ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 22369 OF 2021

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR M/s Aroon Food Services Pvt. Ltd. ..... Petitioner

-Versus-

Airports Authority of India and others ..... Opp. Parties

For Petitioner : Mr. Ashis Mohan along with M/s. Lingaraj Sarangi, S.C. Atabudhi, A. Mohanty and P. Anand, Advocates.

For Opp. Parties : Mr. S.P. Mishra, Sr. Advocate along with M/s. G. Madani and A. Kumar, Advocates [O.Ps. 1 and 2]

Mr. L. Samantaray, along with M/s Pratik Dash and S.A. Pattanaik, Advocates. [O.P.No.3]

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR. JUSTICE G. SATAPATHY

Date of hearing: 24.08.2022: Date of judgment: 06.09.2022

DR. B.R. SARANGI, J. The Petitioner, a Private Limited Company incorporated under the Companies Act on 16.10.2014, which is engaged in the business of manufacturing and distributing food stuff, has entered into certain contracts for F&B services with Opposite Party No.1 at various airports. It has filed this writ petition represented through its Director seeking to quash the letters/orders dated 17.04.2021 and 28.04.2021 under Annexure-2 series issued by Opposite Party No.2 rejecting the technical bid of the Petitioner, and consequential letter dated 21.05.2021 in Annexure-1 awarding the contract "Master Concession to Design, Fit-Out, Finance, Develop, Market, Operate, Maintain and Manage the Food and Beverage Outlets at New Domestic Terminal Building (TI), Biju Patnaik International Airport, Bhubaneswar" in favour of Opposite Party No.3.

2. The factual matrix of the case, in a nutshell, is that Opposite Party No.2-Airport Director, Bijupatnaik International Airport, on behalf of Airports Authority of India-Opposite Party No.1, vide Tender ID No. 2021_

AAI_70823_1, issued Request For Proposal (RFP) inviting bids from the prospective bidders for award of the contract "Concession to Design, Fit-Out, Finance, Develop, Market, Operate, Maintain and Manage the Food and Beverage Outlets at New Domestic Terminal Building (T1), Biju Patnaik International Airport, Bhubaneswar", i.e., the Master Concession for F&B facility at Bhubaneswar Airport. The said bid was of two parts, i.e., technical bid and financial bid. It was provided that the financial bids of those bidders, whose technical bids were qualified, would only be opened. Pursuant to the RFP, the Petitioner participated by submitting duly filled in tender documents, along with the financial bid. As per the RFP, the last date for submission of bids was 12.03.2021 (6:30 pm) and the Petitioner submitted its bid on the very same day at 3:38 pm.

2.1 On 31.03.2021, a technical evaluation summary was uploaded on the Government E-Procurement Website, in terms of which the Petitioner was called upon to fulfill certain requirements. In compliance thereto, Petitioner submitted the requisite documents, but where no documents were available or where the Petitioner had already replied, by writing 'NA' in the corresponding column. Despite submission of all documents, on the E-Procurement Website, the Petitioner's bid was shown as rejected, but no communication was received by the Petitioner with regard to rejection of its technical bid. After seeing the E-Procurement Website and knowing the fact that its technical bid was rejected, the Petitioner wrote a letter on 14.04.2021 to Opposite Party No. 2 stating that it had now been unofficially informed that the reason for rejection was non-submission of details and documents regarding domestic and international brands.

2.2 On 17.04.2021, in response to the letter dated 14.04.2021, a communication was issued by Opposite Parties No.1 and 2 that the Petitioner was technically disqualified. In response to the same, the Petitioner sent another letter to Opposite Party No.2 on 19.04.2021 clarifying that it had submitted its technical bid with all supporting documents as per clause 2.13.6 (b) of the RFP and requested to review the decision of technically disqualification of the Petitioner. On 28.04.2021, Opposite Party No. 2 provided a point-wise rebuttal to the submission made by the Petitioner, wherefrom the reasons for rejection of the technical bid were transpired. Having not satisfied with the reasons mentioned therein, on 05.05.2021, the Petitioner once again wrote a letter to Opposite Party No. 2 to reconsider the decision giving a point-wise response to the contents of the letter dated 28.04.2021. But no response to the letter dated 05.05.2021 was received. On the other hand, Opposite Party No.3 was issued with a letter of intent awarding the contract for the work "Concession to Design, Fit-Out, Finance, Develop, Market, Operate, Maintain and Manage the Food and Beverage Outlets at New Domestic Terminal Building (TI), Biju Patnaik International Airport, Bhubaneswar" vide letter dated 21.05.2021. Hence, this writ petition.

3. Mr. Ashish Mohan, learned counsel appearing along with Mr. Lingaraj Sarangi, learned counsel for the

Petitioner vehemently contended that Opposite Parties No. 1 and 2 have arbitrarily and erroneously rejected the bid of the Petitioner submitted in response to the Tender ID NO. 2021_ AAI_ 70823_1-RFP on the ground of shortfall in the requisite documents to be submitted with the tender and thus the tender was technically non-compliant. Therefore, such rejection of the technical bid is patently arbitrary and based on without any reason and application of mind and, therefore, contended that the reason so assigned, that while submitting the Technical Form-4 details as per the Instruction-2 Format for certificate from Statutory Auditor/ Company Secretary regarding affiliate not submitted, cannot germane to issue, in view of the fact that the Technical Form-4 has been scored out by the Petitioner while submitting its bid, as the contents thereof are inapplicable to the Petitioner. Instruction-2 which is the basis of rejection of the Petitioner's bid provides for furnishing a certificate from the Statutory Auditor/ Company Secretary certifying that a certain percentage of equity is held by one bidder in another which may constitute its affiliate for purposes of Clause 2.1.1. of the RFP. The form is required to be submitted where one bidder holds equity in another bidder. As the Petitioner holds no equity in any of the other bidders, and prior to submission of the bid would not even know who the other prospective bidders are, therefore, the form was not required to be submitted by the Petitioner at all.

3.1 It is further contended that while submitting the proposed capital expenditure as per Technical Form-7, the Petitioner was required to submit the list of equipments planned for the site and as the Petitioner failed to submit such a list of equipment as per the Instructions, its Technical Bid has been held to be non-compliant. To this second reason of rejection, it is submitted that Form-7 required bidders to submit the capital expenditure to be made at site, which had to in any case be more than Rs. 20,000/- per sq. mt. Accordingly, the Petitioner submitted a proposed capital expenditure of Rs. 20,500/- per sq. mt, which is evident from the said clause itself. Therefore, there is no requirement to provide complete list of equipment planned for the site. Instructions only require submission of list of equipment planned for movement of equipments/goods within the Airport in accordance with such movement of equipment/goods strategy as may be directed by the Authority.

3.2 With regard to submission of brand details as per Technical Form-5, it is stated that the Petitioner had not submitted the details of brands, i.e., documentary evidence in support of Information regarding ownership, registration as trademark etc. in accordance with Instruction-2 and, therefore, the bid is technically non-compliant. It is contended that this ground of rejection is also baseless and without any substance whatsoever. On perusal of the of Technical Form-5, as submitted by the Petitioner, it would be seen that the Petitioner has stated 'NA', i.e. Not Applicable, in response to the details of brands, details of registration as a trademark/trade name, details of franchisee/license holder of the brand, if any, and details of the MOU between bidder and legal owner/franchisee/ license holder of the brand. Since the

Petitioner had submitted 'NA' in the corresponding column, there was obviously no question of providing documentary evidence in support of the details of each brand. Therefore, rejection of the bid of the Petitioner on technical ground is arbitrary irrational and violative of Article 14 of the Constitution of India.

