A RELIANCE AIRPORT DEVELOPERS PVT. LTD.

v.

AIRPORTS AUTHORITY OF INDIA AND ORS.

NOVEMBER 7, 2006

B [ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Administrative Law:

C *Administrative authority—Exercise of discretion—Judicial review—Scope of—Privatization of airports of Delhi and Mumbai on joint venture basis—Bids invited—Evaluation of bids—Constitution of Committee (EC)—Approach of EC in evaluation being inconsistent with terms of request for proposal (RPF)—Another committee (GETE) constituted Reports submitted—Two bidders awarded contract of one airport each—One of unsuccessful bidders* D *challenging constitution of GETE—Held, necessity for taking views of different committees was a step towards making the whole decision making process transparent—In multi tier system in decision making process, authority empowered to take decision can accept view expressed by one committee in preference to another for plausible reasons—On facts, discretion properly exercised—Challenge to constitution of GETE clearly untenable—GETE has* E *gone by objective standards—Criterion adopted by GETE more rational—Ultimately, the authority concerned rightly exercised its discretion in larger public interest—Privatization Policy—Contract—Government contract—Evaluation of bids—Confidential and sensitives meetings—Need to maintain secrecy.*

F *Words and Phrases:*

Expressions 'contract' and 'discretion'—Connotation of

In furtherance of the privatization policy of the Government of India, G **"Invitation To Register An Expression of Interest" was issued for privatization of two airports of Mumbai and Delhi on a joint venture basis. The bidders were invited to bid on certain basis and pattern. The tendering process involved two tiers, i.e., Expression-cum-Request for Qualification and a Request for Proposal (RFP). At the RFP stage, evaluation was carried out in four stages. The first two stages involved verification in the**

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nature of mandatory norms. The third stage was technical evaluation stage; and the final stage was financial evaluation stage. Before approval of transaction document by Empowered Group of Ministers (EGOM), RFP documents of two airports were forwarded to the bidders. Thereafter final transaction documents were forwarded to the bidders. There were six bidders for Delhi and five bidders for Mumbai. Bid evaluation was entrusted to Global Technical Adviser, Legal Consultant and Financial Consultant (GTA, LC and FC) which was also described as Evaluation Committee (EC). The technical bids were opened and a Government Review Committee (GRC) was constituted to undertake an independent review of evaluation report of bids of the two airports and restructuring process prepared by the Evaluation Committee/Advisers. EC submitted their evaluation report. A Committee called as Group of Eminent Technical Experts (GETE) was appointed to review the Consultants' Evaluation Report. Accordingly, GETE submitted its reports. On 31.1.2006, Executive Director of AAI informed appellant RAL that GMR would be given a choice of the two airports and whichever airport it chooses it would be required to match the higher financial bid. RAL wrote to AAI alleging change of procedure and protesting against the same. It also wrote to the members of the EGOM alleging *illegalities* in consideration of the bids, and later filed a writ petition before the High Court on 2.2.2006. On 4.2.2006 GOI informed GMR and GVK that they were selected as successful bidders for undertaking the re-structuring and modernization of the Delhi and the Mumbai airports respectively. It was contended for the petitioner that the EGOM/ GOI should have accepted the recommendations of the EC and should not have asked the GETE to make further examination. It is submitted that GETE did not examine the queries relating to GMR as raised by the IMG and the reduction of technical qualification from 80% to 50% was impermissible; that the appointment of GETE itself was illegal and unauthorized. On dismissal of writ petition RAI filed the present appeal.

On the questions: Whether GETE's constitution was legal and whether jurisdiction conferred on GETE has been properly exercised,

Dismissing the appeal, the Court

HELD: *Per Pasayat, J*

1.1. 'Discretion' means when it is said that something is to be done

A within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: according to law, and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to continue himself. [432-G]

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Ramji Dayawala & Sons (P) Ltd. v. *Invest Import*, [1981] 1 SCC 80; *Dhurandhar Prasad Singh* v. *Jai Prakash University and Ors.*, [2001] 6 SCC 534; *Kumaon Mandal Vikas Nigam Ltd* v. *Girja Shankar Pant and Ors.*, [2001] 1 SCC 182; *Siben Kumar Mondal* v. *Hindustan Petroleum Corporation Ltd.*, AIR (1995) Cal 327; *Man Mal Sharma* v. *Bikaner Sahkari Upbhokta Bhandar*, AIR (1999) Raj 13; *Rekha Bhasin* v. *Union of India*, AIR (1998) Del 314; *National Insurance Co. Ltd.* v. *Keshav Bahadur*, AIR (2004) SC 1581; *Kumaun Mandal Vikas Nigam Ltd.* v. *Girja Shanker Pant*, [2001] 1 SCC 182; *Jaisinghani* v. *Union of India*,, AIR (1967) SC 1427 and *Commissioner of Income-tax* v. *Mahindra and Mahindra Ltd.*, AIR (1984) SC 1182, referred to.

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Breem v. *Amalgamated Engineering Union*, [1971] 1 All ER 1148; *Chief Constable of North Sales Police* v. *Evans*, [1982] 3 All ER 141; *Susannah Sharp* v. *Wakefield*, (1891) AC 173; *Sharp* v. *Wakefield*, (1891) Appeal Cases 173; *Hindson and Kersey*, (1680) 8 How St Tr 57; *R.* v. *Kay*, 52 LJMC 90; *Lee* v. *Bude Railway Co.*, (1871) LR 6 CP 576; *Morgan* v. *Morgan*, 1869, LR 1 P & M 644; and *Gardner* v. *Jay*, (1885) 29 Ch D 50; *John Wilke's* case, (1970) 4 Burr 2528, *Council of Civil Service Unions* v. *Minister for the Civil Service*, [1984] 3 All.E.R.935; *Sharp* v. *Wakefield*, 1891 AC 173; *Lee* v. *Budge Railway Co.*, (1371) LR 6 CP 576 and *Morgan* v. *Morgan*, (1869) LR 1 P & M 644 and *Roberts* v. *Hopwood*, (1925) AC 578 and *R.* v. *Wilkes*, (1770) 98 ER 327, referred to.

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1.2. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. [451-C]

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The principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts *ultra vires* [451-E-F]

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Padfield v. *Minister of Agriculture, Fisheries and Food LR,* (1968) AC 997, referred to. A

1.3. One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. In the realms of contract, various choices are available. Comparison of the respective merits, offers of choice and whether that choice has been properly exercised are the deciding factors in the judicial review. [450-H; 451-A-B; 460-D] B C

State of U.P. and Ors. v. *Renusagar Power Co. and Ors.,* AIR (1988) SC 1737, relied on.

1.4. The Court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient. To arrive at a decision on "reasonableness" the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, and must have been a *bona fide* one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view. To characterize a decision of the administrator as "irrational" the Court has to hold, on material, that it is a decision "so outrageous" as to be in total defiance of logic or moral standards. In essence, the test is to see whether there is any infirmity in the decision making process and not in the decision itself. D E F

[452-H; 453-A; 454-A, B, H; 455-A] G

Indian Railway Construction Co. Ltd. v. *Ajay Kumar,* [2003] 4 SCC 579 and *Asia Foundation & Construction Ltd.* v. *Trafalgar House Construction (I) Ltd and Ors.,* [1997] 1 SCC 738, referred to.

Associated Provincial Picture Houses Ltd. v. *Wednesbury Corpn.* KB 229: All ER 682; *R.* v. *Secretary of State for the Home Department,* ex parte H

A *Daly*, [2001] 3 All ER 433; *R (Mahmood)* v. *Secretary of State for the Home Dept.*, (2000)1 WLR 840 and *Huang & Ors* v. *Secretary of State for the Home Department*, [2005] 3 All ER 435, referred to.

2.1. In the instant case, though the High Court seems to have noted that the EGOM has absolute discretion, it has really not held that the B discretion was unfettered. In fact it has on facts found that the discretion was properly exercised to make some variations in the terms of RFP. [437-E-F]

2.2. In the multi tier system in the decision making process the authority empowered to take a decision can accept the view expressed by C one committee in preference to another for plausible reasons. It is not bound to accept the view of any committee. These committees, it needs no emphasis, are constituted to assist the decision making authority in arriving at the proper decision. It is a matter of discretion of the authority to modify the norms. It is not a case of absolute discretion. While exercising the discretion, certain parameters are to be followed. [432-C-D]

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2.3. It is to be noted that the ultimate authority to take the decision in the matter was EGOM. It was within the powers of EGOM to decide as to what inputs it can take note of and the source of these inputs. Therefore, the necessity for taking views of various committees constituted appears to be a step in the right direction. This was a step which appears E to have been taken for making the whole decision making process transparent. There was no question of having the view of one Committee in preference to another. EC was a Committee constituted as a part of the decision making process like other Committees *viz.* GRC, COS and IMG. [432-A-B]

F *Craies Statute Law, 6th Edn.* P. 273 and *Corpus Juris Secundum*, Vol. 27, page 289 and "*Advanced law Lexicon*" by P. Ramanath Aiyar, referred to.

2.4. Coming to the constitution of GETE, no *mala fides* are alleged against the members. About the constitution of GETE, the stand is clearly G untenable. [437-F]

3.1. So far as evaluation of the marks as done by EC is concerned, GETE has given reasons for altering the marks allotted which ultimately led to the non-qualification of the appellant. There were four identified H areas where it was noted that the EC's approach in the evaluation exercise

was inconsistent with the terms of the RFP. Essentially there were four instances of rewriting of priorities and weightages as contained in the RFP and valuation was then made by the EC on the basis of these re-written priorities and weightages. [437-G; 438-D-E] A

3.2. If EC felt that the priorities and weightages as indicated in the RFP were inappropriate, it should have requested AAI/GOI to amend the RFP before the bids were received. Interestingly, the modifications were resorted to after the bids were opened. That is the principal reason for which EGOM appears to have sought views of the COS and the COS was equally entitled to invite a group of experts to examine the matter. B

[447-G-H; 448-A]

3.3. The GETE's report shows that even taking the said four modifications led to some of the bidders getting more marks. GVK and others did not cross the bench mark of 80% and even after exclusion of these marks, GMR had more than 80% marks. It was only the appellant who crossed the threshold of 80% on account of these four variations and fell below 80% when the effect of these four variations was excluded. C D

[449-E-F]

3.4. Departure from the RFP made by EC after opening the bids can reasonably raise a doubt that EC knew that the modalities would benefit the appellant. GETE's report shows that it enunciated the principle to carry out an exercise that would be more in the nature of validation dealing with the four variations made by EC. GETE also noted that certain issues can be more satisfactorily addressed by process of validation that would involve a re-allocation of marks, on the assessment made by the EC of the bids albeit in a manner that would be consistent with the RFP. It essentially was not an exercise of re-evaluation but of a re-allocation consistent with RFP. [449-G-H; 450-A-B] E F

3.5 As noted in GETE's first report, its attempt was to assess whether EC had assigned weightages and marks in a logical and transparent manner to the sub-factors and whether there had been any bias in favour of or against any of the bidders while assigning marks, with reference to the RFP. While making such examination, the issues raised by the members of IMG were kept in view, but as stated in the report, GETE was not solely guided by their views. Though the first report itself indicated the reasons as to why the evaluation process containing the moderation exercise was not undertaken in respect of bidders, as desired by EGOM, GETE did so and submitted its second report. Undisputedly, GMR crossed G H

A the bench mark of 80% in respect of both the bids while others did not. [450-C-D]

3.6. Weightage introduces subjectivity. GETE has gone by objective standards. The criterion adopted by GETE appears to be more rational. It proceeded with the idea that more objectivity was necessary. So it has B called the process to be validation process. [461-B]

4. Challenge has been made by the appellant to the lowering of the bench mark. It is to be noted that the appellant had come into the zone of consideration only because of lowering of the bench mark as otherwise after the modifications were made by GETE, it had not crossed the bench C mark. [450-E]

5. As regards the appellant's stand that if none was found eligible on the basis of 80% bench mark, there should have been a fresh bid, it has been pointed out that the number of bidders was small. The bidders after opening of the bid knew the merits and demerits of all the bids. There D was an urgency for early completion of the airports keeping in view the 2010 Commonwealth Games. [450-F-G]

6.1. There was no stand before the High Court that the appellant wanted to match the bid. Even if it is accepted for the sake of argument, that it was so urged, it would have no consequence. The argument that E as GMR has been allowed to match the financial dealing of appellant for Mumbai airport, the same modality should have been adopted for the other bidders, cannot be accepted for the simple reason that when bench mark is crossed, financial consideration is the determinative factor because of revenue sharing. The safety valve is the OMDA. The ranking becomes F irrelevant after the bidders have come to the arena and then finally the financial bid which determines the ultimate bid. [459-H; 460-A-B, G]

6.2. It is to be noted that if no one was qualified; two alternatives were available either to scrap or abandon the process and second to re-conduct the tenders. The practical compulsion which made the choice G avoidable cannot be termed as perverse or lacking rationality. [460-F]

7.1. It is to be noted that Clause 5.5. deals with a situation of the same bidder being the highest bidder for both the airports. It proceeds on the basis that there would be another eligible bidder for the other airport and on that basis the procedure to be adopted has been prescribed. H In such a situation the bidder who would be successful i.e. the highest

bidder would be asked to take the airport when the difference between his bid and the next higher bid is greater. Such a procedure could be followed where there is second valid bid at the final phase. This procedure does not deal with a situation where there is only one bidder with valid bids for both the airports. In such a situation he becomes the highest bidder for both the airports and for that reason alone, the question of evaluation of financial bid arises. [461-E-G] A B

7.2. If the RFP was to consider at the final phase of evaluation there would be only one bid for each of the airports. In that event, there would be no question of finding out difference between the various bids or comparing bids. That left no option with the EGOM but to either vary RFP or to award one of the airports to GMR and to cancel the process for the second or cancel the entire process. The latter course would not have been in larger public interest. Therefore, the EGOM exercised its option. [461-H; 462-A] C

Ratnaq International Ltd v. *I.V.R. Construction Ltd. and Ors.*, [1999] 1 SCC 492 and *Master Marine Services (P) Ltd.* v. *Metcalfe & Hodgkinson (P) Ltd. and Anr.*, [2005] 6 SCC 138, referred to. D

R. v. *Department of Constitutional Affairs*, [2006] All ER (D) 101, referred to.

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7.3. It is to be noted that in respect of both the appellant and the GETE wherever subjectivity criterion is involved, GETE has not dealt with the same. The mandate of EGOM was to validate and not to invalidate. It was a process for overall validation and calibration to apply the correct standard. It is the texture of the tendered document which is of paramount importance. EC has changed the texture whereas GETE did not do it. It needs no emphasis that uneven denomination breaks the integrity and textures. [462-H; 463-A-B] F

7.4. Perverseness in connection with a finding of fact is an aspect of mistake of law. In the "public law" domain, in order to examine whether the entire proceeding before the appropriate authority is illegal and without jurisdiction or the defect or infirmity in the order goes to the root of the matter and makes it in law invalid or void, the matter may have to be considered in the light of the provisions of the particular statute in question and the fact-situation obtaining in each case. If the decision is without jurisdiction, notwithstanding the provisions for obtaining reliefs G H

A contained in the Act and the "ouster clauses", the jurisdiction of the ordinary court is not excluded. So, the matter assumes significance.

