would have been required to pay to new vendors for additional requirements/ modules taken off the shelf at current benchmark rates. M/s Amadeus is offering all as an Integrated solution with rich scope and value addition without the need for Air India to go for third party solutions at heavily discounted prices.

Concerns made by ED-F have been addressed. Comparison chart/ table requested by ED-MM and ED-C have also been given above in the note.

Propose negotiations may be started immediately with M/s Amadeus whose bid has won the Tender under the QCBS process. Propose constitution of high level committee with representative of Executive Director level officers to hold price negotiations with M/s Amadeus. From Commercial department, ED-Commercial is nominated for the negotiation exercise to be supported by M/s Niket Garg, Mr. Girish Kumar and Mr. Naveen Chhabra.

Sd/
Meenakshi Mallik
Director-Commercial
Camp Bhubaneshwar
02nd June, 2021

~~Director-Finance~~

The perusal of the papers from the opening of the bids to the financial evaluation reveal the following:

(i) The committee evaluating the technical and financial bids comprise of officers from 4 Departments vis. Commercial, Finance, IT and MMD.

(ii) In the Technical bid 14 areas were identified and evaluation was supposed to be made on these 14 areas.

(iii) Mr. Girish Kumar- vide email dated May 19, 2021 (see page 1139-1141), while seeking approval of CD/DF to go the next stage of financial bid opening, indicated the methodology adopted by the committee.

(iv) The email states that the 14 areas were evaluated as under:

	Exclusively	*Jointly*
(a) Commercial	*9*	*1 with finance*
(b) Finance	*-*	*1*
(c) IT	*4*	*-*

(d) MMD	-	-

(v) It is not clear who had decided the above split in the evaluation of the 14 areas. The Committee member of Finance, IT and MMD had access <u>to the technical bid documents pertaining only to the areas allotted to them given in (iv) above.</u>

(vi) On the above basis, the committee submitted their Technical Evaluation Report (TER) which was summarized as under:

	Marks	*On scale of 80*
(a) Sabre	*935.86*	*49.45*
(b) Amadeus	*1436.58*	*75.91*

(vii) Following the TER, the financial bids were opened and evaluated. The Financial bids were as under:

Sabre – Rs. 1039.60 cr.

Amadeus – Rs. 1956.30 cr. } *For seven years' term*

(viii) As per QCBS method, Amadeus scored higher marks than Sabre and the committee recommended giving the contract to Amadeus.

(ix) ED (Fin) had pointed out that the cost of Sabre would be higher by 10% on account of withholding tax, but it would not change the L-1 status.

(x) ED (F) has also in her noting on NS-iii stated that in view of the financial condition of AI, a decision whether to take PRA support which is costing Rs. 123 crores may be examined.

(xi) CD has in the note (NS 114/113) stated that PRA support is necessary. She has also given the correct level of payment to SITA

which is $ 1.913 per Boarded pax as compared to USD 0.953 pbp of Amadeus.

(xii) We would like to state that PRA support in the PSS would not be relevant on the PRA required by Finance. As such, there would not be any savings on PRA.

(xiii) If the commercial needs the PRA support then we would go ahead. It will not have any impact on the revenue accounting required by Finance as the requirements are different.

As the committee has sought approval for negotiation with Amadeus after finding them to be L-1 in the QCBS method. We may agree to the recommendation of the committee and the CD of a ED level committee for negotiation.