3.3 It is further contended that out of total four bidders, three were technically disqualified and, thereby, leaving the tender to be automatically awarded to Opposite Party No.3 itself casts considerable doubt on the tender process and it appears that the authorities have acted with a predisposed mind to award the tender in favour of Opposite Party No.3. Awarding of tender to Opposite Party No.3 in such circumstances is not only anti-competitive but also results in a loss to the Opposite Party-Authorities, inasmuch as the financial bids of other bidders may have brought more revenue to them and, therefore, contended that the rejection of the technical bid, vide letter dated 17.04.2021, and reasons communicated, vide letter dated 28.04.2021, under Annexure-2 series and consequentially the award of tender in favour of Opposite Party No.3, vide Annexure-1 dated 21.05.2021, cannot sustain in the eye of law and the same are liable to be set aside.

To substantiate his contention, learned counsel for the Petitioner has placed reliance on ***Poddar Steel Corporation v. Ganesh Engineering Works & Ors***, (1991) 3 SCC 273 : AIR 1991 SCC 1579 and ***Rashmi Metaliks Ltd and Others v. Kolkata Metropolitan Development Authority and Ors***, 2013 (10) SCC 95.

4. Mr. S.P. Mishra, learned Senior Counsel appearing along with Mr. G. Madani, learned counsel for Opposite Parties No.1 and 2, while justifying the reasons for rejection of technical bid of the Petitioner, vehemently contended that the contentions raised by learned counsel for the petitioner suffers from misrepresentation of facts and the grounds of rejection of technical bid of the Petitioner are well justified and the Petitioner's technical bid has been rejected in terms of the RFP and the subsequent justification made in course of argument

cannot have any benefit to the Petitioner because the documents filed by the Petitioner speak for themselves as the same were not adhered to the requirements of the tender documents and after due application of mind, the Authorities have rejected the technical bid and, thereby, no illegality or irregularity has been committed in rejecting the technical bid of the Petitioner. It is further contended that in spite of opportunity being given to the Petitioner calling upon him to furnish certain documents, the Petitioner having not complied the same, even not intimating the Authorities the reasons for non-supply of such documents, subsequently he cannot turn around and contend that its technical bid should have been accepted and, as such, the contention so made is fallacious. Consequently, the Opposite Party-Authorities are well justified in rejecting the technical bid submitted by the Petitioner. It is further contended that the reasons assigned for rejection of technical bid of the Petitioner are well justified and the same do not require interference by this Court at this stage. He also distinguished the judgment cited by the

Petitioner in ***Poddar Steel*** (supra) as not applicable to the present context.

In support of his contention, learned Senior Counsel appearing for Opposite Parties No.1 and 2 has placed reliance on the cases of ***M/s Utkal Suppliers v. M/s Maa Kanak Durga Enterprises***, 2021 (II) OLR (SC) 168; ***Montecarlo Ltd. v. NTPC Ltd***, (2016) 16 SCC 272; ***Caretel Infotech Ltd., v. Hindustan Petroleum Corpn Ltd.***, (2019) 14 SCC 81; ***Silppi Constructions Contractors v. Union of India***, 2019 SCC OnLine SC 1133; ***State of Madhya Pradesh v. U.P. State Bridge Corporation Ltd.,*** 2020 SCC OnLine SC 1001; ***Meerut Development Authority v. Association of Management Studies,*** (2009) 6 SCC 171; ***Directorate of Education & Ors v. Educomp Datamatics Ltd.***, (2004) 4 SCC 19; and ***Monarch Infrastructure (P) Ltd v. Commissioner, Ulhasnagar Municipal Corporation***, (2000) 5 SCC 287.

5. Mr. L. Samantaray, learned counsel appearing along with Mr. Pratik Dash, learned counsel for the

Opposite Party No.3 contended that the Petitioner having participated in the process of bid and having not come out successful in technical bid, cannot and could not have approached this Court by filing the present writ petition. It is further contended that the parties are bound by the terms and conditions of the tender documents. If for non-compliance of any of the conditions of the tender documents, the bid has been rejected, in that case, the Petitioner should not invoked the jurisdiction under Article 226 of the Constitution of India. More so, the letter of intent to award the work having been issued in favour of the Petitioner on 21.05.2021, Opposite Party No.3 has not been able to operate the work due to the interim order passed by this Court. Consequently, Opposite Party No.3 has sustained a huge loss and the same should be compensated by the Petitioner. It is further contented that the Petitioner having not come to the Court with clean hands and for filing this frivolous petition, the same should have been dismissed with heavy cost. The Opposite Party No.3, having satisfied all the terms and conditions of the RFP, has been awarded with the work and he is duty bound to proceed with the work, as per letter of intent to award the work issued in its favour. More so, it is further contended that Opposite Party No.3 operating the travel food and beverage industry since 2009 and also concession for food and beverage outlets at Mumbai Airport since 2009 till date and also at Goa Airport since 2018. Now, it is operating master concession for food and beverage at Kolkata and Chennai Airports, which Airports are operated and managed by Opposite Party No.1. The subsidiaries of Opposite Party No.3 also engaged in food and beverage outlets at Delhi Airport. Additionally, it also engaged in operating Airlines 1st Class and Business Lounges in Mumbai Airport, Bangalore Airport and presently approximately 300 food and beverage outlets at various travel related locations are operating. Therefore, it has got tremendous experience. Taking into consideration the same and in compliance of the conditions stipulated in tender documents if the letter of intent has been issued in favour of Opposite Party No.3 vide Annexure-1 dated

21.05.2021, it cannot be said that the same is arbitrary, unreasonable and contrary to the provisions of law so as to call for interference by this Court in exercise of extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India.

To substantiate his contention, reliance has been placed on ***Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers v. New J.K. Roadways, Fleet Owners and Transport Contractors***, 2020 SCC OnLine SC 1035; ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd***, (2016) 16 SCC 818: 2016 SCC OnLine SC 940 and ***Bharat Coking Coal Limited v. AMR Dev Prabha***, (2020) 16 SCC 759: 2020 SCC OnLine SC 335.

6. This Court heard Mr. Ashish Mohan, learned counsel appearing for the Petitioner; Mr. S.P. Mishra, learned Senior Counsel appearing along with Mr. G. Madani, learned counsel for Opposite Parties No. 1 and 2; and Mr. L. Samantaray, learned counsel appearing for

Opposite Party No.3 by hybrid mode, and perused the record. Pleadings having been exchanged between the parties, with the consent of learned Counsel for the parties this writ petition is being disposed of finally at the stage of admission.