[463-C, F, G, H]

Union of India v. *Tarachand Gupta & Bros.*, [1971] 1 SCC 486; *A.R Antulay* v. *R.S. Nayak*, [1988] 2 SCC 602; *R.B. Shreeram Durga Prasad and* B *Fatehchand Nursing Das* v. *Settlement Commission (IT & WT)*, [1989] 1 SCC 628; *N. Parthasarathy* v. *Controller of Capital Issues*, [1991] 3 SCC 153; *Associated Engineering Co.* v. *Govt. of AP*, [1991] 4 SCC 93; *Shiv Kumar Chadha* v. *Municipal Corpn of Delhi*, [1993] 3 SCC 161; *M.L. Sathi* v. *R.P. Kapur*, [1972] 2 SCC 427; *Hari Prasad Mulshanker Trivedi* v. *V.B Raju and Ors.*, [1974] 3 SCC 415 and *Mafatlal Industries Ltd. and Ors.* v. *Union of* C *India and Ors.*, [1997] 5 SCC 536, referred to.

R (Iran) v. *Secretary of State*, (2005) EWCA Civ 982; *Anisminic Ltd.* v. *Foreign Compensation Commission*, [1969] 1 ALL E.R. 208; *O' Reilly* v. *Mackman*, [1982] 3 All. E.R. 1124; *Re.* v. *Hull University Visitor*, [1993] 1 All E.R. 97 and *Re: Racal Communications Ltd.*, [1980] 2 All E.R. 634, D referred to.

De Smith, Woolf and Jowell - Judicial Review of Administrative Action (1995 Edn.) p. 238; *Halsbury's Laws of England* (4th Edn.) p. 114; *Sir William Wade, Administrative Law* (7th Edn.), 1994 *De Smith, Judicial Review of Administrative Action-edited by Lord Woolf and Jowell, Q.C.; Professor of* E *Public Law*, 5th Edn. 1995 *"Jurisdiction, Vires, Law and Fact"* pp. 223; *"The Nature of Judicial Process"* by Benjamin Cordozo, referred to.

Administrative Law, 7th Edn., (1994), by *H.W.R. Wade and C.F Forsyth*, referred to.

F 8. The plea of the appellant that the expression 'contact' obviously means an illegal attempt for bribery etc. and cannot stand on the way of submission of documents for consideration, is clearly untenable. Though, there is no penal clause for such breach it goes against the very concept of fairness in the process and evaluation of bids. Whatever documents are to be submitted are clearly stipulated. Any attempt to take advantage of G any newspaper report, clearly falls foul of the mandate that there shall not be any contact with any person involved in the process of selection. It is unusual that the RFP did not make such a contact is a factor for disqualification. This is to be kept in view in future tenders.

[471-H; 472-A-B]

H 9. It appears that whatever has been discussed in the various

meetings apparently found its way outside. Who was responsible for the leak is not very clear but it is not a very healthy trend. The meetings were highly confidential and sensitive in nature dealing with global tenders. [416-F]

Per Kapadia, J

1. In Order to see whether the EC had exceeded its authority in the assessment of technical pre-qualification, it has to be borne in mind that in the scoring system objectivity has an important role to play, and identification of factors (including sub-factors), allocation of marks to each of these factors (including sub-factors) and giving of marks are three distinct and different stages. Clause 5.4 dealt with assessment of technical pre-qualification. Under that clause a scoring system was to be applied based on the assessment of the Terms of the Offer against the Technical pre-qualification criteria. It further stipulated that assessment shall be on absolute basis and not relative as between the offers. Under the said system, each factor had to be allocated certain marks. Objectivity had to be provided in the allocation of marks (and not in giving of marks) to each factor (including sub-factors). This was not done. It may be seen that RFP required certain marks to be allocated for absorption of existing staff. Greater the absorption, higher the marks to be given. In the present case, the EC changed the factor, namely, "absorption of employees" to the overall approach. This led to change in priority. Similarly, in the RFP, the factor earmarked was "property development" which EC compared to "infrastructure development", Experience in property development is different from experience in infrastructure development. Similarly, RFP had given weightage to aeronautical, revenues, revenue whereas in allocation of marks, E.D. obliterated the difference between aeronautical and non-aeronaut ical revenues. Thus, the objectivity which was the underlying principle in clause 5.4 is completely lost either by expanding the enumerated factors like aeronautical revenue, overall capability *vis-a-vis* capacity to absorb existing work-force and comparison of property development with infrastructure development or by allocating un-even marks to sub-factors. EC had no business to expand or narrow down the scope of any of the above factors as it was beyond its authority and contrary to the scoring system. [472-D-H; 473-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2515 of 2006.

From the Judgment and Order dated 21.4.2006 of High Court of Delhi

A at New Delhi, in W.P. (C) No. 1581/2006.

Mukul Rohtagi, Soli J. Sorabjee, Saurabh Kirpal, Mahesh Agrawal, Manali Singhal, Nikhil Sakhardande, Rishi Agrawal and E.C. Agrawal For the Appellant.

B Gopal Subramanium, A.S.G., Harish N. Salve, R.F.Nariman, L. Nageshwar Rao, K. Parasaran, K.K. Venugopal, V.A. Mohta, Dr. A.M. Singhvi, R.N. Karanjawala, Gopal Jain, Ramesh Singh, Ankur Chawla, Meenakshi Grover, Ruby Singh Ahuja, Pragya Singh Baghel, Gayatri Goswami, Akshay Babu, Manik Karanjawala, M.V. Kini, V.B. Joshi, T.S. Murthy, Saket Singh, Siddharth Aggarwal, Senthil Jagadeesan, Atul Sharma, Munish Sharma, Ravi Verma, Ashish Ahuja, Amit Sethi, Milanka Chaudhary, Prashanto Sen, Haripriya, Vibhuti Kabra, Devansh A. Mohta, Sonam Sharma, Nilankanta Nayak and M.A. Chinnasamy for the Respondents.

The Judgment of the Court was delivered by

D **ARIJIT PASAYAT, J.** Challenge in this appeal is to the judgment of a Division Bench of the Delhi High Court. Decision taken by a group of Ministers in a matter of joint venture partnership as a part of the privatization policy of the Government of India was assailed before the High Court.

E According to the appellant, the project has to be grounded because of several major defects which would render the project, take off disastrous. The respondents on the other hand contend that minor technical flaws, if any, have been rectified before the ultimate decision was taken and the project has been rightly held to be in a fit condition to take off.

F The key players in this dispute are M/s Reliance Airports Developers Pvt. Ltd. (in short 'RAL'), Airports Authority of India (in short 'AAI'), Government of India (in short 'GOI'), GMR Infrastructures Ltd. (in short 'GMR'), GVK Industries Ltd. (in short 'GVK').

Background facts sans unnecessary details are as follows:

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As a part of the GOI's avowed policy of privatization of strategic national assets, the first step appears to be privatization of two airports i.e. Mumbai and Delhi on a joint venture basis. In March, 2003 AAI initiated process to consider modernization of Delhi and Mumbai Airports on the basis of an earlier decision taken on January 12, 2000 by the Union Cabinet H relating to re-structuring of airports of AAI through long term leasing route.

On 11.9.2003 the GOI approved restructuring of airports of Mumbai and Delhi through joint venture (shortly called 'JV') route and constituted Empowered Group of Ministers (in short 'EGOM') to decide the detailed modalities including design parameters, bid evaluation criteria etc. based on which JV partners were to be selected. It was required to submit the final proposal for Governments approval. An Inter Ministerial Group (in short 'IMG') was set up to assist EGOM for re-structuring of two airports. The same was set up under the Chairmanship of Additional Secretary-cum-Financial Adviser of Ministry of Civil Aviation. Subsequently, on 15.6.2004, EGOM was re-constituted under the Chairmanship of Minister of Defence. On 12.10.2004 IMG was re-constituted under the Chairmanship of Secretary, Ministry of Civil Aviation. On the basis of recommendations made by IMG, EGOM approved appointment of Global Technical Adviser, Legal Consultant and Financial Consultant (called GTA, LC and FC in short respectively). They were Airport Planning Pty Ltd., Amarchand, Mangaldas and Suresh A. Shroff and Co. and ABN AMRO Asia Corporate Finance (I) Pvt. Ltd (in short Airplan, AMSC and ABN AMRO respectively). The Consultants prepared theInvitation To Register An Expression of Interest (shortly called 'ITREOI') and the same was endorsed by IMG. Subsequently, EGOM approved the same. On 17.2.2004, ITREOI was issued for the two airports. Request for proposal was routed by AAI and the bidders were invited to bid on certain basis and pattern. The tendering process involved two tiers; i.e. an Expression Cum Request for Qualification (in short 'ECRQ') and a Request for Proposal (in short 'RFP'). At the RFP stage, evaluation was carried out in four stages. The first two stages involved verification in the nature of mandatory norms. The third stage was technical evaluation stage and the final stage was financial evaluation stage. On 15.2.2005, EGOM finalized and approved key principles of RFP and draft transaction documents. The RFP documents were issued on 1.4.2005.

Certain changes to the draft transaction documents were approved by EGOM. Before such approval, RFP documents of the two airports were forwarded to the bidders. On 30.8.2005 final transaction documents were forwarded to the bidders. The deadline for submissions of bids was fixed as 14.9.2005. There were in fact six bidders for Delhi and five bidders for Mumbai. On 19.9.2005, a meeting of IMG was held relating to methodology for evaluation of offers and evaluation criteria in RFP documents. IMG decided that bid evaluation on all parameters shall be carried out by a composite team of GTA, LC and FC. IMG also decided to set up a review committee to

A review the evaluation carried out by GTA, LC and FC. The same was also described as an Evaluation Committee (in short 'EC').

The technical bids were opened on 22.9.2005. On 10.10.2005 Government Review Committee (in short 'GRC') was constituted to undertake an independent review of evaluation report of bids of two airports and re-
B structuring process prepared by the Evaluation Committee/Advisers. The Consultants submitted their evaluation report. GRC held its meeting on 23.11.2005 and 24.11.2005 to review the Consultants' Evaluation Reports. GRC endorsed the views expressed in the Consultants' Evaluation Reports. Certain queries were raised by members of the GRC and the Consultants
C clarified the position so far as the queries are concerned. In the Evaluation Report a list of evaluation criteria where a different approach has been adopted by the Consultants was indicated. On 1.12.2005, GRC submitted its report to IMG. In the meeting of IMG held on 2.12.2005 reports of Consultants and GRC were placed. Consultants made a representation to the IMG. The majority members felt that the terms of the RFP had been adhered to and there had
D been sufficient transparency in the process. It is to be noted that one of the members who was the member of the Planning Commission had recorded his personal opinion. Majority of the members of the Committee felt that if the entire bid process was transparent and GRC was satisfied with the process it would not be necessary to go by the advise of the member of the Planning
E Commission and the final decision should be left to the EGOM. The matter was placed before the EGOM on 5.12.2005. EGOM directed IMG to undertake an independent review of the Consultants' evaluation with GRCs assistance and give a clear recommendation to EGOM. It was noted that the bid documents could be made available to the IMG and they could seek
F clarification from the Consultants. It was felt that there was no need for change in the evaluation criteria as stipulated in the RFP documents. It was stipulated that IMG would not undertake any fresh evaluation or allocate marks for any of the criteria and finally the mandate of IMG will be restricted to ascertain as to whether it is in agreement or otherwise with the assessment/ findings and allocation of marks across various criteria in respect of various
G bids. IMG was required to complete the exercise in two weeks. On 6.12.2005 a meeting of the IMG was held. Bid documents were shown to the members of the IMG. Another meeting was held on 9.12.2005 and the Consultants were directed to re-work the marks matrix by strict adherence to RFP norms. On four days i.e. 12th, 13th, 14th and 16th December, 2005 meeting of IMG
H was held. In the meeting queries were raised by IMG members as to whether evaluation was consistent with the RFP evaluation criteria and the answers

given by the Consultants. On 20.12.2005 RAL wrote to the Chairman, EGOM criticizing the SKYTRAX Report and denying that Consultants acted in an improper/biased manner or that the technical evaluation conducted by the Consultants was flawed. RAL wrote another letter on the same day to the EGOM pointing out its alliance with international players.

On 21.12.2005 EGOM met to consider the views of the IMG. It decided that a Committee of Secretaries (in short 'COS') should be set up to advise the EGOM on all issues relating to the restructuring and modernization of the two airports. The COS was required to consider and recommend the selection of appropriate JV bidders for executing the works related thereto. The COS was set up by order dated 21.12.2005 to assist the EGOM. It met and decided to set up two members Committee consisting of Mr. Sreedharan & Mr. Sevadasan (hereinafter described as Sreedharan Committee or Group of Eminent Technical Experts (in short 'GETE') to recommend to the COS on the overall validation of the evaluation process including calibration of the qualifying cut off and sensitivity analysis. 'GETE' was accordingly appointed to review the Consultants, Evaluation Report (in short 'CER') on 27.12.2005. RAL wrote to the Ministry of Civil Aviation (in short 'MCA') asking that copies of its letters dated 20.12.2005 be forwarded to the GETE.

ABN AMRO wrote a letter regarding clarification sought by MCA on determination of bids attached to the criteria used in the technical prequalification of bidders for the two airports. GETE submitted its report on 7.1.2006. A meeting of the COS was held on 9.1.2006. On 12.1.2006 a meeting of EGOM was held where GETE's report was considered. EGOM felt that the GETE had apparently done the evaluation of all the bidders as is evident from the conclusion drawn about status of the other bidders in para 4.8 of its report. No details of revaluation were available about the other bidders, as have been provided in respect of RAL. EGOM therefore decided that in order to reach a definite conclusion, GETE was to be requested to do a similar revaluation exercise in respect of other bidders. Supplementary report of GETE was submitted on 17.1.2006. On 23.1.2006 RAL Airport Operator wrote to the GOI asserting that it had the requisite qualification. On 24.1.2006 meeting of EGOM was held and several decisions were taken. On 28.1.2006 RAL wrote to GOI asking it to adhere to the RFP norms. On 30.1.2006 AAI wrote to the bidders informing them that the final bids were to be opened on January 31, 2006.

On 31.1.2006 Executive Director of AAI informed RAL that GMR

A would be given a choice of the two airports and whichever airport it chooses, it would be required to match the higher financial bid. On that day itself, RAL wrote to the AAI alleging change of procedure and protesting against the same. Later on, the financial bids were opened that day. A report was submitted by the Committee opening the financial bids. RAL again wrote to the members of the EGOM alleging illegalities in consideration of the bids. B On the next day again RAL wrote to the members of the EGOM regarding the events that had transpired during the opening of bids. AAI wrote to RAL setting out the procedure followed while opening and evaluating the financial bids.