Vinod Hejmadi
Director – Finance
030621

M
07.06.2021

CMD *07.06.21*

CD

c) The tender evaluation process file was lastly signed by the CMD of Respondent No.1 on 07.06.2021. Hence, it is apparent that the ED level officers did not undertake the evaluation of the bids on their own, the ED level officers finally concurred with the evaluation of the tender by Mr. Murlidhar Vidhakapet, GM (IT), Ms. Archana Sareen, DGM (Finance), Mr. Niket Garg (DGM-Commercial), Mr. Girish Kumar, DGM (O)-Commerce and Mr. Naveen Chhabra, Sr. AGM (Commercial).

d) Even though the evaluation process was not strictly in terms of the Air India Manual, the approval of the evaluation by the EDs is substantial compliance of the Air India Manual.

e) The most important and relevant aspect of the matter is that the AIL is the National Carrier of our country. It is an admitted fact that the PSS system is required on urgent basis by Respondent No.1 as the existing service provider SITA has already intimated to Respondent No.1 that it will stop providing its services in June, 2022. It is also been argued that its transition to a new service provider will take approximately 12 months.

f) In the present case, if the tender process is set aside, it will put Respondent No.1 in a difficult position, i.e. the PSS system, which is required on urgent basis, will not be in place by June, 2022. That is an overwhelming concern/reason which cannot be ignored by this Court.

g) Hence, in view of the discussion above, we are of the view, that though there has been non-compliance of the Air India Manual in the evaluation of the Tender bids, the said non-compliance is not of such a degree which requires setting aside of award of tender in favour of Respondent No.2. The violations highlighted by us above, when weighed against the prejudice- in monetary terms, that may be caused to Air India if the present tender process is quashed, or if the award of the contract to Respondent No.2 is set aside, would be serious, and may outweigh the good that it would do to Air India. The public interest in the present case, lies in accepting the procedural aberrations, and upholding the award of tender to ensure that the new PSS system is in place by June 2022.

B. As far as the arguments of the Petitioner that:

(i) Tender Committee (TC)/ Tender Evaluation Committee (TEC) following arbitrary whimsical procedure for evaluating technical bids, resulting in violation of equality and fairness in the tender process;

(ii) Arbitrariness in Respondent No. 1's evaluation vis-a-vis Petitioner and Respondent Nos.2.

(iii) The Respondent No.1 making tailor-made terms and conditions of the Tender and weightage to favour Respondent No. 2;

(iv) Respondent No.1's mala fide intent to evaluate the technical bid of Respondent No.2 in such a manner that Petitioner scores so less that even the huge difference in financial bid may not work in favour of the Petitioner;

(v) Respondent No.1's failure to consider overwhelming public interest in savings to the extent of Rs. 900 crores;

(vi) Following QCBS criteria, which was a departure from the earlier practice are concerned

We are unable to agree with any of them. Our reasons for saying the same are as under:-

(i) In our order of 22.07.2021, we had categorically observed that in the present tender technical evaluation is in respect of highly technical aspects. The concerned committee has awarded marks to both - the Petitioner and Respondent No.2, against each technical feature of which assessment is to be made, in terms of tender in question. As a court, sitting in judicial scrutiny of tender evaluation, we are conscious of our limitation and we cannot step into the shoes of Technical Evaluation Committee (TEC). Therefore, the marks awarded against each of the feature, to either the Petitioner or Respondent No. 2, cannot be called in question before us. We have no competence to evaluate the marking process, and we are not examining the said aspect like an appellate authority.

(ii) This Court cannot step into the shoes of Tender Evaluation Committee, and analyse the scores awarded by experts.

(iii) In the case of *Tata Cellular Vs. Union of India (1994) 6 SCC 651,* in paragraph 94, the Supreme Court has emphasized need to find a right balance between the administrative discretion to decide the matters on the one hand and need to remedy any unfairness on the other. The Supreme Court has observed:

"*94. The principles deducible from the above are:*

(1) The modern trend points to judicial restraint in administrative action.
(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations

through several tiers. More often than not, such decisions are made qualitatively by experts.
(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure." *(emphasis supplied)*

(iv) Similarly, the Supreme Court in **Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.,** (2016) 16 SCC 818, has laid down

*"**15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. 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."**(emphasis supplied).*

(v) We are also supported in our views by, ***Consortium of Titagarh Firema Adler S.P.A. - Titagarh Wagons Ltd. v. Nagpur Metro Rail Corpn. Ltd.,*** *(2017) 7 SCC 486, wherein the Supreme Court observed:*