7. For just and proper adjudication of the case, the relevant provisions of the RFP for the work "Concession to Design, Fit-Out, Finance, Develop, Market, Operate, Maintain and Manage the Food and Beverage Outlets at New Domestic Terminal Building (T1), Biju Patnaik International Airport, Bhubaneswar" in E-Bid No. (Tender ID No): 2021_AAI_70823_1 are quoted below:-

"DEFINITIONS AND INTERPRETATIONS

xxx xxx xxx

> **"Affiliate"** means, in relation to any Bidder or Member, a person who controls, is controlled by, or is under the common control with such Bidder or Member. As used in this definition, the expression "control" means: (a) with respect to a company, corporation or limited liability partnership the ownership, directly or indirectly, of more than 50% (fifty percent) of the economic or voting rights of such person, or (b) with respect to a person which is not a company, corporation or limited liability partnership, the power to direct the management and policies of such Person.

"**Authority**" shall mean the Airports Authority of India constituted under Airports Authority of India Act, 1994, including any amendment / re-enactment thereof.

"**BCAS**" shall mean Bureau of Civil Aviation Security and its branch offices having jurisdiction over Airport of Concession.

"**Bid**" shall mean the technical and financial offer to be submitted by a Bidder pursuant to this Request for Proposal (RFP).

"**Bid Due Date**" shall have the meaning ascribed to the term in Clause 1.2.5 of this RFP.

"**Bid Process**" shall mean the bidding and selection process as detailed in this RFP.

"**Bid Validity Period**" shall have the meaning ascribed to the term in Clause 1.4.1 of this RFP.

"**Bidder**" shall mean a sole entity or a Consortium of entities, submitting a Bid pursuant to this RFP.

"**Bidding Documents**" shall mean a collective reference to this RFP including any modifications, addendums, corrigendum, alterations, amendments and clarifications to the RFP, the draft Concession Agreement, and all other agreements and documents executed between the Authority and the Concessionaire from time to time, in relation to the Concession and shall include any guarantees and undertakings executed in favour of the Authority in relation to this Concession.

"**Brand**" shall mean a type of product manufactured by a particular company under a particular name or a distinguishing symbol, mark, logo, name, word, sentence or a combination of these items that companies use to distinguish their product from others in the market and for legal protection is registered as trademark. "Branded" shall have a corresponding meaning."

“CHAPTER-2-INSTRUCTIONS TO BIDDERS

xxx xxx xxx

2.1. Eligibility of Bidders

2.1.1. For determining the eligibility of Bidders for their short-listing hereunder, the following shall apply:

(a) The Bidder may be a single entity or a Consortium of up to three (3) entities coming together to implement the Concession. However, no Bidder applying individually or as a member of a Consortium, as the case may be, can be Member of another Bidder. The term Bidder used herein would apply to both a single entity and a Consortium.

(b) A Bidder may be a natural person, a legal entity or any combination of them with a formal intent to enter into an agreement or under an existing agreement to form a Consortium. A Consortium shall be eligible for consideration subject to the conditions set out in RFP. However, no Bidder applying individually or as a Member of a Consortium, as the case may be, can be Member of another Bidder. The term Bidder used herein would apply to both a single entity and a Consortium. A Consortium shall be eligible for consideration subject to the conditions set out in Clause 2.2.9 below;

(c) A Bidder shall not have a conflict of interest (the "Conflict of Interest") that affects the Bidding Process. Any Bidder found to have a Conflict of Interest shall be disqualified. A Bidder shall be deemed to have a Conflict of Interest affecting the Ridding Process. if:

i) the Bidder, or its Affiliate (or any constituent thereof) and any other Bidder or any Affiliate thereof (or any constituent thereof) have common controlling shareholders or other ownership interest:

Provided that this disqualification shall not apply in cases where the direct or indirect shareholding of a Bidder, its Member or an Affiliate thereof (or any shareholder thereof having a shareholding of more than 20% (twenty percent) of the aggregate issued, subscribed and paid up share capital of such Bidder, Member or Affiliate, (as the case may be) in the other Bidder, its Member or an Affiliate is less than 20% (twenty percent) of the aggregate issued, subscribed and paid up equity share capital thereof; provided further that this disqualification shall not apply to any ownership by the Authority, a bank, insurance company, pension fund or a public financial institution referred to in Section 2(72) of the Companies Act, 2013;

For the purposes of this Clause 2.1.1, indirect shareholding held through 1 (one) or more intermediate persons shall be computed as follows: (A) where any intermediary is controlled by a person through management control or otherwise, the entire shareholding held by such controlled intermediary in any other person (the "Subject Person") shall be taken into account for computing the shareholding of such controlling person in the Subject Person; and (B) subject always to sub-clause (A) above, where a person does not exercise control over an intermediary, which has shareholding in the Subject Person, the computation of indirect shareholding of such person in the Subject Person shall be undertaken on a proportionate basis; provided, however, that no such shareholding shall be reckoned under this sub-clause if the shareholding of such person in the intermediary is less than 26% (twenty six percent) of the aggregate issued, subscribed and paid up equity shareholding of such intermediary; or

ii) a Bidder/ nominated entity has nominated the same nominated entity or nominated personnel as another Bidder; or

iii) a constituent of such Bidder is also a constituent of another Bidder; or

iv) such Bidder or any Affiliate thereof receives, has received, or has entered into an agreement to receive, any direct or indirect subsidy, grant, concessional loan, or subordinated debt from any other Bidder, or any Affiliate thereof or has provided or has entered into an agreement to provide any such subsidy, grant, concessional loan or subordinated debt to any other Bidder, its Member or any Affiliate thereof; or

v) such Bidder has the same legal representative for purposes of a Bid as any other Bidder; or

vi) such Bidder or any Affiliate thereof, has a relationship with another Bidder or any Affiliate thereof, directly or indirectly or through a common third party/ parties, that puts either or both of them in a position to have access to each other's information, or to influence the Bid of either or each other; or such Bidder or any Affiliate thereof, has participated as a consultant to the Authority in the preparation of any documents, design or technical specifications of the Project. Explanation:

In case a Bidder is a Consortium, then the term Bidder as used in this Clause 2.1.1 shall include each Member of such Consortium and the term Affiliate with respect to a Bidder shall include an Affiliate of each Member of that Consortium."

xxx xxx xxx

"2.1.4

xxx xxx xxx

II. Requirement to submit undertaking for branded outlets- The Bidder shall submit an undertaking, in the format provided in Technical Form-1 of Appendix-I,to submit binding MoUs / agreements signed with Brand owners within the Business Incubation Period, as per the table below:

Airport category	Minimum number of Brands
~~Category A (4 to 12 million passengers per annum)~~	~~At least 2 Internationally Branded Outlet and 1 Nationally Branded Outlet~~

Category B (2 to 4 million passengers per annum)	At least I Internationally Branded Outlet and 1 Nationally Branded Outlet
~~Category C (1 to 2 million passengers per annum)~~	~~At least I Internationally Branded Outlet and 1 Nationally Branded Outlet~~

In case the Airport moves to a higher category, such as from category C to category AB or from category B to category A as per AAI's classification, the Authority may require the Concessionaire to comply with the requirement applicable to the higher category."