C Writ Petition was filed by RAL before the Delhi High Court on 2.2.2006. On 4.2.2006 GOI informed GMR and GVK that they have been selected as successful bidders for undertaking the restructuring and modernization of the Delhi and Mumbai airports respectively and required them to furnish enhanced bid bonds guarantees for Rs.500 crores. Both GMR and GVK furnished their bid bonds guarantees of Rs.500 crores each on 6.2.2006 and 8.2.2006.

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On 1.3.2006 Special Purpose Vehicle (in short 'SPV') was formed for Delhi while on the next day SPV was formed for the Mumbai airport. On 4.4.2006 Operations Management and Development Agreement (in short 'OMDA') was signed by the concerned parties. At this stage, it would be appropriate to take note of what has been described as OMDA. Shareholders E agreement with GMR and GVK was signed. Consequently 26% shares in SPV were allotted to AAI and 74% shares allotted to GMR. Similarly, 26% shares in SPV were allotted to AAI and 74% shares allotted to GVK.

By the impugned order, RAL's writ petition before the Delhi High F Court was dismissed by order dated 21.4.2006.

The primary stand of the appellant is that the EGOM/GOI should have accepted the recommendations of the EC and should not have asked the GETE to make further examination. It is submitted that GETE did not examine the queries relating to GMR as raised by the IMG and the reduction of G technical qualification from 80% to 50% was impermissible. It is also submitted that the appointment of GETE itself was illegal and unauthorized. The High Court proceeded on the basis as if EGOM had absolute discretion in the matter of choosing the modalities. It is also submitted that the uniform pattern of assessment has not been done and while reducing the marks so far as the appellant is concerned, similar procedure has not been adopted so far as H

GMR and GVK are concerned. In the initial assessment, only the GMR and the appellant had crossed the bench mark. If in respect of one airport GMR was given the option of matching the financial bid of the appellant, in respect of the other airport similar option should have been given to the appellant who was at the relevant point of time and even now willing to match the financial bid of GVK. There was no justification for reduction of standard from 80% to 50%, particularly when at all stages EGOM had emphasized that there shall not be any compromise with quality. The argument that any bidder who had crossed the mandatory requirement stage would be competent to execute the contract is completely erroneous since in that case there was no need to fix the high bench mark of 80%. Appellant had scored over 80% on the development side and fell short of merely 6% less than 80% on the management side. The award of contract to the third ranked bidder i.e. GVK who had scored only 59% on the development side and whose bid had been adversely commented upon by all committees is against public interest. The bench mark of 80% had been approved by the EGOM. The EC expressly recommended against lowering the bench mark and the EGOM in its meeting on 5.12.2005 had also wanted the bench mark to remain at 80%. GETE had also not recommended lowering of the bench mark.

The constitution of GETE was without jurisdiction as it was outside the RFP. Allegations made by the respondents in the arguments that EC was biased are not factually correct. As noted above, GETE was not competent to deal with the issues relating to airports and, therefore, it was not a competent body to express any view. GETE's evaluation of appellants bid was wrong and it should not have interfered with EC's evaluation. Different weightages were justified in case for criteria 1.2.2 and 1.2.3 and also in respect of criteria 3.1.1 and 3.1.2. GETE's view as regards non aeronautical revenue being less than 40% is not correct. Its view about the lack of experience of operating in a non-OECD country is also erroneous. The marking system for absorption of AAI employees as done in the case of the appellant has been wrongly interfered with.

Appellant has contended that EC has given marks on the basis of RFP parameters. According to it, the parameters were fixed by the GOI or the EC. The question is not of allotting marks, the real issue is whether right parameters have been applied. It has been emphasized that the other Committees consisted of mainly bureaucrats or persons with inadequate technical knowledge, only the EC was an expert body and, therefore, its view had to be given primacy.

A GMR had qualified in both the bids. Appellant has contended that the option of choosing one of the airports should not have been given to GMR but it should have been allotted the Mumbai airport because of its superior quality of bid in respect of the said airport. By giving option to choose one of the airports, the fate of the appellant was sealed because in the other, it had fallen below the bench mark. Though in one case, appellant's bid was B above the bench mark and its bid was the best amongst those who were below the bench mark in respect of the other airport, it has not been able to get any of the airports.

Despite the specific mandate GETE had not examined the queries qua C the other bidders. Objective criteria assessment which was the foundation for GETE's decision has no basis. In fact GETE itself had indicated that the assessment was subjective in totality. By making an artificial distinction between the subjective and objective queries, the real essence has been lost and unacceptable yardsticks have been applied. Queries made by members of the Review Committee, comments of the EC, comments of the Planning D Commission's representatives and the various queries raised by IMG have been either lightly brushed aside or not considered by the GETE. The decision for lowering of technical standard was arbitrary. EGOM should have examined the conflicting reports given by the experts. Since no reason has been given by EGOM to adopt the report of the GETE by giving its preference over the E report of EC, same cannot be maintained. Report of GETE was not independently examined. By reducing the bench mark, the zone of consideration was enlarged and it was against public interest. Since different yardsticks have been adopted and a partisan approach has been adopted, the decision is clearly unsustainable and is amenable to judicial review. Selective examination by GETE is not *bona fide* though no personal allegation of *mala* F *fide* is made against the members of GETE. Adoption of technical criteria for one airport and financial criteria for the other is not in accordance with law.

In response, learned counsel for the GMR, GVK, Union of India and the AAI have submitted that the appellant is trying to enlarge the scope of judicial review. It is not a case of non existence of power. It essentially G relates to exercise of power. The appellant is trying to contend that the report of EC was sacrosanct and GETE's report was not to be accepted. GETE has formed its view as to how the allotment of marks made by EC was clearly not in line with the prescription made in the RFP. Marks have been allotted by EC on irrational basis and even marks had been awarded when no marks H were to be awarded. Even the EC while commenting upon the weaknesses of

the airport development plan of GMR itself had said that the weaknesses would be sorted out at the stage when the master plan is drawn up. It is pointed out that EC on whose evaluation appellant has led great stress found only one flaw with the plan given by GVK i.e. lack of re-use of existing facilities and the high cost limits to assess it as medium. This is really a non-factor, according to learned counsel for GVK, because plan envisages fresh creation of assets at Mumbai airport whose existing buildings are out-dated. It is characterized as a lack of reuse as well as involving high costs. It is pointed out that GVK's development plan took note of much larger amount of fresh development of assets considering that the existing buildings are out-dated. It has also considered that large sum of money for rehabilitation of the slum dwellers is required as they would have to be re-housed if a realistic plan for expansion of facilities and runways was to be drawn up. The development in each of the phases of the 20 years of projected development was also a relevant factor. There was departure by EC from the norms in various cases without good reasons. Where there is such departure it shows arbitrariness. This is a case which relates to judicial review of the exercise of power and not the existence of power.

It is pointed out that the basic fallacy in the argument of the appellant is its stress on EC being the only advisor to assist the EGOM in arriving at a decision. It is submitted that as rightly observed by the High Court, it was a part of multitier decision making process and appointment of GETE is a part of the process. It is pointed out that though the appellant has challenged the constitution of GETE, it, in uncertain terms, asked the GETE to assess the materials placed before it by the appellant. The EGOM has given reasons for the appointment of GETE.

The EC was not designated in the RFP as an external expert agency on whose evaluation the Government was obliged to act. In fact at the first stage itself GRC was constituted to review the evaluation done by EC. The report of EC had no binding effect on the IMG much less the EGOM. The AAI required permission from the Cabinet for privatization of airports. The ultimate decision making authority was EGOM. However, since the decision making process involved inputs from series of 'in house' committees, this creation of GETE is in fact a part of 'in house mechanism'. This itself is clear from the fact that several Committees were constituted like EC, GRC, IMG and COS. In view of the existence of various tiers in the decision making process, EGOM who has delegated the power of Cabinet did not exceed the powers by setting up the committees. If the appellant's submission is accepted, even

A the GRC, IMG and COS being not the committees mentioned specifically in the RFP, their constitution would be vulnerable. This is certainly not a case of the appellant and these were not external agencies. These committees form part of the 'in-house mechanism' for evaluation of the bids. Their reports were to be used as inputs in the final decision making process and thus imparted a great deal of transparency. Judicial review cannot involve evaluation
B of the comparative merits.

It has also been emphasized that the various discussions in the Committees established beyond doubt that the Union of India wanted a transparent process to be adopted considering the fact that this was a first
C case of private JV. It enabled the EGOM to take note of various view points and take the final decision. These discussions strengthened the decision making process and did not weaken it as contended by the appellant. It has also been submitted that the conduct of the appellant is itself contrary to the norms fixed by the RFP. Though it was specifically indicated that there shall not be any contract with the authorities connected with the decision making process,
D several times appellant wrote letters relating to matters which were under consideration. It baffles one as to how the appellant had knowledge as to what had transpired in the meetings. It was conveniently mentioned that the source of appellant's knowledge was "newspaper reports". The appellant therefore has clearly violated the norms fixed by RFP and on that score
E alone, its bid should have been kept out of consideration. A person who seeks relief on equitable ground should have clean conduct and surreptitious methods adopted by it cannot be condoned and this, according to learned counsel for the respondents, is an additional factor to dismiss the appeal filed by the appellant.

F It appears that whatever has been discussed in the various meetings apparently found its way outside. Who was responsible for the leak is not very clear but it is not a very healthy trend. The meetings were highly confidential and sensitive in nature dealing with global tenders.

Various clauses of RFP which have relevance read as follows:

G

I. INTRODUCTION

1.1. Purpose of this RFP

The purpose of this Document is to:

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- Provide an overview of the process for Stage 2 of the restructuring and modernization of Mumbai Airport Transaction;
- Specify the terms and procedures governing the transaction process for selecting Joint Venture Partners and for the Joint Venture Company (JVC) to be incorporated for the Airport;
- Specify the requirements for the preparation and lodgement of binding offers and
- Outline the approach that will be used in evaluating Binding Offers.

Terms used in this RFP are defined in the Glossary section of this RFP.

1.2. *Other Documentation and Information*

In addition to this RFP, Pre Qualified Bidders (PQB) will be issued the following documentation and material:

- An Information Memorandum for the Airport;
- Draft Transaction Documents for the Airport (open for discussions before finalising the terms and conditions);
- Specialist Reports and AAI data substantially in CD ROM form with some documents in hard copy form for the Airport.

AAI may choose to update, vary or add to all or some of this information (including this RFP) at any time during the Transaction process.

A separate document will be provided to PQB outlining the times, dates and venues of their scheduled meetings with the AAI, the Airport management team and parties of the GTT, as relevant and necessary.

1.3. *Confidentiality*

PQB receiving this RFP must have completed and returned the required, duly executed Confidentiality Deed.

PQB are reminded that information provided in this RFP and the accompanying documentation package is covered by the terms of the Confidentiality Deed and the Disclaimer set out herein. PQB are also reminded that they are not to make any public statements about the Transaction process

A or their participation in it.

1.4. *The Transaction*

AAI is offering a long term Operations, Management and Development Agreement to suitably qualified, experienced and resourced parties to design, B construct, operate, maintain, upgrade, modernize, finance, manage and develop the Airport. The Successful Bidder will participate in a Joint Venture Company with the AAI (and other GOI public sector entities) and such JVC shall be awarded the right to operate, manage and develop the Airport.

An overview of the indicative Transaction structure is set out in C Appendix G.

The key features of the Transaction are as follows:

* The Operations, Management and Development Agreement will be for an initial period of 30 years with the JVC having the right D to extend this by a further 30 years, in accordance with the terms and conditions of the Transaction Documents.

* The Successful Bidder will have an initial 74% equity interest and AAI, along with other GOI Public Sector Entities, will have 26% equity interest in the JVC.

E * AAI will endeavor to contribute (without any binding commitment) equity funds in cash in proportion to its equity share to assist the JVC in funding working capital and major developments upto a cap of Rs.5000 million (Rupees five thousand million) for the Airport. It is AAI's intention to maintain F 26% equity share capital in the JVC.

* If AAI along with other GOI Public Sector Entities does not wish to contribute to further equity calls, the JV Partners will contribute the additional equity and the equity interest, of AAI and other GOI Public Sector Entities will be correspondingly G reduced but the voting rights with regard to reserved board and shareholder matters (as contained in the Shareholders Agreement) will be preserved in the manner set forth in the Shareholders Agreement.

* JVC will have an Employee Arrangement for a period of three H years whereby AAI employees (other than those pertaining to

ATC and CNS departments) posted at the Airport on Effective Date continue to provide their services at the Airport. Further the JVC will be required, during the three years period to make offers of employment in order to absorb a minimum of 40% (or such higher percentage as committed by the Bidder) of the existing AAI employees working at the Airport excepting those engaged in Communication Navigation Surveillance (CNS), Air Traffic Management (ATM), Security, as reduced for retirements, resignations, transfers and death. Employment offers can be made at any time during this Employee Arrangement Period but in no event later than three (3) months prior to the end date of the Employee Arrangement Period. At the end of this Employee Arrangement Period those employees who do not take up the employment offers or who are not made such an employment offer will return to the services of AAI. Additional weightage is provided in the evaluation process to Bidders who commit to make offers of employment in order to absorb more than the minimum level of 40%. There will be a financial penalty, as set out in the OMDA, for any shortfall between the 40% or such higher nominated percentage and the result actually achieved.

Due to the public and economic importance of the Airport a State Support Agreement will be entered into between the JVC and GOI. The State Support Agreement will address matters such as principles of economic regulation, approvals, assistance with licensing and coordination with government agencies. Under the State Support Agreement, the JVC for a specific Airport will have a "Right of First Refusal (ROFR)" with regard to the second airport in the vicinity (except in the case of a proposed new airport in/for Pune) on the basis of a competitive bidding process, in which the JVC can also participate. In the event, the JVC is not the successful bidder, the JVC will have the ROFR by matching the first ranked bid in terms of the selection criteria for the second airport, provided the JVC has satisfactory performance without any material default at the time of exercising the ROFR.

It is the endeavour of the AAI/GOI that a State Government Support Agreement will be entered into with the State Government of Maharashtra wherein the said State Government will provide assistance on a best endeavour basis on dealing with encroachments, reservation of land for settlement of

A encroachments and assistance in making land available if required for aeronautical purposes, surface land transport access to the Airport, expediting applicable clearances and the provisions, where applicable, of essential utility services. However, bidders should note that the exact form of the State Government Support Agreement and contents thereof will be decided upon receipt of feedback from the said State Government. Upon receipt of feedback
B from the said State Government and finalization of form and contents of the State Government Support Agreement, the same will be provided to Pre-Qualified Bidders.

The JVC for the Airport will have a lease over the land and assets (with
C certain exclusions which are not limited only to carve out assets listed in the schedule to the Lease Deed) of the Airport for the tenure of the OMDA.

The JVC will enter into separate MOUs with various agencies such as Customs, immigration, Health and Plant and Animal Quarantine to deal with issues relating to space, performance standards, facilitation/coordination
D mechanism.