"30 ..we intend to deal with role of the Court when the eligibility criteria is required to be scanned and perceived by the Court. In

Montecarlo Ltd. (supra), the Court referred to TATA Cellular (supra) wherein certain principles, namely, the modern trend pointing to judicial restraint on administrative action; the role of the court is only to review the manner in which the decision has been taken; the lack of expertise on the part of the court to correct the administrative decision; the conferment of freedom of contract on the Government which recognizes a fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere, were laid down. It was also stated in the said case that the administrative decision must not only be tested by the application of Wednesbury principle of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. ***The two-Judge Bench took note of the fact that in Jagdish Mandal (supra) it has been held that, if the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out.*** *The decisions in Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and another, B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others and Michigan Rubber (India) Ltd. (supra) have been referred to.* ***The Court quoted a passage from Afcons Infrastructure Ltd. (supra) wherein the principle that interpretation placed to appreciate the tender requirements and to interpret the documents by owner or employer unless mala fide or perverse in understanding or appreciation is reflected, the constitutional Courts should not interfere. It has also been observed in the said case that 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. After referring to the said authority, it has been ruled thu****s:*

"26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature

of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. ***This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule****. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint.* ***Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."***

31. In Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) rep. by its Chairman & Managing Director and another v. CSEPDI-Trishe Consortium, rep. by its Managing Director and another[18], the Court, after referring to Jagdish

Mandal (supra) and taking note of the complex fiscal evaluation and other aspects, held:

"36. … At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant's assessment. Suffice it to say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd."

32. In Reliance Telecom Ltd. and another v. Union of India and another, the Court referred to the authority in Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd. and others wherein it has been observed that

"58….though the principle of judicial review cannot be denied so far as exercise of contractual powers of Government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose."

Thereafter, the Court in Reliance Telecom Ltd. (supra) proceeded to state thus:

"58. ... In the instant case, we are unable to perceive any arbitrariness or favouritism or exercise of power for any collateral purpose in the NIA. In the absence of the same, to exercise the power of judicial review is not warranted. In the case at hand, we think, it is a prudent decision once there is increase of revenue and expansion of the range of service."

And again:

"59. It needs to be stressed that in the matters relating to complex auction procedure having enormous financial ramification, interference by the Courts based upon any perception which is thought to be wise or assumed to be fair can lead to a situation which is not warrantable and may have unforeseen adverse impact. It may have the effect potentiality of creating a situation of fiscal imbalance. In our view, interference in such auction should be on the ground of stricter scrutiny when the decision-making process commencing from NIA till the end smacks of obnoxious arbitrariness or any extraneous consideration which is perceivable."*(emphasis supplied)*

(vi) From the above, the following proposition emerge:

i. That judicial restraint must be exercised by the Court in tender matters.
ii. The Court cannot substitute its decision for the decision of the Technical evaluation committee.
iii. The court cannot go into a comparative analysis of the marks
iv. The Courts would interfere, only if the decision is perverse or *mala fide*

(vii) In the present case, there are 774 technical requirements which were framed keeping in mind business criticality, the competitive advantage which the possession of these requirements could give to the airlines over its peers, their future prospects and consequent impact on the business. In order to meet this high standard, the responses submitted by each bidder were divided in two components, namely, compliant status and solution description and justification i.e., the bidder was not only supposed to achieve compliance for each technical requirement, but also provide description with complete justification in support of its claim.

(viii) Since the tender involves appointing a service provider for providing Integrated PSS, it would only be proper that the evaluation be left to persons who not only have a higher degree of skill and experience in the aviation sector, but also had the subjective knowledge of the specified and customized requirements of AIL.

(ix) Thus, such an evaluation would necessarily require that the assessment of each individual requirement should be done by technical/subject-matter experts.