"APPENDIX-1-BID DOCUMENTS

xxx xxx xxx

6. I/we declare that

xxx xxx xxx

f) I/ We hereby undertake to produce binding MOUs / agreements signed with Brand owners, within 30 days of issue of LOIA, as per the table below:

Airport category	Minimum number of Brands
~~Category A (4 to 12 million passengers per annum)~~	~~At least 2 Internationally Branded Outlet and 1 Nationally Branded Outlet~~
Category B (2 to 4 million passengers per annum)	At least I Internationally Branded Outlet and 1 Nationally Branded Outlet
~~Category C (1 to 2 million passengers per annum)~~	~~At least I Internationally Branded Outlet and 1 Nationally Branded Outlet~~

Any delay in producing the required MoUs / agreements shall attract damages at the rate of Rs.5,000/- per day of delay, as provided in Clause 4.1.1 of this RFP. The branded outlet(s) in respect of which signed MOUs/ agreements were submitted, need to be operated by the Concessionaire during at least 75% of the Concession Term.

In case the Airport moves to a higher category, such as from category C to category A/B or from category B to category A as per AAI's classification, I/we shall comply with the requirement applicable to the higher category;

g) I/ We hereby agree to pay damages at the rate of INR 5,000 per day of delay in case of failure to produce MoUs / agreements with Brand owners within 30 days of issue of LOIA as per Clause 6. f) above; and

h) I/ We hereby agree that in case of failure to produce binding MOUs / agreements within the Business Incubation Period, the LOIA shall automatically stand cancelled without any further reference. I/ We agree and undertake that I/ We shall not make any claim to the Authority in this regard. The Authority shall be free to debar me/ us as per the terms and conditions of the RFP."

"TECHNICAL FORM-4

xxx xxx xxx

2. Format for certificate from Statutory Auditor/Company Secretary regarding Affiliate:

Certificate from Statutory Auditor/Company Secretary regarding Affiliate Based on the authenticated record of the Company, this is to certify that _______________ of the subscribed and paid up voting equity of …………………(name of the Bidder/ Lead Member/ Affiliate) is held, directly or indirectly,

by……………….(name of Affiliate/ Bidder/ Lead Member). By virtue of the aforesaid share-holding, the latter exercises control over the former, who is an Affiliate as per Clause 2.1.1 of the RFP.

A brief description of the said equity held, directly or indirectly, is given below:

{Describe the share-holding of the Bidder/ Lead Member and the Affiliate. In the event the Affiliate is under common control with the Bidder/ Lead Member, the relationship may be suitably described and similarly certified herein }

Name of the audit firm:

Seal of the audit firm: (Signature, Name and Designation of the authorized signatory."
Date

"**TECHNICAL FORM-5**

2. Documentary evidence in support of the information regarding ownership, registration as trademark, etc. should be furnished for each Brand.

"**TECHNICAL FORM-7**

Instructions:

1. Along with the proposed capital expenditure, the Bidder shall furnish to Authority as part of its Bid, a list of equipment planned for the site including but not restricted to forklifts, trolleys etc, for the movement of equipment/goods within the airport in accordance with such movement of equipment/goods strategy as may be directed by Authority. The Bidder shall be responsible for procurement, operations and maintenance of the equipment. Any vehicle used within the terminal must be battery operated only."

8. In view of the above provisions contained in the RFP, now, it is profitable to refer to the grounds of rejection of technical bid, which have been communicated to the Petitioner vide letter dated 28.04.2021 under Annexure-2 series:-

> "This has reference to your letter dated 19.04.2021 regarding the aforementioned subject. The documents submitted by you on CPP under shortfall were evaluated. The documents submitted outside CPP Portal after the call for shortfall documents cannot be evaluated. As per the evaluation of the shortfall documents the point wise reply to the claims by M/s Arron Food Services Pvt. Ltd is appended below:-

S. No	Documents requested under shortfall	Action by AFS on Shortfall claimed by AFS	Remarks by AFS	Remarks/Observations by AAI BPI Airport, Bhubaneswar
1.	Technical Form 4-format for Technical Capacity of the Bidder with Annual Report for 2019-20	Uploaded on Portal	Copy Enclosed	Only Undertaking as per Instruction 4 submitted as per format. Details as per the Instruction 2 Format for certificate from Statutory Auditor/Company Secretary regarding Affiliated not submitted.
2.	Information under point No. 8 of Technical Form 2	Uploaded on Portal	Copy Enclosed	Submitted as requested
3.	NOTARIZED copy of Technical Form 12	Uploaded notarized copy on Portal	Copy Enclosed	NOTARIZED copy Submitted as requested
4.	Notarized copy of Technical Form 17 and Documents of Incorporation along with details Arron Food Services and Aroon Aviation	Uploaded notarized copy on Portal	Copy Enclosed	NOTARIZED copy of Technical Form 17 and Documents of incorporation Submitted as requested.

5.	Proposed capital expenditure along with list of equipment planned for the site may be submitted as per the Technical Form 7	Uploaded on Portal	Copy enclosed	The list of equipment planned for the site as per the Instructions not submitted
6.	Brand Details as per Technical Form 5 and Technical Form 6	Uploaded on Portal	Copy enclosed	As per Instruction 2, the details of brands i.e. Documentary evidence in support of the information regarding ownership, registration as trademark, etc. not submitted.

This is for your information please.

Yours sincerely,

Manager (Commercial)
For Airport Director."

Though the aforesaid table indicates that while adjudging the technical bid, six criteria had been followed, but effectively the technical bid of the Petitioner has been rejected on the grounds mentioned at Sl. Nos. 1, 5 and 6 and the shortfall of the documents required thereunder, as is evident from the remarks/observations made by AAI BPI Airport, Bhubaneswar in the last column itself.

9. The first ground of rejection of technical bid is that while submitting Technical Form No.4, details as per

Instruction-2 Format for certificate from Statutory Auditor/Company Secretary regarding Affiliate were not furnished. The word 'Affiliate' has been defined in the RFP, as has been quoted above. After going through the same, it is evident that the word 'Affiliate' has been defined to mean that any Bidder or Member, a person who controls, is controlled by, or is under the common control with such Bidder or Member. As used in this definition, the expression "control" means: (a) with respect to a company, corporation or limited liability partnership the ownership, directly or indirectly, of more than 50% (fifty percent) of the economic or voting rights of such person. But fact remains, the Technical Form No.4 has been scored out by the Petitioner while submitting its bid, as the context thereof is inapplicable to the Petitioner.

Furthermore, Instruction-2, which is the basis of rejection of the Petitioner's bid, provides for certificate from Statutory Auditor/Company Secretary certifying that a certain percentage of equity is held by one bidder in another which may constitute its affiliate for purposes of clause-2.1.1 of the RFP. As the Petitioner holds no equity in any of the other bidder and prior to submission of its bid it was not practicable on the part of the Petitioner to even know who the other prospective bidders are, therefore, the form was not required to be submitted by the Petitioner.

10. It may be noted that the term of the Concession, as per the RFP, which has been placed on record as Annexure-3 to the writ petition at Page 41 to 268, is for a period of seven years. Clause-1.2.5 of the RFP speaks about the submission of documents, which read thus:-

> *"All Bids shall be prepared and submitted in accordance with the terms of the Bidding documents on or before the date specified in clause No.1.6 of this RPF (the Bid Due Date)."*

As per the aforementioned clause, the bidder, along with its bid, shall enclose all necessary documents, certificates, undertakings in the prescribed form strictly in accordance with the RFP. The technical bid including the materials evidencing the technical capacity and financial capacity should be furnished through online in the prescribed formats under Appendix-1.