The JVC will be required to prepare a Master Plan for the development, expansion and modernization of the Airport, covering a time period of 20 years as well as the ultimate vision of the Airport at full aeronautical development and to submit this for approval of MCA within the stipulated
E time frame as outlined in the Transaction Documents. The Master Plan has to be consistent with the Initial Development Plan submitted as part of the Binding Offer. Thereafter, the JVC will be required to update the Master Plan every ten years (or upon occurrence of certain traffic trigger events or as and when circumstances warrant). In addition, each major development requires
F the preparation and approval of a Major Development Plan setting out the proposed details of the development.

The Airport, in recognition of its natural monopoly position, will be subjected to economic regulatory measures. The regulatory authority or the GOI (until such regulatory authority is in place) will set a price cap for
G acronautical charges and will be entitled to impose other standards.

Over the tenure of the OMDA, the Joint Venture Company will pay both a nominal lease rental and a fee (consisting of an upfront fee of Rs.1,500 million (Rupees one thousand five hundred million) and an annual fee expressed as a percentage of gross revenue of the Airport) for the right to operate,
H manage and develop the Airport. The fee will be calculated annually in

advance on projected revenue, paid monthly and with an adjustment at the end of each quarter to reflect any difference between actual and projected revenue. Revenue for this purpose shall mean all pre-tax gross revenue of JVC, excluding the following: (a) payments made by JVC, if any, for the activities undertaken by Relevant Authorities; (b) Insurance proceeds except insurance indemnification for loss of revenue; (c) any amount that accrues to JVC from sale of any capital assets or items, (d) Payments and/or monies collected by JVC for and on behalf of any governmental authorities under applicable law. It is clarified that annual fee payable to AAI and Employee Arrangement costs payable to AAI shall not be deducted from revenue.

2. *GOVERNMENT OBJECTIVES, REQUIREMENTS AND REGULATION*

2.1 *Key Strategic Objectives*

Key strategic objectives of the GOI are:

World class development and expansion:

Ensure world class phased development and expansion such that the JVC meets its commitments through the timely provision of high quality airport infrastructure, on both the airside and landside, to meet growing demand; and

World class airport management:

Ensure the creation of world class airport management team and systems through the selection of serious, committed Successful Bidders with suitable operational expertise, managerial and financial capability, Financial commitment and the commitment to provide quality airport services, in order to transform the present Airport into world class international airport.

2.2. *Other Transaction Objectives*

In addition to the key strategic objectives, other Transaction objective include:

Timely completion end certainty of Transactions, with minimal residual risks.

Appropriate financial consideration for the right to operate, manage and develop the airport.

A Smooth transition of operations from AAI to JVC.

Appropriate regulation - achieving economic regulation of aeronautical assets that is fair, commercially and economically appropriate, transparent, predictable, consistent and stable while protecting the interests of users and ensuring that the Airports are operated and
B developed in accordance with world standards;

Fair and equitable treatment of AAI employees, including preservation of accrued entitlements.

Diversity of ownership between Mumbai and Delhi Airports, to enhance
C competition, encourage innovation and allow competitive benchmarking, and

Ensure satisfaction on the part of passengers and airlines by the provision of quality services and the provision of State-of-the-art facilities.

D The GOI's key strategic and other Transaction objectives will provide the means of establishing the bid evaluation criteria.

2.3. *Management and Development Requirements*

E Reflecting the focus on the strategic objectives, Bidders will be required to present as part of their Binding Offer a fully detailed Business Plan and Initial Development Plan, as well as a Transition Plan and certain other documents. These documents will be an important element in the selection of the Successful Bidder for the Airport.

F *TERM OF REFERENCE*

1.0. Scope of work

1.1. The scope of work for the FINANCIAL CONSULTANT shall consist of the following:

G a. Updating of the traffic, financial, commercial and operational data pertaining to the two airports;

b. Organizing Road Shows in India and/or abroad, if required;

c. Preparation of the Request for Expression of interest (RFEOI), Request for Proposal (RFP), draft concession agreement, draft

H

Joint venture agreement and all other necessary project documentation. A

d. Determining the pre-qualification criteria, technical and financial evaluation criteria which will include formulation and analysis of various options along with the recommended approach in respect of the same; B

e. Evaluation of Expressions of Interests and Technical and Financial proposals received.

f. Organizing and managing interactions and communications with the potential bidders; C

g. Negotiation assistance together with other advisors to AAI in successfully concluding the transaction;

h. Work closely with AAI on overall coordination and management of various aspects of the transaction;

i. Any other work as may be required for the successful completion of the transaction, D

Glossary

Words and phrases used in the document have the meaning set out below. E

AAI	Airports Authority of India
Airport Operator -	The Entity in the Consortium submitting the Binding Offer who has been identified as such by the Bidder and who is assessed for the necessary qualifications for operating, managing and developing a major international airport which seeks to provide airport management services to the Joint Venture Company. F
Financial Consultant or ABN AMRO	ABN AMRO Asia Corporate Finance (I) Pvt. Ltd. being the financial adviser to the Transaction. G
Foreign Airline(s)	Means a Foreign Entity that provides air transport services. H

GTA or Global Technical Adviser or Airplan	The technical adviser, to AAI advising on the technical aspects in relation to this Transaction, being Airport Planning Pty Ltd. (Airplan).
Initial Development Plan	The Development Plan submitted by the Bidder(s) an part of their Offer which sets out plans over a calmed period for the development of the Airport to meet traffic growth as per the terms hereof.
ITREOI	The Invitation to Register an Expression of interest document issued by AAI in relation to the Transaction.
Legal Consultant or AMSS	The legal adviser to the Transaction, being Amarchand & Mangaldas & Suresh A. Shroff & Co.

5. *EVALUATION OF STAGE 2 OFFERS*

5.1 *Overview of Evaluation Process*

This section sets out the approach that will be applied by the AAI and its advisers when evaluating Offers. General Guidance in relation to the relative importance of each of the criteria and certain tender requirements are set out below.

The approach to be followed will be undertaken in four phases as set out in summary form in the figure below:

Phase		Explanation
Phase 1	Assessment of Mandatory Requirement	Any Bidder not meeting the mandatory requirement will have its Offer removed from further consideration.
		Clarification
		Debt and equity commitment

Phase 2	Assessment of Financial Commitment	as specified at Appendix A is evaluated and Offers not meeting the requirement are excluded from further consideration.
Phase 2	Technical Pre-Qualifications *Management Capability, Commitment and value add *Development Capability, Commitment and value add	All remaining offers are assessed on technical prequalification criteria and only those assessed with technical pre-qualification on each of the two criteria of 80% or more proceed to Phase 4
Phase 4	Assessment of Financial Consideration	The offer of the Bidder with highest Financial consideration for the Airport is selected as Successful Bidder

5.2. *Mandatory Requirement*

The Mandatory Requirements for Stage 2 Offers are as follows:

Mandatory Requirements for Stage 2 Offers

- Confirmation of acceptance of final Transaction Documents
- Confirmation that the Networth criteria of the Bidder as per the requirement in the ITREOI document continues to be fulfilled
- No Consortium member or Group Entity of a Consortium member or nominated Airport Operator is participating in more than one Consortium bidding for the same Airport
- Consortium has an Airport Operator who has relevant and significant experience of operating, managing and developing airports.
- Confirm that the Offer is capable of acceptance anytime during the Bid Period
- Confirm that the offer commits the Offeror to the mandatory capital projects and/the Initial Development Plan is in accord with the Development Planning.
- Principles and the Traffic Forecast (It is to be noted that Traffic Forecasts are only the Base level forecast)
- Equity Ownership in the Joint Venture Company by a Scheduled Airline and their Group Entities does not exceed 10% and there is no participation by any airline that is a Foreign Entity and their Group Entities, subject to the exemption of group Entities that are existing airport operator.
- FDI in the JVC does not exceed 49%
- Minimum equity ownership by Indian Entities (other than AAI/ GOI public sector entities) in the JVC is 25%
- Provision of suitable probity and security statements
- Lodgement of Offer that incorporates all the material required as set out in Appendices A to E, inclusive, in this Document
- Submission of Bid Bond.

5.4. *Assessment of Technical Pre-Qualification*

The Technical pre-qualification is based on two global pre-qualification criteria

- Management Capability, Commitment and Value Add

" Development Capability, Commitment and Value Add

Each of these is assessed in terms of a set of pre-qualification criteria and supporting pre-qualification factors that are detailed in the Section 5.6.

The purpose of the Technical Pre Qualification phase is to ensure that only those Bidders that can address the GOI's strategic objectives are evaluated at the final phase of the evaluation process and that only Bidders satisfying the benchmark of 80% under the technical pre qualification requirements are allowed into the final phase of Evaluation.

A scoring system will be applied based on the assessment of the evaluation terms of the Offer against the Technical pre-qualification criteria. Each of the two global pre-qualification criteria is assessed out of a possible 100 marks. The assessment is on an absolute basis not relative as between the Offers. Hence there is no predetermined number of Offers that will be considered in the final phase.

5.6. Technical Pre-Qualification Criteria and Factors

This section sets out the pre-qualification criteria and pre-qualification factors that will be used to assess each of the two global pre-qualification factors.

Pre-Qualification Criteria	Pre-Qualification Criteria Weighting	Pre-Qualification factors
Global Technical Pre-Qualification Criteria:	(A) Management Capability, Commitment and Value Add	
Sub Criteria:	(i) Management Capability	
(a) Experience of the nominated Airport Operator	25 Each of the following to be supported by documents case studies and relevant statistics (PAX and cargo statistics for each airport nominated) Number, scale and geographic diversity	

A

of airports operated and managed by the airport operators with substantial domestic, international and cargo operations including specific role of the airport operator in respect of each of these operations

B

Experience in operating global or regional hub airports, including achieving improved connectivity.

Track record in route and traffic development and in managing relations with airlines and other key stakeholders.

C

The level of service quality performance achieved at major airports managed by the Airport Operator and trends over the last 5 years.

D

Experience if any, with operating a multi-airport system.

The performance of commercial operations at major Airports managed by airport Operators, covering retail, property and other commercial operations, focusing on airport where non-aeronautical revenue is 40% or more of total revenue.

E

F

Performance in around and improving aeronautical and non-aeronautical operations at airports.

Experience in operating and developing airports in non-OECD countries and a track record in improved performance.

G

Experience in proactive environmental monitoring, evaluation, planning and implementation of environmental systems and improvements.

H

(b) Experience of the other Prime Members (separately identifying and evaluating Indian and non-Indian Prime Member experience on an equal weight basis).	12.5	Commercial/retail experience Experience with major property development experience with major infrastructure developments. Experience with handling HR issues in ownership change situations.	A B
Sub Criteria:		(ii) Management Commitment	
(a) Commitment of airport operator	12.5	Level of equity commitment Performance based nature of the Airport Operator Agreement Experience and level of management resources committed to the transaction in each area of airport management including: * Traffic and route development and marketing * Aeronautical operations * Cargo handling * Slot management * Terminal operations * Airport Retail operations * Airport Property operations * Environmental Management	C D E
(b) Commitment by other Prime Members (separately identifying and evaluating Indian Prime Members.	12.5	Experience and level of management resources committed by the other Prime Members in and non-aeronautical operations and development	F

6.7. *Variations to the RFP*

G

AAI/GOI reserves the right, in its absolute discretion and at any stage, to cancel, add to or amend the information, terms, procedures and protocols set out in the RFP. PQB and Consortium member will have no claim against AAI with respect to the exercise, or failure to exercise, such rights.

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A 6.12. *Other AAI rights:*

AAI/GOI reserves the right in its absolute discretion without liability and at any stage during the Transaction-process, to:

- Add to, or remove parties from any shortlist of PQBs or Bidders;
- B Require additional information from any PQB or Bidders;
- Vary its tender requirements;
- Terminate further participation in the Transaction process for any PQB or Bidder;
- C Change the structure and timing of the Transaction process;
- Accept or reject any Offer at any time for any reason;
- Not provide PQBs or Bidders any reasons for any actions or decisions it may take including in respect of the exercise by the AAI of any or all of the above mentioned rights; and
- D Take such other action as it considers, in its absolute discretion, appropriate in relation to the Transaction process for the Airport.

xx xx xx

E **APPENDIX 'A' (Information to be included in offer)**

xx xx xx

A.7 Relevant Management Experience and Expertise

xx xx xx

F (c) In addition, please provide information on any experience that the airport operator has with turning around the performance of under performing airports and in the operation, management, development of major airports in developing countries and handling human resource management issues in ownership change situation, including privatization.

G xx xx xx

A.11. Initial Development Plan

The Initial Development Plan must be prepared in conformity with the Airport Development Planning Principles set out in the Transaction Document, shall H incorporate the mandatory capital projects as set out in the Transaction

Documents and shall use the base Traffic Forecasts prepared by SH & E. Where the PQB has a strong view that an alternative trafficforecast is significantly more likely to occur, it can indicate the implications for the timing of the implementation of the development plan. A

The Offer should provide the following information in the initial Development Plan: B

(a) A long-term airport development vision for year 20 and the ultimate vision for the Airport showing the following:

(i) The full configuration of the Airport identifying all aeronautical facilities and their operating capacity and all commercial development areas and their functions. C

(ii) Information on traffic, passenger and cargo flows, both landside and airside.

(b) The development path for the Airport leading up to its long-term vision in year 20, shown in five (5) yearly stages for each functional area, namely airfield, apron, passenger terminals, cargo terminals, car parks, city side access roads and commercial area together with capital expenditure estimates. The development path should show the linkage of the development to traffic projections, with the indicated trigger points for both the commencement of the development and its completion. D E

(c) An outline of how the development path can be flexibly adjusted to accommodate both lower and higher traffic flows than the base projection used for Airport development planning.

(d) Set out how it is planned to fully maintain aeronautical operation during the development phase. F

(e) Explain how key stakeholders will be involved during both the planning and implementation stages, including the preparation of the Master Plan, identifying issues that will need to be addressed and the approach to each issue. G

(f) Identify any constraints that will negatively impact on the Development Plan, explain the extent of the impact and any mitigating strategy proposed.

Pivotal challenge by the appellant is to the constitution of GETE and H

A the scope for its constitution. It is to be noted that the ultimate authority to take the decision in the matter was EGOM. It was within the powers of EGOM to decide as to what inputs it can take note of and the source of these inputs. Therefore, the necessity for taking views of various committees constituted appears to be a step in the right direction. This was a step which appears to have been taken for making the whole decision making process transparent.
B There was no question of having the view of one Committee in preference to another. EC was a Committee constituted as a part of the decision making process like other Committees viz. GRC, COS and IMG.

In the multi tier system in the decision making process the authority
C empowered to take a decision can accept the view expressed by one committee in preference to another for plausible reasons. It is not bound to accept the view of any committee. These committees, it needs no emphasis, are constituted to assist the decision making authority in arriving at the proper decision. It is a matter of discretion of the authority to modify the norms. It is not a case of absolute discretion.

D

While exercising the discretion, certain parameters are to be followed.

"Discretion" said *Lord Mansfield* in *R.* v. *Wilkes*, (1770) 4 Burr 2527, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and
E fanciful but legal and regular. (See *Crawes Statute Law*, 6th Edn. P. 273 and *Ramji Dayawala & Sons (P) Ltd* v. *Invest Import*, [1981] 1 SCC 80.