(x) Moreover, the requirements authored by the AIL and their associated weightages, as well as the subsequent assessment, must have been done, keeping in mind certain goals that the AIL wishes to achieve. Hence, this court cannot question or interfere with the terms, or its understanding/appreciation of those terms. Keeping in mind the highly complex technical nature of the tender, the court must allow the AIL a free hand to lay down its own terms of the tender, as well as interpretation of those terms. Accordingly, in absence of any perversity or malafide this court, cannot, in guise of judicial review, second guess the Evaluation committee's decision or go into comparative analysis of the marks granted to both parties, especially since the scrutinization of the present tender document involves a subject that requires technical expertise and special skills.

C. The petitioner, knowing fully well of the terms and conditions of the tender, participated in the tender and having been declared L-2 cannot now be permitted to challenge the terms of the tender and/ or the QCBS method, or the weightage assigned to each requirement etc. If the petitioner was aggrieved by any of the above conditions, the Petitioner should have challenged those conditions before participating in the tender. Having participated in the tender with open eye and having been declared as L-2, the petitioner cannot now seek to agitate the issue.

(i) In *Siemens Aktiengesellschaft and Siemens Ltd. v. Delhi Metro Rail Corporation Ltd., 2013 SCC OnLine Del 1982,* a Division Bench of this court held that the Petitioner was estopped from challenging the tender, it having participated in the tendering process, and having challenged the tender conditions upon being unsuccessful. (the judgment of the High court was upheld by the Supreme *Court in Siemens Aktiengeselischaft & Siemens Ltd. v. DMRC Ltd., (2014) 11 SCC 288*). This Court, inter alia, observed as follows:

"68. Subsequent to the issue of Addendum No. 7 on 13.07.2012 the Petitioner had raised several queries on GEC related issues which were responded to by the Respondent No. 1, however the Petitioner never communicated or expressed any doubts or apprehensions. The Petitioner had thus accepted and adhered to the tender conditions while submitting its bids. ***Having accepted the tender conditions and the Guaranteed Energy Consumption based evaluation by submitting its bid, the Petitioner is now estopped from challenging the tender conditions or the manner of financial bids evaluation.***

69. The Petitioner has not challenged any of the conditions of the tender document on the contrary it has accepted that the Energy Consumption Value Parameters were an accepted norm across the world in similar tenders. Even before is the Learned Senior Advocate *for the Petitioner submitted that the introduction of GEC parameters were laudable, however, the only grievance raised by the Petitioners was with the use of Guarantee Energy Consumption Values for evaluation of the financial bids.* ***Once the Petitioner has submitted its bid being fully aware that the evaluation of the financial bids would be done on the basis of the GEC values and the financial bids would be loaded with the differential, the Petitioner is now estopped from challenging the loading of the financial bids by using the GEC values submitted by the Petitioner."*** *(emphasis supplied)*

(ii) Thus, if any condition- in the opinion of the tenderer, suffers from any vice, the same must be raised at the first instance. A person who participates in the tender, knowing fully well what the tender conditions are, cannot be allowed to raise a challenge once he has been found unsuccessful.

(iii) In the present case the Petitioner has alleged that from the outset, prior to participate, it found that the tender conditions were skewed in favour of Respondent No. 2. Admittedly, for the initial PSS tender floated by AIL in August 2020, the Petitioner had raised a complaint vide letter 31.08.2020 regarding weightages assigned to certain requirements giving an unfair advantage to Respondent No.2 and had elected not to proceed with the bid. The Petitioner had the same course open for it to adopt with regard to the present tender, especially since AIL made no significant changes. However, it decided to agree to all the terms and conditions of the Tender, even the so called "heavily skewed" technical ones, and participated in the tendering process with open eyes, and without any demur. Accordingly, despite knowing about the conditions which existed, the

Petitioner not only chose to not challenge the tender condition at the very first instance i.e. prior to participation, but decided to take its chance by participating in the tender. It was only after having participated and been declared the L-2 bidder that the Petitioner has come to the court to allege *mala fides*. The petitioner, in our view cannot be permitted to do so, in the light of the aforesaid decisions.