11. Clause-2.13.6 of the RFP, as available at Page-75 of the writ petition, provides that the technical bid shall contain following documents:-

> *"Clause-2.13.6, the Technical bid shall contain-*
> *(a) Index of submission*
> *(b) Bid in the prescribed format along with all annexures and supporting documents including those as per technical form-1, technical form-2, technical form-3, technical form-4, technical form-5, technical form-6, technical form-7, technical form-8, technical form-9, technical form-10 and technical form-11 of Appendix1 (Bid documents).*
> *(c) Statement of legal capacity as per technical form-12 of Appendix-1.*
> *(d) Power of Attorney for signing bid as per technical form-13 of Appendix-I.*
> *(e) If applicable, the power of Attorney for the lead member of Consortium as per technical form-14 of Appendix-I.*
> *(f) Copy of the joint bidding agreement, in case of Consortium, substantially as per the technical form-15 of the Appendix-I.*
> *(g) Affidavit as per the technical form-16 of Appendix-1.*
> *(h) Integrity Pact as per technical form-17 of the Appendix-1.*
> *(i) Documents of incorporation (in case of consortium, for all members) duly notarized.*
> *(j) Copy of PAN Card, copy of memorandum and articles of Association, if the bidder is a body Corporate, and if a partnership, then a copy of the partnership deed (in case of consortium for all members).*
> *(k) Copies of bidder's duly audited balance sheet and profit and loss account for the preceding*

financial year and for the years for which experience under clause 2.1.4 of the RFP has been claimed.
(l) Self-attested copy of proof of payment of Earnest Money Deposit.
(m)Self-attested copy of proof of payment for purchase of Tender Documents.
(n) Checklist of submission as per technical form-18 of Appendix-1."

A corrigendum was issued, by which the bidders were permitted to submit "Self-declaration/Self Certification" in lieu of "Affidavit" as per Technical Form-16.

12. Under clauses-2.13.7, 2.13.8 and 2.14 of the RFP instructions were issued to the bidders as to how the documents of the technical bid were to be serially arranged and page marked and the due date of submission of the bid. For better appreciation, the said clauses are quoted hereunder:-

"Clause No.2.13.7 of the RFP
The bidders are advised to arrange the submissions/documents in the above order. Each page of the technical bid is to be serially numbered, signed and stamped by the authorized signatory of the bidder."
Clause No. 2.13.8
All pages of the technical bid shall be typed or written in indelible ink and signed by the authorized signatory of the bidder who shall also initial each page in blue ink and stamp all pages. All the alteration, omission, additional or any other amendments made to the bid shall be initialed by the person(s) signing the bid.

<u>Clause No.2.14</u>
Bid due date:
Bids should be submitted before 12.03.2021, 1600 hours IST on the Bid Due Date."

13. On 15.03.2021, i.e., the date of opening of technical bid, the Constituted Committee of Airport Authority of India opened the technical bid of the bidders/participants and observed that five bidders had participated in the tender process, namely, (i) M/s Aroon Food Services Private Limited, (ii) M/s Travel Food Services Private Limited, (iii) M/s Saptagiri Restaurant Private Limited, (iv) M/s Oynx Management Services Private Limited, and (v) M/s Arvind Enterprises. Out of five participants/bidders, it was observed that the bids of the bidders/participants, namely, M/s Oynx Management Services Pvt. Ltd. and M/s Arvind Enterprises were failed in the test of responsiveness, as per Clause-3.2.1 and, therefore, the said two bidders were rejected. That is to say, M/s Oynx Management Services Pvt. Ltd. did not submit the Earnest Money Deposit and M/s Arvind Enterprises also did not submit the Earnest Money Deposit

as well as the cost of RFP document. Therefore, the tender committee evaluated the technical bid of the rest three bidders/participants, namely, the Petitioner, Opposite Party No.3 and M/s Saptagiri Restaurant Private Limited. As the committee observed shortfall of necessary documents, as per Clause-3.3.3 of the RFP, an opportunity was given to three bidders to furnish the requisite documents by giving them a shortfall notice on 31.03.2021.

14. For better appreciation, Clause-3.3.3 of the RFP, which deals with evaluation of technical bid, is extracted hereunder:-

> *"Authority reserves the right to seek clarifications or additional information/documents from any bidder regarding its bid. Such clarification (s) for additional information/document(s) shall be provided within the time specified by Authority for the purpose. Any request and response thereto shall be in writing. If the bidder does not furnish clarification(s) or additional information/document(s) within the prescribed time, the bid shall be liable to be rejected. In case the bid is not rejected, Authority may, proceed to evaluate the bid by construing the particulars requiring the clarification to the best of its understanding, and the bidder shall be barred from subsequently questioning such interpretation of Authority."*

15. Invoking the aforesaid clause, the Petitioner was also directed, by means of the shortfall notice dated 31.03.2021, to submit the required documents by 6.00 P.M. of 05.04.2021. The details of the shortfall documents, which the Petitioner was asked to comply, are as follows:-

> *"i) Technical Form-4 – format for technical capacity and financial capacity of the bidder with annual report for 2019-20.*
> *ii) Information under point No.8 of technical form-2.*
> *iii) Notarized copy of the technical form-12 and technical form-17 and documents of incorporation along with details of relation between Aroon Food Services Private Limited and Aroon Aviation.*
> *iv) Proposed capital expenditure along with list of equipment planned for the site as per technical form-7.*
> *v) Brand details as per technical form-5 and technical form-6."*

16. In response to the letter dated 31.03.2021, the Petitioner submitted the documents on 05.04.2021 at 1506 hours to the following effect:-

> *"i) Technical Form-4 format for technical capacity and financial capacity of the bidder with annual report for 2019-20. Here the information under clause(2) format for certificate from statutory auditor/company secretary regarding affiliate not provided/submitted in the prescribed format of RFP. The Petitioner had altered the prescribed format, and suppressed the information required in Clause-3 of the technical form-4.*
>
> *ii) Information under point No.8 of the technical form-2 duly submitted.*
>
> *iii) Notarized copy of the technical form-12, technical form-17 and documents of incorporation along with*

details of relation in between M/s Aroon food services private limited and M/s Aroon Aviation duly submitted."