'Discretion' undoubtedly means judicial discretion and not whim, caprice or fancy of a Judge. (See *Dhurandhar Prasad Singh* v. *Jai Prakash University and Ors.*, [2001] 6 SCC 534. Lord Halsbury in *Sharp* v. *Wakefield* (1891) AC
F 173 considered the word 'discretion' with reference to its exercise and held: 'Discretion' means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: (Rooke case, (1598) 5 Co. Rep. 99b, 100a) according to law, and not humour. It is to be, not
G arbitrary, vague, and fanciful but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to continue himself. (See *Kumaon Mandal Vikas Nigam Ltd* v. *Girja Shankar Pant and Ors.*, [2001] 1 SCC 182)

'Discretion' when applied to a court of justice, means sound discretion
H guided by law. It must be governed by rule, not by humour; it must not be

arbitrary, vague and fanciful but legal and regular. A

Though the word, 'discretion' literally means and denotes an uncontrolled power of disposal yet in law, the meaning given to this word appears to be a power decide within the limits allowed by positive rules of law as to the punishments, remedies or costs. This would mean that even if a person has a discretion to do something the said discretion has to be exercised within the limit allowed by positive rules of law. The literal meaning of the word 'discretion' therefore, unmistakably avoids untrammeled or uncontrolled choice and more positively pointed out at there being a positive control of some judicial principles. B

C

Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection: deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself (Per Lord HALSBURY, L.C. in *Sharp* v. *Wakefield.* (1891) Appeal Cases 173. D E

F

The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. (33 Bom 334) The word in itself implies vigilant circumspection and care: therefore, where the Legislature concedes discretion it also imposes a heavy responsibility. [(See *National Insurance Co. Ltd.* v. *Keshav Bahadur,* AIR (2004) SC 1581, 1584, para 10) (AIR 1933 Sind 49)]. G

The discretion of a Judge is the law of tyrants; it is always unknown. It is different in different men. It is casual, and depends upon constitution, H

A temper, passion. In the best it is often times caprice; in the worst it is every vice, folly, and passion to which human nature is liable," said Lord Camden, L.C.J., in Hindson and Kersey, (1680) 8 How St Tr 57, as cited in National Insurance Corporation Ltd. v. Keshav Bahadur, AIR 2004 SC 1581, 1584, para 11 and Kumaron Mandal Vikas Nigam Ltd. v. Girja Shanker Pant, (2001) 1 SCC
B 182).

If a certain latitude or liberty accorded by statute or rules to a Judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him. It is judicial discretion. It limits and regulates the exercise of the discretion, and prevents it from being wholly absolute,
C capricious, or exempt from review.

In "ADVANCED LAW LEXICON" BY P. RAMANATHA AIYAR, it has been stated as follows: "Discretion. Power of the Court or arbitrators to decide as they think fit. The word "discretion" connotes necessarily an act
D of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a hard-and-fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion may properly operate. [Corpus Juris Secundum, Vol. 27, page 289 as referred in Aero Traders Pvt.
E Ltd. v. Ravinder Kumar Suri, VI (2004) SLT 428, 430, para 6]".

"A discretion", said Lord WRENBURY, "does not empower a man to do what he likes merely because he is minded to do so, he must in the exercise of his discretion do not what he likes but what he ought. In other words, he
F must, by the use of his reason, ascertain and follow the course which reason dictates." (Roberts v. Hopwood, 1925 AC 578). This approach to construction has two consequences the statutory discretion must be truly exercised, and when exercised it must be exercised reasonably. (MAXWELL).

"Discretion", said Lord MANSFIELD in R. v. Wilkes, (1770) 98 ER 327),
G "when applied to a Court of justice, means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague, and fanciful but legal and regular. (See Craies on Statute Law, 6th Edn. P.273)

'Discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according
H

to the rules of reason and justice, not according to private opinion: Rooke's case according to law, and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. *Lord HALSBURY LC in Susannah Sharp* v. *Wakefield*, (1891) AC 173 at p. 179 referred to in *Siben Kumar Mondal* v. Hindustan Petroleum Corporation Ltd. (AIR 1995 Cal 327, 333-335). (See also *Aero Traders Pvt. Ltd.* v. *Ravindra Kumar Suri.* VI (2004) SLT 428, 430, para 6; *Man Mal Sharma* v. *Bikaner Sahkari Upbhokta Bhandar*, (AIR 1999 Raj 13, 18) and *Rekha Bhasin* v. *Union of India*. (AIR 1998 Del 314, 322.)

Discretion, Lord MANSFIELD stated in classic terms in, John Wilke's case, (1970) 4 Burr 2528, must be a sound one governed by law and guided by rule, not by humour; Lord DENNING put it eloquently in *Breen* v. *Amalgamated Engineering Union*, [1971] 1 All ER 1148, that in a Government of Laws' "there is nothing like unfettered discretion immune from judicial reviewability." Courts stand between the executive and the subject alert, to see that discretionary power is not exceeded or misused. Discretion is a science of understanding to discern between right or wrong, between shadow and substance, between equity and colourable glosses and pretences and not to do according to one's wills and private affections. Lord BRIGHTMAN elegantly observed in the case of, *Chief Constable of North Soles Police* v. *Evans*. [1982] 3 All ER 141 that:

"Judicial review, as the words imply is not an appeal from a decision, but a review of the matter in which the decision was made."

"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primodial necessity of order in the social life'. Wide enough in all conscience is the field of discretion that remains." BENJAMIN CARDOZE in 'The Nature of Judicial Process'.

The power to decide within the limits allowed by positive rules of law as to punishments, remedies or costs and generally to regulate matters of procedure and administration; discernment of what is right and proper [See Article 136(1), Constitution)

A 'Discretion' is governed by rule and it must not be arbitrary, vague and fanciful. (See *Jaisinghani* v. *Union of India*, AIR (1967) SC 1427, 1434).

When any thing is left to any person, Judge or magistrate to be done according to his discretion, the law intends it must be done with sound discretion, and according to law, (Tomlin). In its ordinary meaning, the word B signifies unrestrained exercise of choice or will; freedom to act according to one's own judgment; unrestrained exercise of will; the liberty of power of acting without other control than one's own judgment. But, when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their C own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right and wrong; and therefore whoever hath power to act at discretion, is bound by the rule of reason and law. (2 Inst. 56, 298; Tomlin) There may be several degrees of Discretion, discretio generalis, discretio legalis, discretio specialis,- Discretio generalis is D required of every one in everything that he is to do, or attempt "Legalis discretio", is that which Sir E Coke meaneth and setteth forth in Rooke's and Keighley's cases and this is merely to administer justice according to the prescribed rules of the law.

"The third discretion is where the laws have given no certain rule .... E and herein discretion is the absolute judge of the cause, and gives the rule." (Callis. 112. 113) DISCRETION, FREE AND UNQUALIFIED, The "free and unqualified discretion" to refuse or grant licences, which is given to justices by the Beer Dealers Retail Licences is absolute as well as regards the renewal of an old, as the grant of a new, licence. (*R.* v. *Kay*, 52 LJMC 90). Discretion, F Judicial is a certain latitude or liberty accorded by statute or rules to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him, The use of the word "judicial" limits and regulates the exercise of the discretion, and prevents it from being wholly absolute, capricious, or exempt from review. But the presence of the word "discretion" G permits the judge to consider as a judge, what are vaguely termed, all the circumstances of the case and the purpose for which he is invested with the considerations of convenience or utility or saving of expense rather than on considerations of strict law or technicalities.

Such discretion is usually given on matters of procedure or punishment, H or costs of administration rather than with reference to vested substantive

rights. The matters which should regulate the exercise of discretion have been stated by eminent judges in somewhat different forms of words but with substantial identity. When a statute gives a judge a discretion, what is meant is a judicial discretion, regulated according to the known rules of law, and not the mere whim or caprice of the person to whom it is given on the assumption that he is discreet (*Lee* v. *Bude Railway Co.*, (1871) LR 6 CP 576, 580, WILLES, J.; and see *Morgan* v. *Morgan*, (1869), LR 1 P & M 644, 647). "That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it, it will be reviewed; but still it is a discretion, and for my own part I think that when a tribunal is invested by Act of Parliament, or by rules, with a discretion, without any indication in the Act or rules of the grounds on which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves on which the discretion would run, for if the Act or rules did not fetter the discretion of the judge, why should the Court do so?" *Gardner* v. *Jay*, (1885) 29 Ch D 50 at 58, per BOWEN, L.J.) (See also 5 Cal 259) Discretion of Court. "Ability to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion"; freedom to act according to the judgment of the Court, or according to the rules of equity, and the nature of circumstances; judicial discretion regulated according to known rules of law; legal discretion, and not personal discretion sound discretion guided by fixed legal principles".

In the instant case, though the High Court seems to have noted that the EGOM has absolute discretion, it has really not held that the discretion was unfettered. In fact it has on facts found that the discretion was properly exercised to make some variations in the terms of RFP.

Coming to the constitution of GETE, no *mala fides* are alleged against the members. It is only the method of evaluation done by GETE which is challenged apart from contending that GETE should not have been constituted About the constitution of GETE, as noted above, the stand is clearly untenable. So far as evaluation of the marks as done by EC is concerned, GETE has given reasons for altering the marks allotted which ultimately led to the non qualification of the appellant. There were four identified areas where it was noted that the EC's approach in the evaluation exercise was inconsistent with the terms of the RFP.

EGOM in its order dated 27.12.2005 constituting GETE, stipulated as

follows:

"The Group would particularly look into and present its recommendations before the COS on:

(a) Overall validation of the evaluation process, including calibration of the qualification and sensitivity analysis. The sensitivity analysis will cover the impact of *inter-se* weightages of sub-criteria as well as scoring.

(b) The issues raised by the Members of the Inter Ministerial Group about the evaluation process.

(c) An overall assessment of transparency and fairness of the evaluation process, including steps required, if any, to achieve a transparent and fair outcome.

(d) Suggestions for improving the selection process for Joint Venture Partner in the future."

Essentially there were four instances of rewriting of priorities and weightages as contained in the RFP and valuation was then made by the EC on the basis of these re-written priorities and weightages. These were as follows:

(i) Change in priority in the matter of absorption of staff,

(ii) Changing the weightage ascribed to property development by merging the marks for infrastructure development and property development.

(iii) Changing of the weightage ascribed to non-aeronautical development by failing to consider aeronautical revenue of 40% as a "threshold" - less than which would not get any marks, and

(iv) Changing the weightage of experience in respect of a non-OECD airport by treatment of a OECD airport on par with non-OECD airports.

As regards (i), the EC divided the marks between 3.1.1 and 3.1.2 unequally, and also awarded marks for the extent of absorption proposed from a baseline of Zero - instead of a baseline of 40% which was the mandatory absorption criteria. The RFP accorded a priority to a higher absorption of existing staff

by the new company. The EC proceeded to modify this priority. It opined that the overall approach was more important than absorption, and gave marks accordingly. So far as (ii) is concerned, the EC again altered the weightages accorded in the RFP, which considered experience in "property development"as valuable as "infrastructure development" and thereby put each of them as a sub-head. According to EC, the former was not as important as the latter and thus gave 1.6 marks for the former (1.2.2) and 4.7 marks for the latter (1.2.3.).

As consequence of (iii) above, EC gave marks to the appellant who had projected less than 40% non-aeronautical revenue - whereas the RFP clearly gave a weightage to aeronautical revenue beyond 40%. As rightly contended by the respondents, if a project has a high revenue share given to the government, then aeronautical revenue being regulated, the incomes would flow from non-aeronautical revenues. However generation of such non-aeronautical revenues would involve a larger capital investment in property development. EC (a) gave less marks to GVK because it had a high capital outlay projected (as compared to the appellant), (b) did not regard experience in property development as having the same priority as infrastructure development, and (c) gave marks to the appellant for its non-aeronautical revenue, although its projected revenue was less than 40%.

As a consequence of (iv) above, EC gave marks to the appellant for Mexico Airport which is admittedly an OECD Airport - on the spacious reasoning that it is virtually like a non-OECD Airport since Mexico is like a developing country.

Relevant portions of GETE's reports read as follows:

FIRST REPORT DATED 7.1.2006

xx xx xx xx

2.1. The Group of Eminent Technical Experts (GETE) had their first meeting and deliberations on Friday, 30th December, 2005....The presentation was basically for explaining the contents of the Request for Proposal (RFP), the approach adopted by the EC in evaluating the technical bid and the views expressed by Inter Ministerial Group (IMG) on the EC evaluation. The EC explained that the weightage marks for the two criteria and sub-criteria were already indicated in the RFP for the information of bidders. Splitting up these marks to the different sub-factors of sub-criteria was done by the EC based

A on the mandate given to them by the IMG. On query from the GETE, they formed that after the technical bids were opened certain clarifications were invited from bidders mainly to sort out discrepancies in their submittals and not for eliciting additional information or submission of additional documents. EC stated that the assignment of marks for technical evaluation was done B strictly based on the submittals of the tenderers.

2.2. The GETE again met on 2 January when only Shri Sanjay Narayan and Dr. Sihag were present. The Consultants were not invited to this meeting. In this meeting Shri Sanjay Narayan handed over to the GETE a copy of the Note prepared for the Committee of Secretaries (COS) dated 23rd December, C 2005 together with all Annexures which also contained details of marks assigned (both original and revised) to the Consortiums A to E in The Annexure IX and Appendix-II to Annexure XII to the Note. In this meeting, the GETE enquired at what stage the apportionment of marks to the sub-factors was done by the EC and whether after assigning these marks, the same had the D approval of the I.M.G. The GETE also wanted to know whether after assigning the marks to the sub-factors, the same were kept in a sealed cover to obviate the possibility of any changes or alterations to these marks during evaluation stage. The GETE also enquired whether a formal Tender Committee was appointed for the technical and financial evaluation of the bids and whether the Airport Authority of India, as the owner, was associated in the technical E evaluation. It was informed to the GETE that there was no Tender Committee per se and the assignment of marks to the sub-factors was done entirely by the EC. (The Global Consultants) and at no stage Airport Authority of India was associated in assessing and assigning the marks. The GETE was informed that the EC had taken about one and a half months to complete this exercise, F scrutinizing about 40,000 pages of submissions.

2.3. The GETE again met on 4th January, 2006 when ABN-AMROs letter dated 3rd January, 2006 in reply to queries raised was handed over to the GETE (Annexure- B.). From this letter it appears *inter-se* weightage and marks to the sub-factors were finalized prior to assigning scores on the offers, but G there was no categorical assertion that this was finalized before the exercise was started and kept seated. We are only pointing out that since these *inter-se* weightages were not approved by the Government and kept sealed, the possibility of these being changed during the course of evaluation cannot be ruled out.