D. As far as the price difference of Rs. 900 crores is concerned, the TEC decided that the bid of the Respondent No. 2 is superior, and the same being within the exclusive domain of TEC, cannot be looked into by this Court.

(i) In *Municipal Corporation, Ujjain & Anr. v. BVG India Ltd. & Ors., (2018) 5 SCC 462*:

> *"34. Per contra, Shri Gourab Banerji, learned senior counsel argued in support of the judgment of the High Court and contended that the High Court is justified in correcting the errors committed by the technical expert while rejecting the bid of BVG India Limited. Shri Gourab Banerji, relying upon the financial bid submitted by BVG India Limited, which is the lowest one, contends that the bid of BVG India Limited should have been accepted by the committee inasmuch as the said bid if accepted would safeguard the financial interest of the corporation. In other words, he submits that the work to be carried out, if assigned to BVG, India Limited would be carried out at cheaper rates as compared to the successful bidder.*
>
> *35. Shri Kailash Vasdev, arguing on behalf of technical expert, contends that the expert has acted in fairest of fair manner and has kept in mind the public interest; one of the Directors of respondent no.2 is an Agro-Environment Scientist and has 22 years of experience in the field of Municipal Solid Waste Management Projects. The technical expert provides Technical Consultancy to various Municipal Corporations all over India, State Governments, Nodal Agencies etc. The technical expert has already successfully commissioned over 77 Municipal Solid Waste Management assignments. The respondent has duly applied its mind while evaluating the technical bids and financial bids. It has*

meticulously and carefully considered all relevant aspects and given a report. There are no allegations of mala fides or bias against the expert wherever it has carried on its work as an expert. In the matter on hand also, the expert has acted true to the office it held and has not acted contrary to the confidence reposed on it by the corporation and by the parties.

36. The contentions of Shri Banerji cannot be accepted, because the bid should be accepted not only based on the outcome of the financial bid, but also based on the evaluation of the technical bid. Moreover, in the matter on hand, the technical bid will have 80% marks whereas the financial bid will have 20% marks. This clearly shows that the municipal corporation has given due importance to the quality and not the financial aspect, keeping in mind the object for which bids are invited. A Constitution Bench of this Court in Trilochan Mishra Etc v. State of Orissa & Ors (1971) 3 SCC 153 held that the Government most certainly has a right to enter into a contract with a person well known to it, and especially one who has faithfully performed its contracts in the past in preference to an undesirable or unsuitable or untried person.

38. It may also be pertinent to note the judgment of this Court in Delhi Science Forum (supra), where it observed as follows:

"13…...The question of awarding licences and contracts does not depend merely on the competitive rates offered; several factors have to be taken into consideration by an expert body which is more familiar with the intricacies of that particular trade. While granting licences a statutory authority or the body so constituted, should have latitude to select the best offers on terms and conditions to be prescribed taking into account the economic and social interest of the nation. Unless any party aggrieved satisfies the court that the ultimate decision in respect of the selection has been vitiated, normally courts should be reluctant to interfere with the same." (emphasis supplied)

39. <u>In Montecarlo Ltd. v. NTPC Ltd</u>. (2016) 15 SCC 272, this Court highlighted the freedom of the owner to decide in matters of tenders as follows:

"26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly, in consonance with the language of the tender document or subserves the purpose for which the ***tender is floated, the court should follow the principle of restraint Technical evaluation or comparison by the court would be impermissible****. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to*

be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints." (emphasis supplied)

40. In Central Coalfields (supra), the Court held that the employer can decide to even deviate from the NIT:

"48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot." (emphasis supplied)

41. The reason for allowing public authorities such wide leeway in matters of contracts and tenders was elucidated in Sterling Computers (supra). Therein, the Court observed as follows:

"12. At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the courts have impressed that even in contractual matters the public authority should not have

unfettered discretion. ***In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive."***

42. That the authorities should be given latitude in making a decision on the offers was also observed in Sterling Computers (supra). Therein, the Court observed that any judicial interference amounts to encroachment on the exclusive right of the executive to take a decision.