But the Petitioner did not submit the following documents, which are required as per the RFP, despite shortfall notice and opportunity of being heard. The same are extracted hereunder:

> *"i) The Petitioner had not submitted the proposed capital expenditure and list of equipment planned for the site in the prescribed format as per the technical form-7.*
>
> *ii) Details of Brands of F&B Items Proposed as per technical form-5. As per Instruciton-1 of technical form-5- information in respect of the F&B Brands, proposed for the concession was not provided. As per Instruciton-2 Technical form-5, documentary evidence in support of the information regarding ownership, registration as trademark etc. had not been submitted. It is therefore evident that the instructions under technical form-5 were not carried out by the Petitioner. The Petitioner in response to the shortfall notice had submitted that the "Aroon Food Services" is the Brand name, which cannot be considered as brand in accordance with interpretation and definition of "Brand" as per the RFP. The Petitioner had submitted the documents in "pdf" file name- 'shortfall Doc. RFPBBSR.pdf" file size-13558 KB. Since the set of documents have already been annexed to the writ petition at Annexure-6 series, the same not being filed in the present affidavit.*
>
> *iii) Information under para-3 of the technical form-6-3. Background information of the Proposed Brand(s) was not submitted by the Petitioner."*

17. On 12.04.2021, the technical bids were evaluated strictly as per Chapter-3 of the RFP, which is made available at Page-80-81 of the writ petition, according to which a technical bid shall be considered to be in compliance with the requirement of the RFP only if-

> *"a)The bidder demonstrates technical capacity, as set forth clause-2.1.4 of the RFP;*
>
> *b) It contains all the information and documents in support as requested in the RFP."*

In the event of non-compliance of the above, as per Clause-3.3.2, the technical bid is to be rejected. Clause-3.3.2 is quoted below:

> *"Such technical bids which are not in compliance with the requirements of the RFP shall be rejected forthwith and no request for alteration, modification, substitution or withdrawal shall be entertained by Authority in respect of such Bid(s)."*

18. After due technical evaluation, on 12.04.2021, the status position of technical bids of all the bidders was indicated summarily to the following effect:-

> *"i) M/s Arvind Enterprises*
> *Bid rejected, because the bidder did not submit the tender fee and earnest money deposit*
> *ii) M/s Saptagiri Restaurant Private Limited*

Bid rejected, because the bidder had not submitted the requisite documents as per the RFP even after shortfall notice.
iii) M/s Aroon Food Services Private Limited
Bid rejected, because the bidder had not submitted the requisite documents as per the RFP even after shortfall notice.
iv) M/s Oynx Management Services Private Limited- Bid rejected, because the bidder had not submitted the earnest money deposit.
v) M/s Travel Food Services Private Limited
All requisite documents as per RFP were submitted by the bidder, hence, the bidder was technically qualified."

19. From the above it would be seen that Opposite Party No.3 was the only qualified bidder at the time of evaluation of technical bid. Consequentially, the financial bid of the only qualified bidder was opened on 12.04.2021. As such, the committee determined Opposite Party No.3 as the successful bidder. Since only one bidder was qualified, the committee, as per the Delegation of Power (DoP) of the Airport Authority of India under Point No.5.4(b), sent the entire proceeding of the bid opening committee to the Competent Authority, i.e., the Regional Executive Director, Regional Headquarters, Eastern Region, Kolkata on 13.04.2021 for perusal of the proceeding and its approval as per DoP. The competent

authority, in its turn, accorded approval to the proceeding of the bid opening committee on 17.05.2021, which is in consonance with Clause-5.4(b), in terms of the DoP as stated above. Accordingly, the Letter of Intent to award the work was issued in favour of the Opposite Party No.3. Though on 19.06.2021, the agreement was executed with Opposite Party No.3, and on 23.07.2021 sites were handed over, but because of the interim order passed on 10.08.2021 in I.A. No.10286 of 2021 by this Court, Opposite Party No.3 could not be able to function there, as the Petitioner was allowed to continue.

20. Coming to the reasons for disqualifying/ rejecting the technical bid of the Petitioner, the same are well explained in the order/ letter dated 28.04.2021. The first ground of rejection is due to non-submission of Technical Form-4, which refers to the Technical Capacity (defined under clause-2.1.4 of RFP) and Financial Capacity (defined under clause-2.1.5 of RFP) of the bidder. The Technical Form-4 is governed by clause-2.1 of the RFP which states about 'Eligibility of Bidders". Clause-

2.1.4 refers to Technical Capacity of the Bidder, which reads as under:-

"2.1.4 – Technical Capacity ("Technical Capacity")-

For demonstrating technical capacity the bidder shall satisfy the follow criteria:-

I. Experience Criteria – The bidder must fulfill the condition mentioned in sub-clause A below along with one of the sub-clauses B(i), B(ii), B(iii), B(iv) and B(v).

A. The bidder (in case of a consortium, the Lead Member) must individually have two (02) years' of experience in the Food and Beverage Services business as on 19.02.2021 in the preceding seven (07) years 20.02.2021 to 19.02.2021.
And

B. The bidder must fulfill at least one of the following conditions:
B. The bidder must fulfill at least one of the following conditions:

(i) The bidder (in case of Consortium, the Lead Member) shall currently be operating at least two (02) Food & Beverage outlets as on 19.02.2021 out of which at least one should be located

i. In any Indian airport/International airport with more than 1 million passenger per annum as on 19.02.2021; or

ii. In other passenger transport terminal such as, metro rail, metro rail station, railway, railway station (metro or railway stations must be in cities with population more than 10 Lacs (as per 2011 census) or commercial complex (commercial complex should have a floor plat size of at least 10,000 square meters).

Other outlets can be present at ports, bus stations, airports, railway stations, hotels, metro stations, roads, highways, shopping complexes, other commercial complexes.

Note: A copy of required documentary proof (such as work order, lecense, etc.) of shops and establishment Acts, trade tax certificates, etc. for each outlet and proof of completion of tenure of two (02) years shall be submitted for verification.

(ii) The bidder (in case of consortium, the Lead Member) shall currently be operating a hotel rated at least three star or be of heritage category as per Hotel and Restaurant Approval and Classification Category (HRACC), Ministry of Tourism, Government of India with at least two (02) years of experience.

The copy of Hotel and Restaurant Approval and Classification Committee (HRACC) document for verifying the star rating and proof of completion of requisite tenure of two (02) years shall be submitted for verification.

In case the hotel is not HRACC certified, then the hotel should have all of the following facilities-

- *Coffee shop operating at least 16 hours per day*
- *Standalone restaurant*
- *Minimum 80 rooms*
- *Swimming Pool*

The above are to be duly supported with relevant documents

OR

(iii) The bidder (in case of consortium, the Lead Member) shall currently be an operator of the food and beverage business in a three star hotel having valid star category or heritage category issued by Hotel and Restaurant Approval and Classification Category (HRACC), Ministry of Tourism, Government of India with at least two (02) years of experience.

A copy of work order/license /MoU with the hotel and proof of completion of tenure of two (02) years shall be submitted for verification.

OR

(iv) The bidder is currently functioning as a flight kitchen operator with at least two (2) years' experience

A copy of work order/license/MoU with the airline company and proof of completion of requisite tenure of two (02) years shall be attached as proof.

OR

(v) The bidder must have at least two (02) years of experience in the last seven (7) years in operating and managing passenger/airline lounge, at an airport. Following requirements must have been fulfilled by lounge for which experience is claimed.

i. Lounge should have a minimum area of seventy (70) square meters and

ii. Lounge should have a minimum seating capacity of thirty (30) persons.
The validity of the above requirements shall be determined as per Clause-2.1 of the RFP. Any other document to support the above claim which is not included in Clause-2.1 should also be attached.