H

2.4. With all the papers made available to the GETE, the need for seeking further clarification from the EC was not felt. Therefore, they were not invited for any further clarification by the GETE. A

3. *Scrutiny of the evaluation procedure adopted by EC.:*

3.1.1 We (GETE) did not call for the technical bid papers nor perused the same. We also did not make any attempt for a fresh technical evaluation of the bids by assigning marks to the sub-criteria and sub-factors. Our attempt was to assess whether the E.C. had assigned weightages and marks in a logical and transparent manner to the sub-factors and whether there has been any bias in favour of or against any of the bidders while assigning marks. For this we relied upon the RFP and the mark sheets attached to the Note prepared for the Committee of Secretaries. B C

3.1.2 While examining the assignments of marks to the various bidders we kept in mind the issues raised by the members of the Inter Ministerial Group but we were not solely guided by their views. We also examined in a dispassionate way whether there was any flaw or bias in the exercise of subjectiveness while assigning marks to the different consortiums. Our observations in this matter are briefly given as under- D

3.1.3 The Global Consultants prepared ITREOI in January, 2004 which was approved by the IMG in February, 2004 but the appointment of the Global Consultants was approved by EGOM in April, 2004. Thus the Consultants started working even before their appointment was approved. E

3.1.4 From the report of the Govt. Review Committee, it is seen that the Evaluation Committee (E.C.) has stated that their evaluation was not based merely on the submittals but they relied upon some published statistics, information available within their setup and their own perception and understanding of various aspects of Evaluation (Please refer GRC's) report on their meeting dated 23rd/24th November, 2005). This is not in conformity to RFP. F

G

xx xx xx

4.2. There are 8 sub-criterions in the criteria no. 4.1.1 out of which 4 have further sub-factors. Similarly there are 11 sub-criterions in the criteria 4.1.2 out of which 8 have further sub-factors. H

A 4.3. Through allocation of weightage to different sub-criterions were indicated in RFP, weightage to different sub-factors were not indicated but was assigned later by EC based on IMG directions. EC has not confirmed explicitly whether these weightages were assigned before or after opening of bids. Certain anomalies have been observed in the allocation of the weightages. B While equal weightage has been allocated to most of the sub- factors; un-equal allocation has been done in two cases (1.2.2 /1.2.3 & 3.1.1/3.1.2). The justification given by EC that these sub-factors are of different importance is not considered satisfactory and convincing because such a logic can apply to many other sub-factors as well. Since weightages of these sub- factors were not mentioned in RFP and allocation of equal weightage has been done C in majority of sub-factors, we feel the same concept of equal weightage should have been adopted for these two sub-factors also. By assigning different weightages there is room to suspect that some of the bidders have been favoured.

D 4.4. In sub-factor 1.1.6, the assessment of performance of commercial operations of major airports covering retail property and other commercial operations was to be done focusing on Airports having non-aeronautical revenue of 40% or more of total revenue. Though non- aeronautical earnings of bidder "E" are only 37%, but they have been given 75% marks. This is considered to be in non-conformity of the RFP. The explanation of EC that E wording of the Clause did not make the 40% mandatory is not convincing. In any case, since the non-aeronautical earnings of "E" was less than the threshold limit of 40%, assigning a high score of 75% was not justified. This should have been of the order of 40% to 50%.

F 4.5. In sub-factor 1.1.8, the assessment of operating in non-OECD countries was to be as per the RFP. Bidder "E" operating in Mexico, which, is an OECD country, has been awarded 75% marks, which is not in conformity to RFP. The explanation given by EC to IMG that the bidder has Airport development experience in other developing countries like Ecuador, Uruguay and Guatemala, is not considered convincing. Our considered opinion is the G "track record in improved performance" is also to be judged only in the context of a non-OECD country. Therefore, awarding marks against this item is not considered in conformity to the item in RFP.

4.6. In sub-factor 3.1.2 (proportion of AAI Staff targeted for absorption H into JVC by year 3), EC has awarded 50% marks for minimum 40% absorption

and remaining 50% on prorata basis between 40% to 100% absorption. Since RFP has stipulated 40% absorption as minimum acceptable and additional weightage has been contemplated for a higher proportion of absorption, we feel it is more reasonable and rational to distribute full marks....to 100% absorption.

4.7. If moderation of marks for the above mentioned items is done, following reduction in the score of bidder 'E' will take place:

Sr. No.	Item	Mumbai	Delhi
(i)	If equal weightage is given to sub-factors 1.2.2 & 1.2.3.	1.1	1.1
(ii)	If equal weightage is given to sub-factors 3.1.1 & 3.1.2.	0.5	0.6
(iii)	If the marks of sub-factor 1.1 6 given for non-aeronautical revenue less than 40% are reduced from 75 % to 50%.	0.7	0.7
(iv)	If score of sub-factor 1.1.8 given for experience in an OECD country, is excluded.	2.1	2.1
(v)	If marking system of sub-factor 3.1.2 as modified keeping '0' for 40% absorption and '5' for 100% absorption	1.6	1.9
	Total (i) to (vi)	6.0	6.4
	Resultant score of 'E' for criteria 4.1.1.	75.0	74.6

From the above, it is clear that the above moderation clearly disqualifies bidder E in criteria 4.1.1.

4.8. Modernization exercise attempted above will not make any material difference in the position of bidders 'A', 'C', 'D' and 'F' who will remain still disqualified. In regard to bidder 'B' he will still be well above the qualifying marks of 80%. In fact his position would improve marginally. Therefore, we have not attempted to moderate the marks of the other bidders based on our observations of paras 4.3 to 4.6.

4.9 While scrutinizing the marks for criteria 4.1.2 we have the following observations to make:-

The GETE have not studied the development plan of this bidder or any other bidder for that matter. We have also not discussed this with the GTA (Air Plan). Considering the type of deficiencies in the developmental plans pointed out by AAI, we feel the marking of bidder 'E' has been on a liberal side in regard to sub-criteria 6.1 to 6.5. This will also be the marks if we compare the marks scored by bidder B *vis-a-vis* marks scored by bidder 'E' in regard to Delhi Airport as brought out under:-

	Maximum Score	Score of B	Score of E
Delhi	44.5	30.2	43.0

4.10. Admittedly bidder B has better credentials, for airport development and such vast difference in marks scored by bidder 'E' over bidder B cannot be easily explained. We feel that if the rational approach has been adopted bidder 'E' who now gets qualified by 0.3 marks for Mumbai and by 1.1 marks for Delhi would have been disqualified.

4.11. Since in any case in our view bidder 'E' gets disqualified on the basis of our assessment contained in Para-4.7 above, we are of the opinion that qualifying bidder E technically is not correct.

SECOND REPORT OF GETE DATED 13th JANUARY, 2006

xx xx xx xx

Based on the methodology adopted by GETE for moderating the marks of bidder 'E', we have now moderated the scores of all other bidders as well. Based on this exercise, the marks secured by the different bidders are given

in a tabulated form separately for Delhi and Mumbai Airports.

A- Table showing moderated scores of all the bidders in criteria 'A' (Management Capabilities) for Mumbai Airport

Sl. No.	Weightage	A	B	C	D	E	F
1.1.	25.0	6.7	22.5	17.1	19.7	19.6	17.2
1.2.	12.5	2.8	9.7	9.7	4.7	9.2	9.5
2.1	12.5	5.4	7.1	11.7	6.7	9.6	8.8
2.2	12.5	5.0	10.0	11.3	5.0	11.3	10.0
3.1	12.5	6.9	10.5	10.9	7.2	10.8	10.5
3.2	12.5	2.5	12.5	5.0	7.5	11.3	11.3
3.3&3.4	12.5	6.3	12.5	7.5	6.3	9.4	8.8
Total	100	35.6	84.8	73.2	57.1	81.2	76.1
Score as per shift		35.5	84.7	73.1	57.0	81.0	76.0
Moderation due to							
(i) If equal weightage is given to sub-factor 1.2.2 and 1.2.3		0.96	0.21	0.2	-0.02	-1.09	-0.23
(ii) If equal weightage is given to sub-factor 3.1.1 and 3.1.2		−1.85	-0.81	+0.35	-0.32	-0.49	-0.81
(iii) If the marks of sub-factor 1.1.6 given to 'E' for non-aeronautical revenue less than 40% are		0.0	0.0	0.0	0.0	-0.70	0.0

reduced from 75% to 50% -others no change.						
(iv) If score of sub-factor 1.1.8 given for experience in OECD country to 'E' is excluded - others no change.	0.0	0.0	0.0	0.0	-2.1	0.0
(v) If marking-system of sub-factor 3 1.2 is modified keeping '0' for 40% absorption and '5' for 100% absorption.	0.0	-1.98	-0.17	-3.13	-1.82	-1.98
Total variation	+2.81	-3.00	+0.16	-3.47	-6.20	-3.02
Revised score	38.3	81.7	73.3	53.5	74.8	73.0

B - Table showing moderated scores of all the bidders in criteria 'A' (Management Capabilities) for Delhi Airport

Sl. No.	Weightage	A	B	C	D	E
1.1	25.0	6.7	22.5	17.1	19.7	19.6
1.2	12.5	2.8	9.7	9.7	4.7	9.2
2.1	12.5	7.5	7.1	11.7	6.7	9.6
2.2	12.5	5.0	10.0	11.3	5.0	11.3
3.1	12.5	6.9	10.5	10.9	7.2	10.6
3.2	12.5	2.5	12.5	5.0	7.5	11.3
3.3 & 3.4	12.5	6.3	12.5	7.5	6.3	9.4
Total	100	37.7	84.8	73.2	57.1	81.0

Score as per shift	37.6	84.7	73.1	57.0	80.9	A
Moderation due to						
(i) If equal weightage is given to sub-factor 1.2.2 and 1.2.3	+0.96	-0.21	-0.02	-0.02	-1.09	
(ii) If equal weightage is given to sub-factor 3.1.1 and 3.1.2	+1.85	-0.81	+0.35	-0.32	-0.60	B
(iii) If the marks of sub-factor 1.1.6 given to E for non-aeronautical revenue less than 40% are reduced from 75% to 50% -others no change.	0.0	0.0	0.0	0.0	-0.70	C
						D
(iv) If score of sub-factor 1.1.8 given for experience in OECD country to 'E' is excluded - others no change	0.0	0.0	0.0	0.0	-2.1	E
(v) If marking system of sub-factor 3.1.2 is modified keeping '0' for 40% absorption and 5 for 100% absorption.	0.0	-1.98	-0.17	-3.13	-1.60	F
Total variation	+2.8	-3.00	+0.16	-3.47	-6.09	
Revised score	40.4	81.7	73.3	53.5	74.8	

As rightly pointed out by learned counsel for the respondents that if EC felt that the priorities and weightages as indicated in the RFP were inappropriate, it should have requested AAI/GOI to amend the RFP before the bids were received. Interestingly, the modifications were resorted to after the bids were opened. That is the principal reason for which *EGOM* appears to have sought views of the COS and the COS was equally entitled to invite a G H

group of experts to examine the matter.

The details relating to the marks allotted to the bids are as follows:

Delhi airport

Sl. No	Name of Bidder	Technical evaluation			Financial Bid%
		Management capability		Development capability	
		Pre-Sridharan	Post-Sridharan		
1	Reliance-ASA (Bidder E)	80.9	74.8	81.0	45.99
2	GMR-Frapport (Bidder B)	84.7	81.7	80.1	43.64
3	DS Construction Munich Airport (Bidder C)	73.1	73.3	70.5	40.15
4	Sterlite - Macquarie (Bidder D)	57.0	53.5	61.9	37.04
5	Essel - TAV (Bidder A)	37.6	40.4	41.4	Bid not opened

Mumbai Airport

Sl. No	Name of Bidder	Technical evaluation			Financial Bid%
		Management capability		Development capability	
		Pre-Sridharan	Post-Sridharan		
1	Reliance-ASA (Bidder E)	81.0	74.8	80.2	21.33

2	GMR-Frapport (Bidder B)	84.7	81.7	92.7	33.03	A
3	DS Construction Munich Airport (Bidder C)	73.1	73.3	54.7	28.12	B
4	Sterlite Macquarie (Bidder D)	57.0	53.5	65.1	Bids not opened	
5	Essel - TAV (Bidder A)	35.5	38.3	29.4	Bids not opened	C
6	GVK-ACSA (Bidder F)	76.0	73.0	59.3	38.70	

Learned counsel for the respondents have emphasized that a curious feature of the four changes is that at least three of them were in principle designed to enable the appellant to get over the shortcomings in its bid. It is to be noted that the appellant had no property development experience. It had projected less than 40% non aeronautical revenue and had a partner from an OECD country. D

E

The GETE's report shows that even taking these four modifications led to some of the bidders getting more marks. GVK and others did not cross the bench mark of 80% and even after exclusion of these marks, GMR had more than 80% marks. It was only the appellant who crossed the threshold of 80% on account of these four variations and fell below 80% when the effect of these four variations was excluded. F

Departure from the RFP made by EC after opening the bids can reasonably raise a doubt that EC knew that the modalities would benefit the appellant. In any event, it is not necessary to go into the question whether EC was partial to the appellant because that is nobody's case, though it has been submitted that after opening the bids, EC made the variations and beneficiary was the appellant. G

GETE's report shows that it enunciated the principle to carry out an exercise that would be more in the nature of validation dealing with the four H

A variations made by EC.

GETE also noted that certain issues can be more satisfactorily addressed by process of validation that would involve a re-allocation of marks, on the assessment made by the EC of the bids albeit in a manner that would be consistent with the RFP. It essentially was not an exercise of re-evaluation but
B of a re-allocation consistent with RFP.

As noted in GETE's first report, its attempt was to assess whether EC had assigned weightages and marks in a logical and transparent manner to the sub-factors and whether there had been any biased in favour of or against
C any of the bidders while assigning marks, with reference to the RFP. While making such examination, the issues raised by the members of IMG were kept in view, but as stated in the report, GETE was not solely guided by their views.

Though the first report itself indicated the reasons as to why the
D evaluation process containing the moderation exercise was not undertaken in respect of bidders, as desired by EGOM GETE did so and submitted its second report. Undisputedly, GMR crossed the bench mark of 80% in respect of both the bids while others did not.

E Challenge has been made by the appellant to the lowering of the bench mark. It is to be noted that the appellant had come into the zone of consideration only because of lowering of the bench mark as otherwise after the modifications were made by GETE, it had not crossed the bench mark.

The appellants stand that if none was found eligible on the basis of
F 80% bench mark, there should have been a fresh bid, has been answered by the respondents. It has been pointed out that the number of bidders was small. The bidders after opening of the bid knew the merits and demerits of all the bids. There was an urgency for early completion of the airports keeping in view the 2010 Common wealth Games.

G

The scope for judicial review of administrative actions has been considered by this Court in various cases.

One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is
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stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary (See *State of U.P. and Ors.* v. *Renusagar Power Co. and Ors.*, AIR (1988) SC 1737. At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work "Judicial Review of Administrative Action" 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarized as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts *ultra vires*.