43. In the matter on hand, admittedly, the successful bidder was more technically qualified and it got more marks. Normally, the contract could be awarded to the lowest bidder if it is in the public interest. Merely because the financial bid of BVG India Ltd. is the lowest, the requirement of compliance with the Rules and conditions cannot be ignored.

*44. **As rightly contended by respondent no. 3, a statutory authority granting licenses should have the latitude to select the best offer on the terms and conditions prescribed. The technical expert in his report categorically stated that, "All the above aspects demand high level of Technicalities and Expertise rather than just depending on lowest financial price quote for a material transport." As clarified earlier, the power of judicial review can be exercised only if there is unreasonableness, irrationality or arbitrariness and in order to avoid bias and mala fides. This Court in Afcons Infrastructure (supra) held the same in the following manner:***

"13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision-making process or the decision."

*45. Evaluating tenders and awarding contracts are essentially commercial transactions/contracts. If the decision relating to award of contract is in public interest, the Courts will not, in exercise of the power of judicial review, interfere even if a procedural aberration or error in awarding the contract is made out. The power of judicial review will not be permitted to be invoked to protect private interest by ignoring public interest. **Attempts by unsuccessful bidders with an artificial grievance and to get the purpose defeated by approaching the Court on some technical and procedural lapses, should be handled by Courts with firmness. The exercise of the power of judicial review should be avoided if there is no irrationality or arbitrariness.** In the matter on hand, we do not find any illegality, arbitrariness, irrationality or unreasonableness on the part of the expert body while in action. So also, we do not find any bias or mala fides either on the part of the corporation or on the part of the technical expert while taking the decision. Moreover, the decision is taken keeping in mind the public interest and the work experience of the successful bidder." (emphasis supplied)*

(ii) It is clear from the above-mentioned judgements that for the Hon'ble Courts to interfere in commercial transaction, the Court must be satisfied that there exists some element of public interest.

(iii) The submission of the Petitioner, that keeping in mind that AIL has financial distress and is being disinvested, such a tender is not in public interest cannot be accepted. The need of a Passenger Service System, is the need of the hour for AIL, considering its existing service provider would stop providing services from June, 2022.

(iv) Present tender is based on a Quality Cum Cost Based Selection (QCBS), having evaluation criteria as 80:20 (Technical: Financial), laying greater emphasis on the quality of the system. The present tender is a highly complex technical tender, which was issued by the AIL with an aim to maintain a leading edge of the PSS over its peers in the highly competitive aviation industry. To achieve this objective, it was imperative to employ individuals who are experts in the field, and are intimately aware of the concerns and demands of AIL's requirement. In terms of the evaluation by the TEC, it was found that the system offered by Respondent No.2 is technically more superior, compared to the system offered by the Petitioner.

(v) A mere difference of prices offered by the two tenderers may, or may not, be the reason for the Courts to ascertain whether any public interest is involved calling for interfere in a commercial transaction. This would depend on the terms and conditions laid down in the tender in the light of the objective sought to be achieved by the employer/ tender floating authority. In the case in hand, the Tender Floating Authority is the best person to assess its requirements; float a tender; assess the marks on various technical requirements declared in the tender, and after carefully analysing the same, declared the successful bidder. The AIL is the best judge of its own requirement i.e., choosing a system that gives an edge to the airline over its peers, which ultimately will translate into increased revenue. As a result, merely because the financial bid of the Petitioner is the lowest, would not mean it is automatically to be accepted.

In this view of the matter, in the ultimate analysis, we are not inclined to grant any relief to the Petitioner. The petition is, accordingly, rejected.

(JASMEET SINGH, J)

(VIPIN SANGHI, J)

NOVEMBER 17, 2021/ 'ms'