II. Requirement to submit undertaking for branded outlets-
The bidder shall submit an undertaking in the format provided in technical form-I of the Appendix-I to submit binding MOUs/agreements signed with Brand owners within the Business Incubation Period, as per the table below:

Airport Category	*Minimum number of Brands*
Category A (4 to 12 million passengers per annum	*At least 2 Internationally Branded Outlets and 1 Nationally Branded Outlet*
Category-B (2 to 4 million passengers per annum	*At least 1 Internationally Branded Outlet and 1 Nationally Branded Outlet*
Category C (1 to 2 million passengers per annum	*At least 1 Internationally Branded Outlet and 1 Nationally Branded Outlet*

In case the Airport moves to a higher category, such as from category C to category A/B or from category B to category A as per AA's classification, the Authority *may require the Concessionaire to comply with the requirement applicable to the higher category.*

Clause-2.1.5 of the RFP refers to Financial Capacity and the same reads as follows:-

"Financial Capacity ("Financial Capacity") – For demonstrating Financial Capacity the Bidder shall satisfy the following criteria:

The bidder must have minimum annual turnover from F&B business during two (02) years (for which technical experience has been claimed) in the last seven (07) years, in accordance with the audited financial statements (i.e. profit and loss account and balance sheet along with schedules) as per the table below:

Airport Category	*Minimum number of Brands*
Category A (4 to 12 million passengers per annum	*Five Crore only*
Category-B (2 to 4 million passengers per annum	*One Crore only*
Category C (1 to 2 million passengers per annum	*One Crore only*

For the sake of clarity, Airport categorization as per the above table will be ascertained for the year preceding the year of publication of the RFP.

The bidders shall enclose, along with its bid documents, certificate(s) as per format provided in technical form-4 of Appendix-I from its Statutory Auditors reflecting sales turnover of the bidder from the F&B business in India or overseas, in support of its claim of meeting the Financial Capacity criteria required under this Clause-2.1.5. For the purposes of this RFP, turnover ("Turnover") shall mean the total revenue earned from sales of F&B products and services to ultimate consumers, less applicable sales tax, GST or value added tax."

As the Petitioner had not submitted the Technical Form-4 along with its technical bid, it was instructed to submit the same in prescribed format vide shortfall notice/letter dated 31.03.2021. But, the Petitioner submitted the Technical Form-4 by scoring out the particulars and, thereby, did not comply with the mandatory eligibility criteria/requirements as per the RFP.

20.1 However, in the remarks/observations column of the first ground of rejection a mention has been made that details, as per the Instruction-2 format for certificate from Statutory Auditor/Company Secretary regarding affiliate were not submitted. Instruction-2 under Technical Form-4 provides the format for certificate from Statutory Auditor/Company Secretary regarding affiliate. The Petitioner has not submitted the certificate from Statutory Auditor/Company Secretary regarding affiliate citing the following reasons, as is evident from paragraph-6(i) of the writ petition, which reads thus:-

> *"......... In the submission of the Petitioner, the technical form-4 has been scored by the Petitioner*

while submitting its bid as the contents thereof are inapplicable to the Petitioner. Instruction No.2 which is the basis of rejection of the Petitioner's bid provides for a certificate from statutory auditor/company secretary certifying that a certain percentage of equity is held by one bidder in another which may constitute its affiliate for purposes of clause-2.1.1 of the RFP. The form is required to be submitted where one bidder holds equity in another bidder. However, the Petitioner holds no equity in any of the other bidders and prior to submission of the bid would not know who the other prospective bidders are. Therefore, the form was not required to be submitted by the Petitioner at all. Accordingly, rejection of the Petitioner bid on this ground is absolutely illegal and arbitrary."

20.2. The word 'affiliate' has been defined in the RFP, as mentioned above. Having regard to the meaning attached to the word 'affiliate', the Petitioner has misconstrued the meaning thereof and misconceived the purport of its requirement and has not submitted the certificate in the prescribed format, as per Instruction-2 under Technical Form-4. As such, the Petitioner has candidly admitted that the same was not submitted by the Petitioner either along with the technical bid or in pursuance of the shortfall notice wherein opportunity was given by the Opposite Party-Authorities to reconcile such shortfall. Thereby, rejection of the Petitioner's technical bid on this ground cannot be said to be faulted with.

21. The second ground of rejection, as contained in the impugned letter of rejection dated 28.04.2021, is due to non-submission of the list of equipments planned for the site as per Instructions. In terms of the RFP, the Petitioner was required to furnish Technical Form-7, which refers to submission/furnishing of information by the bidders with respect to their proposal on capital expenditure plan (CAPEX) which has to in any case be more than Rs.20,000/- per Sq.Mt. and, as it appears, the Petitioner had not submitted the Technical Form-7 along with its technical bid. Though Opposite Party-Authorities in shortfall notice dated 31.03.2021 directed the Petitioner to rectify the said shortfall documents, but the Technical Form-7, which has been annexed at Page-382 of the writ petition does not indicate any amount towards the Petitioner's proposed CAPEX as per the mandatory requirement of the said form. Further, the list of equipments, as required under Instruction-1 of Technical Form-7, was not submitted by the Petitioner, which is evident from the records itself. As per Technical Form-7,

the bidders are required to submit a list of equipment planned for the site for the movement of the equipment/goods within the airport and that such movement of the equipment/goods within the airport shall be as per the direction/strategy of the Authority. The explanation appended by the Petitioner for not having submitted a list of equipment(s) in the prescribed format under Technical Form-7 does not justify the very purport of the Instructions. Thereby, rejection/ disqualification of the Petitioner's technical bid on that score is justified.

22. Coming to the next ground of rejection of technical bid, it relates to non-submission of brand details as per Technical Form-5. It is stipulated in Technical Form-5 that the bidders are to mention the details of brands of F&B items proposed to be sold through their F&B sales outlets at the Concessioned premises within the airport. The Petitioner did not submit the list of brands of F&B items proposed for the Concession along with its technical bid. On the said non-fulfillment being pointed out to the Petitioner vide shortfall notice by the

Opposite Party-Authorities, the Petitioner submitted Technical Form-7, as is evident from Page-383 of the writ petition, wherein the name of the Petitioner has been mentioned against "Name of F&B Brand" and the name of Praveen Kumar Rana towards providing "Details of the legal owner of the Brand". Though the Petitioner has tried to justify his stand, but a perusal of Technical Form-5 would show that the Petitioner has stated 'N.A.' i.e., Not Applicable, in response to the details of registration as a trademark/trade name, details of franchisee/license holder of the brand, if any, and details of MOU between bidder and legal owner/franchisee/license holder of the brand. The Petitioner has stated that it is not required. Therefore, rejection of Petitioner's bid cannot be said to be not justified, because on a bare perusal of the definition of Brand vis-à-vis Technical Form-5 would show that the Petitioner ought to have enlisted the Brand Owners' whole products the Petitioner proposes to sale through its outlet at the Concessioned premises within the airport by appending/submitting documentary evidence that would indicate that the MOU with the Brand Owners shall be to the effect that if such bidder is selected for the grant of Concession, the parties to the MOU shall enter into a binding franchise agreement which shall be co-terminus with the concession term. Thereby, the rejection of the technical bid of the Petitioner for non-submission of the information specified is justified.

23. Mr. Ashish Mohan, learned counsel for the Petitioner contended that the instructions in Technical Form-5 mandate the bidders to have MOUs/agreements executed with the respective F&B and to provide documentary evidence thereof. The bidders under Technical Form-4 are made to undertake that in the event LOIA is issued in their favour, binding MOUs/agreement signed by such successful bidder with such F&B brands as disclosed while submitting their bid, to be produced within 30 days from the issuance of such LOIA. Such contention of learned counsel for the Petitioner cannot be sustainable and accordingly the same is rejected.