The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troupes, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is 'illegality' the second 'irrationality', and the third 'procedural

A impropriety'. These principles were highlighted by Lord Diplock in *Council of Civil Service Unions* v. *Minister for the Civil Service*, [1984] 3 All.ER. 935, (commonly known as CCSU Case). If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative
B or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See *Commissioner of Income-tax* v. *Mahindra and Mahindra Ltd.*, AIR (1984) SC 1182). The effect of several decisions on the question of jurisdiction have been summed up by Grahame Aldous and John Alder in their book "Applications for Judicial Review, Law and Practice" thus:

C

> "There is a general presumption against ousting the jurisdiction of the Courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradig,
> D which the Courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the government's claim is *bona fide*. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but
> E since the speeches of the House of Lords in council of *Civil Service Unions* v. *Minister for the Civil Service* this is doubtful. Lords Diplock, Scaman and Roskill appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. May
> F prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney Generals's prerogative to decide whether to institute legal proceedings
> G on behalf of the public interest."

(Also see *Padfield* v. *Minister of Agriculture, Fisheries and Food* LR (1968) AC 997.

The Court will be slow to interfere in such matters relating to

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administrative functions unless decision is tainted by any vulnerability A
enumerated above: like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient.

The famous case commonly known as "*The Wednesbury's case*" is B
treated as the landmark so far as laying down various basic principles relating to judicial review of administrative or statutory direction.

Before summarizing the substance of the principles laid down therein we shall refer to the passage from the judgment of Lord Greene in *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corpn.*, (KB at p. 229: All ER C
p. 682). It reads as follows:

> ".....It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is D
> frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to E
> consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably.' Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers the authority....In another, it is taking into consideration extraneous matters. It is unreasonable that it might F
> almost be described as being done in bad faith; and in fact, all these things run into one another."

Lord Greene also observed (KB p. 230: All ER p. 683)

> ...it must be proved to be unreasonable in the sense that the G
> court considers it to be a decision that no reasonable body can come to. *It is not what the court considers unreasonable. ... The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another.*" (emphasis supplied)

H

A Therefore, to arrive at a decision on 'reasonableness' the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have B been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view.

The principles of judicial review of administrative action were further summarized in 1985 by Lord Diplock in *CCSU* case as illegality, procedural C impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community. Lord Diplock observed in that case as follows:

D "....Judicial review as I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second irrationality and the third 'procedural impropriety'. That is not to say that further E development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community."

F Lord Diplock explained "irrationality" as follows:

"By irrationality I mean what can by now be succinctly referred to as Wednesbury unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that G no sensible person who had applied his mind to the question to be decided could have arrived at it."

In other words, to characterize a decision of the administrator as "irrational" the Court has to hold, on material, that it is a decision so outrageous H as to be in total defiance of logic or moral standards. Adoption of

proportionality into administrative law was left for the future. A

In essence, the test is to see whether there is any infirmity in the decision making process and not in the decision itself. (See *Indian Railway Construction Co.Ltd.* v. *Ajay Kumar*, [2003] 4 SCC 579)

Wednesbury principles of reasonableness to which reference has been made in almost all the decisions referred to hereinabove is contained in *Wednesburys* case (supra). In that case Lord Green MR has held that a decision of a public authority will be liable to be quashed in judicial review proceeding where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have arrived it. B C

The standards of judicial review in terms of Wednesbury is now considered to be traditional in England in contrast to higher standards under the common law of human rights. Lord Cooke in *R.* v. *Secretary of State for the Home Department, ex parte Daly*: [2001] 3 All ER 433 observed: D

> "And I think that the day will come when it will be more widely recognized that the Wednesbury case was an *unfortunately retrogressive decision in English administrative law*, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd." E F

It is further observed that this does not mean that there has been a shift to merits review. On the contrary, the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in *R (Mahmood)* v. *Secretary of State for the Home Dept.*, (2000)1 WLR 840 are correct. And Laws L.J. (at 847 (para 18) rightly emphasized in Mahmood's case that the intensity of review in a public law case will depend on the subject matter in hand'. G

(underlined for emphasis) H

A In *Huang & Ors. v. Secretary of State for the Home Department*, [2005] 3 All ER 435 it is observed:

> "50....the depth of judicial review and the deference due to administrative discretion vary with the subject matter. Can we find a principled approach to give this proposition concrete effect in cases such as these appeals? In *R (on the application of ProLife Alliance)* v. *BBC*, [2003] 2 All ER 977, Lord Hoffmann said:
>
> > "My Lords, although the word "deference" is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. *In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.*
>
> (underlined for emphasis)

E Section 9 of the Judicial Review Procedure Act, 1996 (Canada) states that the Court may reject an application for judicial review of a statutory power of decision, if there is mere irregularity in form or a technical irregularity, or if the court feels that there has been no miscarriage of justice.

F Chapter 5 of the US Code 41 also talks about judicial review of administrative decisions regarding public contracts. It states that the courts would not interfere in an award process unless it is shown to be manifestly fraudulent, capricious and so grossly erroneous as to imply bad faith.

G While exercising power of judicial review courts should not proceed where if two views are possible and one view has been taken. In such a case, in the absence of *mala fide* taking one of the views cannot be a ground for judicial review. In *Asia Foundation & Construction Ltd* v. *Trafalgar House Construction (I) Ltd. and Ors.*, [1997] 1 SCC 738 this Court observed as follows:

H "9. The Asian Development Bank came into existence under an Act

called the Asian Development Act, 1966, in pursuance of an international agreement to which India was a signatory. This new financial institution was established for accelerating the economic development of Asia and the Far East. Under the Act the Bank and its officers have been granted certain immunities, exemption and privileges. It is well known that it is difficult for the country to go ahead with such high cost projects unless the financial institutions like the World Bank or the Asian Development Bank grant loan or subsidy, as the case may be. When such financial institutions grant such huge loans they always insist that any project for which loan has been sanctioned must be carried out in accordance with the specification and within the scheduled time and the procedure for granting the award must be duly adhered to. In the aforesaid premises on getting the evaluation bids of the appellant and Respondent-1 together with the consultant's opinion after the so-called corrections made the conclusion of the Bank to the effect "the lowest evaluated substantially responsive bidder is consequently AFCONs" cannot be said to be either arbitrary or capricious or illegal requiring Court's interference in the matter of an award of contract. There was some dispute between the Bank on one hand and the consultant who was called upon to evaluate on the other on the question whether there is any power of making any correction to the bid documents after a specified period. The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any *mala fides* or favouritism in the grant of contract in favour of the appellant. In *Tata Cellular* v. *Union of India*, [1994] 6 SCC 651 , this Court has held that:

> The duty of the court is to confine itself to the question of legality. Its concern should be:
>
> 1. Whether a decision-making authority exceeded its powers,
>
> 2. committed an error of law,

A 3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

B

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative C action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and D must give effect to it;

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

E The above are only the broad grounds but it does not rule out addition of further grounds in course of time."

10. Therefore, 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 F 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. But on examining the facts and circumstances of the present case and on going through the records we are of the G considered opinion that none of the criteria has been satisfied justifying Court's interference in the grant of contract in favour of the appellant. We are not entering into the controversy raised by Mr Parasaran, learned Senior Counsel that the High Court committed a factual error in coming to the conclusion that Respondent-1 was the lowest bidder and the alleged mistake H committed by the consultant in the matter of bid evaluation in not

taking into account the customs duty and the contention of Mr. Sorabjee, learned senior counsel that it has been conceded by all parties concerned before the High Court that on corrections being made respondent-1 was the lowest bidder. As in our view in the matter of a tender a lowest bidder may not claim an enforceable right to get the contract though ordinarily the authorities concerned should accept the lowest bid. Further we find from the letter dated 12.7.1996 that Paradip Port Trust itself has come to the following conclusion:

> "The technical capability of any of the three bidders to undertake the works is not in question. Two of the bids are very similar in price. If additional commercial information which has now been provided by bidders through Paradip Port Trust, had been available at the time of assessment, the outcome would appear to favour the award to AFCONS."

11. This being the position, in our considered opinion, the High Court was not justified in interfering with the award by going into different clauses of the bid document and then coming to the conclusion that the terms provided for modifications or corrections even after a specified date and further coming to the conclusion that Respondent 1 being the lowest bidder there was no reason for the Port Trust to award the contract in favour of the appellant. We cannot lose sight of the fact of escalation of cost in such project on account of delay and the time involved and further in a coordinated project like this, if one component is not worked out the entire project gets delayed and the enormous cost on that score if rebidding is done. The High Court has totally lost sight of this fact while directing the rebidding. In our considered opinion, the direction of rebidding in the facts and circumstances of the present case instead of being in the public interest would be grossly detrimental to the public interest".

It is also to be noted that there was no stand before the High Court that the appellant wanted to match the bid. Even if it is accepted for the sake of argument, that was so urged it would have no consequence.

A A very attractive argument was advanced that as GMR has been allowed to match the financial dealing of appellant for Mumbai airport, the same modality should have been adopted for the other bidders. Though the argument is attractive, at first flush, it cannot be accepted for the simple reason that when bench mark is crossed, financial consideration is the determinative B factor because of revenue sharing.

It is to be noted that though emphasis was led that the constitution of Committees of non technical persons could not have thrown much light on the ultimate decision, yet it is to be noted that all the three Committees were part of the government machinery. The issue was to assess correctness of the C EC's decision.

Expression of different views and discussions in different meetings really lead to a transparent process and transparency in the decision making process. In the realms of contract, various choices were available. Comparison D of the respective merits, offers of choice and whether that choice has been properly exercised are the deciding factors in the judicial review.

As has been rightly submitted by learned counsel for the Union of India, the RFP has to be considered in the context of other documents like substantial document OMDA, execution of the agreements culminating to the E final master plan. Initial development plan is nothing but a projection which has to be broadly in line with OMDA. Undisputedly, OMDA is prepared by the GOI and AAI. One of the documents in the transaction documents is OMDA.

F It is to be noted that if no one was qualified, two alternatives were available either to scrap or abandon the process and second to re-conduct the tenders. As noted above, the practical compulsion which made the choice avoidable cannot be termed as perverse or lacking rationality.

The safety valve is the OMDA. The ranking becomes irrelevant after the G bidders have come to the arena and then finally the financial bid which determines the ultimate bid.

It is to be noted that GETE wanted to know as to whether the variation for allotment of marks in respect of the development side area was done H before opening the bids or after opening it. EC had given a very evasive

answer stating that same was done before allotting marks. GETE's job was not the evaluation but verifying the evaluation process. GETE's examination was restricted to see whether alignment with RFP was correctly done. GETE was not expected to give fresh opinion and no evaluation was necessary. A

Weightage introduces subjectivity. GETE has gone by objective standards. The criterion adopted by GETE appears to be more rational. It proceeded with the idea that more objectivity was necessary. So it has called the process to be validation process. B

It is pointed out by learned counsel for the respondents that parameters for judicial review are different in the matters of contract for normal case of tenders. In case of commercial contracts the normal contractual matters are excluded. It is pointed out that there is no overwhelming public interest involving such matters. GETE had only touched the fallacious approach of EC to make the process transparent. The view taken is a possible view supported by reasons and there should not be any interference. C D

In the ultimate, the question would be whether in the process of selection the Government had adopted transparent and fair process.

While balancing several claims a rational approach is necessary and that is to be formed in line with the scope of judicial interference. E

It is to be noted that Clause 5.5. deals with a situation of the same bidder being the highest bidder for both the airports. It proceeds on the basis that there would be another eligible bidder for the other airport and on that basis the procedure to be adopted has been prescribed. In such a situation the bidder who would be successful i.e. the highest bidder would be asked to take the airport when the difference between his bid and the next higher bid is greater. Such a procedure could be followed where there is second valid bid at the final phase. This procedure does not deal with a situation where there is only one bidder with valid bids for both the airports. In such a situation he becomes the highest bidder for both the airports and for that reason alone, the question of evaluation of financial bid arises. F G

If the RFP was to consider at the final phase of evaluation there would be only one bid for each of the airports. In that event, there would be no question of finding out difference between the various bids or comparing H

A bids. That left no option with the EGOM but to either vary RFP or to award one of the airports to GMR and to cancel the process for the second or cancel the entire process. The latter course would not have been in larger public interest. Therefore, the EGOM exercised its option.

B In final analysis, what the EGOM has done is to accept the report of EC subject to validation done by GETE.

The extent of judicial review in a case of this nature where the texture cannot be matched with one relating to award of contract, the observations of this Court in *Raunaq International Ltd.* v. *I.V.R Construction Ltd. and* C *Ors.*, [1999] 1 SCC 492 are relevant. It was observed as follows:

> "13. Hence before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court D should intervene."

The view was re-iterated in *Master Marine Services (P) Ltd.* v. *Metcalfe & Hodgkinson (P) Ltd. and Anr.*, [2005] 6 SCC 138.

E In the Queen's Bench decision in *R.* v. *Department of Constitutional Affairs*, [2006] All ER (D) 101 it was *inter-alia* held as follows:

> "It is not every wandering from the precise paths of best practice that lends fuel to a claim for judicial review."

F Same would be available only if public law element is apparent which would arise only in a case of "bribery,corruption, implementation of unlawful policy and the like." In the case of commercial contract, the aforesaid view about wandering was noted. In paras 50 and 51 it was noted as follows:

> G "It does not have the material or expertise in this context to "second guess" the judgment of the panel. Furthermore, this process is even more clearly in the realm of commercial judgment for the defendant, which judgment cannot properly be the subject of Public Law challenge on the grounds advanced in the evidence before me.

H It is to be noted that in respect of both the appellant and the GETE

wherever subjectivity criteria is involved, GETE has not dealt with the same. A

The mandate of EGOM was to validate and not to invalidate. It was a process for overall validation and calibration to apply the correct standard. It is the texture of the tendered document which is of paramount importance. EC has changed the texture whereas GETE did not do it. It needs no emphasis that uneven denomination breaks the integrity and textures. B

Perverseness in connection with a finding of fact is an aspect of mistake of law. Linked with the question whether GETE's constitution was legal, other question is whether the jurisdiction conferred on GETE has been properly exercised. Examination of the second question alone would be necessary C since we have held that constitution of GETE does not suffer from any infirmity. In *R (Iran)* v. *Secretary of State* [2005 EWCA Civ 982 at para 11) it was observed as follows:

> "It is well known that "perversity" represents a very high hurdle. In D
> *Mylan* v. *SSHD*, (2005) EWCA Civ 481) the whole court agreed that the word meant what it said: it was a demanding concept. The majority of the court (Keene and Maurice Kay LJJ) said that it embraced decisions that were irrational or unreasonable in the Wednesbury sense (even if there was no wilful or conscious departure from the rational), but it also included a finding of fact that was wholly E unsupported by the evidence, provided always that this was a finding as to a material matter.

Opinions may differ as to when it can be said that in the "public law domain, the entire proceeding before the appropriate authority is illegal and F without jurisdiction or the defect or infirmity in the order goes to the root of the matter and makes it in law invalid or void. The matter may have to be considered in the light of the provisions of the particular statute in question and the fact-situation obtaining in each case. It is difficult to visualise all situations hypothetically and provide an answer. Be that as it may, the question that frequently arises for consideration, is, in what situation/cases G the non-compliance or error or mistake, committed by the statutory authority or tribunal, makes the decision rendered ultra vires or a nullity or one without jurisdiction? If the decision is without jurisdiction, notwithstanding the provisions for obtaining reliefs contained in the Act and the "ouster clauses", the jurisdiction of the ordinary court is not excluded. So, the matter assumes H

A significance. Since the landmark decision in *Anisminic Ltd.* v. *Foreign Compensation Commission*, [1969] 1 All E.R. 208, the legal world seems to have accepted that any "jurisdictional error" as understood in the liberal or modern approach, laid down therein, makes a decision *ultra vires* or a nullity or without jurisdiction and the "ouster clauses" are construed restrictively, and such provisions whatever their stringent language be, have been held, not to prevent challenge on the ground that the decision is *ultra vires* and being a complete nullity, it is not a decision within the meaning of the Act. The concept of jurisdiction has acquired "new dimensions". The original or pure theory of jurisdiction means the authority to decide and it is determinable at the commencement and not at the conclusion of the enquiry. The said approach has been given a go-by in *Anisminic* case as we shall see from the discussion hereinafter [see *De Smith, Woolf and Jowell - Judicial Review of Administrative Action* (1995) Edn. p. 238; *Halsbury's Laws of England* (4th Edn.) p. 114, para 67, footnote (9)]. As Sir William Wade observes in his book, *Administrative Law* (7th Edn.), 1994, at p. 299:

> "The tribunal must not only have jurisdiction at the outset, but must retain it unimpaired until it has discharged its task."

The decision in *Anisminic* case (supra) has been cited with approval in a number of cases by this Court.(See: *Union of India* v. *Tarachand Gupta & Bros.*, [1971] 1 SCC 486, *A.R. Antulay* v. *R.S. Nayak*, [1988] 2 SCC 602, *R.B. Shreeram Durga Prasad and Fatehchand Nursing Das* v. *Settlement Commission (IT & WT)* [1989] 1 SCC 628, *N. Parthasarathy* v. *Controller of Capital Issues*, [1991] 3 SCC 153, *Associated Engineering Co.* v. *Govt. of A.P.*, [1991] 4 SCC 93, *Shiv Kumar Chadha* v. *Municipal Corpn. of Delhi* [1993] 3 SCC 161. In *M.L. Sethi* v. *R.P. Kapur*, [1972] 2 SCC 427 legal position after *Anisminic* case (supra) was explained to the following effect:

> 12 The word 'jurisdiction' is a verbal coat of many colours. Jurisdiction originally seems to have had the meaning which Lord Reid ascribed to it in *Anisminic Ltd.* v *Foreign Compensation Commission*, namely, the entitlement to enter upon the enquiry in question. If there was an entitlement to enter upon an enquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord Darman in *R.* v. *Bolton* (1841) 1 QB 66. He said that the

question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. In Anisminic Ltd., Lord Reid said:

> 'But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

In the same case, Lord Pearce said:

> "Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn into its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity."

The dicta of the majority of the House of Lords, in the above case would show the extent to which 'lack' and 'excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of 'jurisdiction'. The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing

A point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as 'basing their decision on a matter with which they have no right
B to deal', 'imposing an unwarranted condition' or 'addressing themselves to a wrong question'. The majority opinion in the case leaves a court or tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how
C much latitude the court is prepared to allow...."

In the subsequent Constitution Bench decision in *Hari Prasad Mulshanker Trivedi* v. *V.B. Raju and Ors.*, [1974] 3 SCC 415, it was held as follows:

D "... Though the dividing line between lack of jurisdiction or power and erroneous exercise of it has become thin with the decision of the House of Lords in the Anismintic case (i.e. *Anismintic Ltd.* v. *Foreign Compensation Commission*, [1967] 2 All E.R. 986), we do not think that the distinction between the two has been completely wiped out. We are aware of the difficulty in formulating an exhaustive rule to tell
E when there is lack of power and when there is an erroneous exercise of it. The difficulty has arisen because the word 'jurisdiction' is an expression which is used in a variety of senses and takes its colour from its context. (see per Diplock, J. at p. 394 in the *Anisminic* case). Whereas the 'pure' theory of jurisdiction would reduce jurisdictional
F control to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the formal structure of law may lose something of its logical symmetry. 'At bottom the problem of defining the concept of jurisdiction for purpose of judicial review has been one of public policy rather than one of
G logic'. [S.A. Smith, Judicial Review of Administrative Action, 2nd Edn., p. 98. (1968 Edn.)

The observation of the learned author, (S.A. De Smith) was continued in its 3rd Edn. (1973) at p.98 and in its 4th Edn. (1980) at p. 112 of the book. The observation aforesaid was based on the then prevailing academic opinion

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only as is seen from the footnotes. It should be stated that the said observation is omitted from the latest edition of the book De Smith, Woolf and Jowell Judicial Review of Administrative Action - 5th Edn. (1995) as is evident from p. 229; probably due to later developments in the law and the academic opinion that has emerged due to the change in the perspective.

After 1980, the decision in first *Anisminic's* case came up for further consideration before the House of Lords, Privy Council and other courts. The three leading decisions of the House of Lords wherein *Anisminic* principle was followed and explained, are the following: *Re Racal Communications Ltd.*, [1980] 2 All E.R. 634; *O'Reilly* v. *Mackman*, [1982] 3 All E.R. 1124; *Re* v. *Hull University Visitor*, [1993] 1 All E.R. 97. It should be noted that *Racal*, in *re* case (supra) the Anisminic principle was held to be inapplicable in the case of (superior) court where the decision of the court is made final and conclusive by the statute. (The superior court referred to in this decision is the High Court) [1981 AC 374 (383, 384, 386, 391). In the meanwhile, the House of Lords in *CCSU* case (supra) enunciated three broad grounds for judicial review, as "legality", "procedural propriety" and "rationality" and this decision had its impact on the development of the law in post-Anisminic period. In the light of the above four important decisions of the House of Lords, other decisions of the Court of appeal, Privy Council etc. and the later academic opinion in the matter the entire case-law on the subject has been reviewed in leading text books. In the latest edition of De Smith on Judicial Review of Administrative Action-edited by Lord Woolf and Jowell, Q.C. [Professor of Public Law, 5th Edn. 1995], in Chapter 5, titled as "Jurisdiction, Vires, Law and Fact" (pp.223-294), there is exhaustive analysis about the concept "Jurisdiction" and its ramifications. The authors have discussed the pure theory of jurisdiction, the innovative decision in *Anisminic* case, the development of the law in post-Anisminic period, the scope of the "finality" clauses (exclusion of jurisdiction of courts) in the statutes, and have laid down a few propositions at pp. 250-256 which could be advanced on the subject. The authors have concluded the discussion thus at p. 256:

> After Anisminic virtually every error of law is a jurisdictional error, and the only place left for non-jurisdictional error is where the components of the decision made by the inferior body included matters of fact and policy as well as law, or where the error was evidential (concerning for example the burden of proof or admission of evidence).

A Perhaps the most precise indication of jurisdictional error is that advanced by Lord Diplock in Racal Communications, when he suggested that a tribunal is entitled to make an error when the matter 'involves, as may do interrelated questions of law, fact and degree'. Thus it was for the county court judge in Pearlman to decide whether the installation of central heating in a dwelling amounted to a 'structural, alteration, extension or addition'. This was a typical question of mixed law, fact and degree which only a scholiast would think it appropriate to dissect into two separate questions, one for decision by the superior court, *viz.*, the meaning of these words, a question which must entail considerations of degree, and the other for decision by a county court *viz.*, the application of words to the particular installation, a question which also entails considerations of degree.

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It is, however, doubtful whether any test of jurisdictional error will prove satisfactory. The distinction between jurisdictional and non-jurisdictional error is ultimately based upon foundations of sand. Much of the superstructure has already crumbled. What remains is likely quickly to fall away as the courts rightly insist that all administrative action should be, simply, lawful, whether or not jurisdictionally lawful.

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E The jurisdictional control exercised by superior courts over subordinate courts, tribunals or other statutory bodies and the scope and content of such power has been pithily stated in *Halsbury's* Laws of England - 4th Edn. (Reissue), 1989 Vol. 1(1), p. 113 to the following effect.

F "The inferior court or tribunal lacks jurisdiction if it has no power to enter upon an enquiry into a matter at all; and it exceeds jurisdiction if it nevertheless enters upon such an enquiry or, having jurisdiction in the first place, it proceeds to arrogate an authority withheld from it by perpetrating a major error of substance, form or procedure, or by making an order or taking action outside its limited area of competence. Not every error committed by an inferior court or tribunal or other body, however, goes to jurisdiction. Jurisdiction to decide a matter imports a limited power to decide that matter incorrectly.

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A tribunal lacks jurisdiction if (1) it is improperly constituted, or (2) the proceedings have been improperly instituted, or (3) authority

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to decide has been delegated to it unlawfully, or (4) it is without competence to deal with a matter by reason of the parties, the area in which the issue arose, the nature of the subject-matter, the value of that subject-matter, or the non-existence of any other pre-requisite of a valid adjudication. Excess of jurisdiction is not materially distinguishable from lack of jurisdiction and the expressions may be used interchangeably.

Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue, or as jurisdictional. (p. 114).

There is a presumption in construing statutes which confer jurisdiction or discretionary powers on a body, that if that body makes an error of law while purporting to act within that jurisdiction or in exercising those powers, its decision or action will exceed the jurisdiction conferred and will be quashed. The error must be one on which the decision or action depends. An error of law going to jurisdiction may be committed by a body which fails to follow the proper procedure required by law, which takes legally irrelevant considerations into account, or which fails to take relevant considerations into account, or which asks itself and answers the wrong question. (pp. 119-120)

The presumption that error of law goes to jurisdiction may be rebutted on the construction of a particular statute, so that the relevant body will not exceed its jurisdiction by going wrong in law. Previously, the courts were more likely to find that errors of law were within jurisdiction; but with the modern approach errors of law will be held to fall within a body's jurisdiction only in exceptional cases. The Court will generally assume that their expertise in determining the principles of law applicable in any case has not been excluded by Parliament.(p. 120).

Errors of law include misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting

A to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof."
B (pp.121-122)

H.W.R. Wade and C.F. Forsyth in their book *Administrative Law*, 7th Edn., (1994), discuss the subject regarding the jurisdiction of superior courts over subordinate courts and tribunals under the head "Jurisdiction over Fact and Law" in Chapter 9, pp. 284-320. The decisions before Anisminic and those
C in the post - Anisminic period have been discussed in detail. At pp. 319- 320, the authors give the Summary of Rules thus:

Jurisdiction over fact and law: Summary

D At the end of a chapter which is top-heavy with obsolescent material, it may be useful to summarise the position as shortly as possible. The overall picture is of an expanding system struggling to free itself from the trammels of classical doctrines laid down in the past. It is not safe to say that the classical doctrines are wholly obsolete and that the broad and simple principles of review, which
E clearly now commend themselves to the judiciary, will entirely supplant them. A summary can therefore only state the long-established rules together with and broader rules which have now superseded them, much for the benefit of the law. Together they are as follows:

F Errors of fact

Old rule : The court would quash only if the erroneous jurisdictional.

New rule : The court will quash if an erroneous and decisive fact was-

G (a) jurisdictional

(b) found on the basis of no evidence; or

(c) wrong, misunderstood or ignored.

H Errors of law

Old rule: The court would quash only if the error was - A

(a) jurisdictional; or

(b) on the face of the record.

New rule: The court will quash for any decisive error because all B errors of law are now jurisdictional."

(emphasis supplied)

The above position was highlighted by this Court in *Mafatlal Industries Ltd. and Ors.* v. *Union of India and Ors.*, [1997] 5 SCC 536. C

Stand of respondents about appellant's objectionable conduct needs consideration.

Para 1.3 of RFP reads as follows: D

"1.3. *Confidentiality* - PQB receiving this RFP must have completed and returned the required, duly executed Confidentiality Deed.

PQB are reminded that information provided in this RFP and the accompanying documentation package is covered by the terms of the E Confidentiality Deed and the Disclaimer set out herein. PQB are also reminded that they are not to make any public statements about the Transaction process or their participation in it.

Para 6.13 speaks of the 'Contract Points' and in no uncertain terms provides as follows: F

"....Any request for information or clarification of information must be directed through the questions and answer process set out in Section 3.3 hereof.

PQB and their advisers must not make contact with any employees G of AAI or other GOI agencies or airport customers except as arranged through ABN AMRO as part of the Transaction process."

Learned counsel for the appellant submitted that the expression 'contract' obviously means an illegal attempt for bribery etc. and cannot H

A stand on the way of submission of documents for consideration. The plea is clearly untenable. Though, there is no penal clause for such breach it goes against a very concept of fairness in the process and evaluation of bids. Whatever documents are to be submitted are clearly stipulated. Any attempt to take advantage of any newspaper report, clearly falls foul of the mandate B that there shall not be any contract with any person involved in the process of selection. It is unusual that the RFP did not make such a contract is a factor for disqualification. This is to be kept in view in future tenders.

The inevitable conclusion is that the appeal is sans merit, deserves dismissal, which we direct. Costs made easy.

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KAPADIA, J. Although, I respectfully agree with the conclusion contained in the opinion of brother, Arijit Pasayat, the importance of the scoring system in the tender process has impelled me to elucidate and clarify certain crucial aspects. Hence, this separate opinion.

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The basic controversy in the present case is: whether the E.C. had exceeded its authority in the assessment of technical pre-qualification.

In the scoring system objectivity has an important role to play (Clause 5.4). In the scoring system the identification of factors (including sub-factors), E allocation of marks to each of these factors (including sub-factors) and giving of marks are three distinct and different stages. Clause 5.4 dealt with assessment of technical pre-qualifications. Under that clause a scoring system was to be applied based on the assessment of the Terms of the Offer against the Technical Pre-qualification criteria. It further stipulated that assessment shall be on F absolute basis and not relative as between the offers. Under the said system, each factor had to be allocated certain marks. Objectivity had to be provided in the allocation of marks (and not in giving of marks) to each factor (including sub-factors). This was not done. For example, RFP required certain marks to be allocated for absorption of existing staff. Greater the absorption, higher the marks to be given. In the present case, the E.C. changed the factor, namely, G "absorption of employees" to the overall approach. This led to change in priority. Similarly, in the RFP, the factor earmarked was "property development" which E.C. compared to "infrastructure development". Experience in property development is different from experience in infrastructure development. Similarly, RFP had given weightage to aeronautical revenue whereas in allocation of H marks, E.C. obliterated the difference between aeronautical and non-aeronautical

revenues. The above examples are given only to show that objectivity which was the underlying principle underlying clause 5.4 is completely lost either by expanding the enumerated factors like aeronautical revenue, overall capability *vis-a-vis* capacity to absorb existing work-force and comparison of property development with infrastructure development or by allocating uneven marks to sub-factors. In my view, E.C. had no business to expand or narrow down the scope of any of the above factors as it was beyond its authority and contrary to the scoring system.

With these words, I agree with the conclusion contained in the opinion of brother, Arijit Pasayat.

R.P. Appeal dismissed.