24. Reliance has been placed by learned counsel for the Petitioner on ***Podar Steel Corporation*** (supra), which clearly lays down the essential conditions of eligibility and the others, which are merely ancillary and subsidiary with the main object to be achieved by the conditions. It is only first case the authority issuing the tender may be required to enforce them rigidly and in the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in the appropriate cases.

25. In view of the fact that there was no minimum requirement of the kind of number of equipments planned for the site for the movement of the equipment/goods in the tender nor is there any consideration attached to this planned, as per clause-2.8 of the RFP, which states about the right of the Airport Authority to accept and reject any or all bids. Clause-2.8.1 is extracted hereunder:

> *"2.8.1. Authority reserves the right to verify all statements, information and documents submitted by the bidder in response to the RFP or the bidding documents and the bidder shall, when so required by the authority, make available all such documents as*

> *may be necessary for such verification. Any such verification or lack of such verification, by authority shall not relieve the bidder of its obligations or liabilities hereunder nor will it affect any rights of authority thereunder.*
>
> *2.8.2 – Notwithstanding anything contained in this RFP, the Authority reserves the right to accept or reject any Bid and to annul the bidding process and reject all bids, at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons thereof."*

26. Therefore, power has been vested with the Opposite Parties No.1 and 2 to accept or reject the bid. If the Petitioner has not qualified in the technical bid, as per the reasons mentioned above, for having not satisfied the requirement thereof, it cannot be said that such rejection of the technical bid of the Petitioner is not justified. Rather, the Opposite Party-Authorities have acted in consonance with the terms and conditions of the tender documents. Thereby, the order rejecting the technical bid of the Petitioner is well justified.

27. In ***M/s Utkal Suppliers v. M/s Maa Kanak Durga Enterprises***, 2021 (II) OLR (SC) 168, referring to earlier judgment of the apex Court in the case of ***Tata***

Cellular v. Union of India, (1994) 6 SCC 651, the apex Court held as follows:-

> *"11. This Court has repeatedly held that judicial review in these matters is equivalent to judicial restraint in these matters. What is reviewed is not the decision itself but the manner in which it was made. The writ court does not have the expertise to correct such decisions by substituting its own decision for the decision of the authority. This has been clearly held in the celebrated case of Tata Cellular v. Union of India, (1994) 6 SCC 651, paragraph-94. At paragraph No.12, held as follows:-*
>
> > *"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 falible.*
> >
> > *(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 or 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."

28. In ***Afcon Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.***, (2016) 16 SCC 818, in paragraphs-14 and 15, the apex Court held as under:-

"14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous- they must be given meaning and their necessary significance. In this context, the words metro in Clause-4.2 (a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner of 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 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."

29. The aforesaid settled principle laid down by the apex Court in ***Afcon Infrastructure Ltd***. (supra) has also been referred to in subsequent judgments by the apex Court in the cases of ***Montecarlo Ltd.***, ***Caretel Infotech Ltd.***, ***Silpi Constructions Contractors*** and ***U.P. State Bridge Corporation Ltd***. In view of the aforementioned propositions of law, it remains no more *res integra* that Courts must defer to the understanding and appreciation of the tender documents, as the Petitioner has not alleged mala fides or perversity in the understanding or appreciation or in the application of the terms of the tender condition.

30. In ***Meerut Development Authority*** (supra), while considering the rights of a bidder participating in the tender process, in paragraphs-26, 27 and 33 of the said judgment, the apex Court lucidly explained as under:-

> *"26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made*

must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender where so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

xxx xxx xxx

33. …….. Once it is clear that there was no vagueness, uncertainly or any confusion with regard to the reserved price there is no scope for any interference in the matter by this Court. The terms and conditions of the tender were expressly clear by which the authority as well as the bidders were bound and such conditions are not open to judical scrutiny unless the action of the tendering authority is found to be malicious and misuse of its statutory powers."

Such a view has been taken by the apex Court taking into account the judgments rendered in ***Tata Cellular, Cochin International Airport Ltd., Directorate of***

Education, Association of Registration of Plates, Global Energy, and Puravankara Projects Limited (supra).

31. In ***Directorate of Education*** (supra), the apex Court held that terms of initiation to tender are not open to judicial scrutiny and the same being in the realm of contract, Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. Further, in paragraph-9 of the said judgment, the apex Court held as under:-

> *"It is well settled now that the courts can scrutinize the award of the contracts by the government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters."*

32. In ***Monarch Infrastructure (P) Ltd*** (supra), the apex Court held that the terms and conditions in the tender are prescribed by the government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the

terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the one prescribed in the earlier tender invitations."

33. In ***Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers v. New J.K. Roadways, Fleet owners and Transport Contractors***, 2020 SC Online SC 1035, the apex Court, while considering the terms and conditions of the contract of the tender, interpretation and scope thereof in exercise of power of judicial review held that author of the tender document is the best person to understand and appreciate its requirements. Its interpretation should not be second-guessed by a court in judicial review proceedings. The interpretation of the tendering authority in this case cannot be said to be perverse. It is held that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court.

34. On perusal of the writ petition, it is seen that nowhere the Petitioner has alleged *mala fide* against the Opposite Party-Authorities. So far as arbitrariness is concerned, though the same has been alleged, but not demonstrated, as is required to be done, as the Petitioner has not satisfied the conditions stipulated in the tender documents. Therefore, in exercise of power of judicial review, this Court cannot interfere with the reasons assigned so as to annul the decision taken by the technical committee in rejecting the technical bid of the Petitioner.

35. In ***Bharat Coking Coal Limited v. AMR Dev Prava and others***, (2020) 16 SCC 759 : 2020 SCC Online SC 335, apex Court held that writs are impermissible when the allegation is solely with regard to violation of a contractual right or duty, thus, the persons seeking writ relief must also actively satisfy the Court that the right it is seeking is one in pubic law. Further, it is imperative that in addition to arbitrariness, illegality or discrimination under Article 14 or encroachment of

freedom under Article 19 (1) (g), public interest too is demonstrated before remedy is sought, though the threshold for the latter need not be high.

36. In view of the facts and law, as discussed above, this Court does not find any material to interfere with the reasons assigned in rejecting the bid (technical bid) of the Petitioner submitted, pursuant to E-Bid No. (Tender ID No): 2021_ AAI_70823_1- RFP for the work "Concession to Design, Fit-Out, Finance, Develop, Market, Operate, Maintain and Manage the Food and Beverage Outlets at New Domestic Terminal Building (T1), Biju Patnaik International Airport, Bhubaneswar".

37. In the result, while holding that the letters/orders dated 17.04.2021 and 28.04.2021 under Annexure-2 series rejecting the technical bid of the Petitioner, and consequential letter dated 21.05.2021 under Annexure-1 awarding the work in favour of Opposite Party No.3, as well justified, the writ petition is

dismissed being devoid of merits. The parties are directed to bear their own costs.

38. With the dismissal of the writ petition, the interim order passed on 10.08.2021 in I.A. No. 10286 of 2021 stands vacated.

....
DR. B.R. SARANGI,
JUDGE

G. SATAPATHY, J. I agree.

....
G. SATAPATHY,
JUDGE

Orissa High Court, Cuttack
The 6th September, 2022, Arun/Ashok/GDS