(2011) 12 DEL CK 0331

In the Delhi High Court

Case No : Writ Petition (C) 1883 of 2011

Thales Air Systems S.A. APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 13-12-2011

Acts Referred:

Airports Economic Regulatory Authority of India Act, 2008 — Section 2

Citation : (2012) 128 DRJ 154 : (2012) 2 ILR Delhi 115

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : V.P. Singh, with Ms. Tasneem Ahmadi, Mr. Anuj Kr. Ranjan and Mr. M.I. Choudhary, for the Appellant; Sachin Datta, CGSC with Mr. Abhimanyu Kumar, for Respondent No. 1, Mr. Sandeep Sethi with Mr. Digvijay Rai, Sanding Counsel for Respondent No. 2/AAI along with Mr. S. Sundara Raman, ED (CNS-P), Mr. Sanjan U. Ghosh, GM (CNS-P) and Mr. Mansoor Ahmed, Jt. GM (CNS-P), Mr. Kamal Mehta, Vivek Bhardwaj and Mr. Brijesh Singh, Advocates for Respondent No. 3, Mr. Suhail Dutt with Mr. Ujjwal Sharma and Mr. Vishal Dass, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J.

Main contours of the challenge laid in the petition

1. In this writ petition a challenge has been laid to the revised price bid invited by respondent no 2, that is, the Airport Authority of India (in short "AAI") vide its communication dated 4.3.2011. The main grievance of the petitioner is that, it is, in effect, the lowest bidder (hereinafter in short referred to as "L-1") since, respondent no. 3, i.e., Eldis was excluded from the race, so to speak, on account of its technical ineligibility.

1.1 It is, therefore, the contention of the petitioner before us that it was in its capacity as the L-1 it was called for renegotiation of the price by the AAI, on 19.11.2010 which, resulted in scaling down of its offer by Rs 125 lacs.

1.2 It is for these reasons that the second prayer in the writ petition is for issuance of a writ of mandamus qua the respondents, seeking thereby a direction to them, to issue a Letter of Award (in short "L.O.A") with regard to the tender in issue, being tender No. (CNS-P)-12/2009-10 (hereinafter referred to in short as the "Tender").

1.3 It is therefore the contention of the petitioner that the impugned communication dated 4.3.2011, whereby the AAI has called for revised bids, is nothing but a ploy to re-induct in the fray respondent no. 3, by ostensibly confining the invitation to those who had qualified both the eligibility and the technical criteria laid out in the Tender.

1.4 It is the say of the petitioner that it is because of this reason that respondent no. 3 i.e., Eldis and respondent no. 4, i.e., Raytheon Canada Radar Systems (in short "Raytheon") are in the fray; whereas the communication dated 19.11.2010 and, the events which led up to it, would show that it was the only entity which had met every criteria put in place by the respondents, and thus, ought to have been logically issued a LOA.

PARTIES

2. Before we proceed further we may indicate that for the sake of convenience that we would be referring to main parties by their names, albeit in abbreviated forms. Therefore, the petitioner being Thales Air Systems S.A. would be referred to as TAS; the Respondent no. 1, i.e., Union of India as UOI, Respondent no. 2, i.e., Airport Authority of India as AAI; Respondent no. 3, i.e., Eldis as Eldis, and lastly Respondent No. 4, i.e., Raytheon Canada Radar Systems as Raytheon.

FACTS

3. In order to appreciate the contentions of parties and the challenge made in the petition it may be necessary to refer to the background in which disputes have emerged inter-se the parties.

3.1 On 16.12.2009, the UOI had issued a global tender inviting bids for supply, installation, testing and commissioning of eight (8) co-located airport surveillance radar (ASR) with mono-pulse secondary surveillance radar (MSSR) Mode-S (collectively referred to as "radars") in respect of airports situate at Amritsar, Chennai, Cochin, Kolkata, Mumbai and Delhi.

3.2 The purpose being, while for the first four (4) airports (referred to hereinabove) one (1) radar each would be necessary, as regards Mumbai and Delhi, offers were invited for two (2) radars each. The Tender, adverted to the fact that the estimated cost for purchase of the said radars would be Rs 225.50 crores and, that each bidder would be required to deposit earnest money equivalent to Rs 2,50,50,000/-.

3.3 Apart from other conditions the eligibility criteria as also the tendering procedure, was laid out in the Tender. As per clause 5.2 to 5.5 each bidder was required to submit its tender by way of three (3) envelopes marked A, B and C respectively. Envelope "A" was to contain eligibility requirements as per the stipulated conditions contained in the Tender; envelope "B" similarly, was required to contain the technical bid; and lastly, in envelope "C", the bidder was required to put in its price bid as per the format given in annexure "I". Importantly, clause 5.5.5. of the Tender clearly stipulated that any information found missing would result in the bid being rejected. Similarly, clause 5.5.6 provided that envelope "C", which was to contain the price bid, should advert to the particulars qua the price alone and, not allude to any conditions. In other words, the tendency to append ifs" and buts" to the price bid had to be eschewed. Resultantly, anything that the bidder had to say was required to be stated in the technical bid. Consequently, if any condition was stipulated in the price bid, the bid was liable to be rejected.

3.4 As per clause 5.6, it was further stipulated that the three (3) envelopes had to be separately sealed. Each such envelope was required to bear the tender number alongwith the appropriate caption, i.e., "eligibility criteria" in respect of, envelope marked A, "technical bid" in respect of, envelope marked "B" and, "price bid" qua envelope marked "C".

3.5 The bids as per the Tender were required to be submitted by 1430 hours on 29.1.2010. The submission of bids was required to be made with the Executive Director, CNS (Planning), at the indicated address. It may be pertinent to note at this stage that, as per clause 14 of the Tender, each bidder was mandatorily required to execute an Integrity Pact, in the given format, i.e., annexure VIII to the Tender. The Integrity Pact, had to be submitted by the bidder in envelope "A", alongwith the earnest money deposit. In clause 14.3, it was, therefore, clearly indicated that in pursuance of the Integrity Pact executed by the bidders, one of the Independent External Monitor''s (in short, IEM''s) would be one, Mr R.C. Rekhi.

3.6 The Tender contained several parts and sections. What is important for our purposes is clause 1.3 and 7 in section "B", titled terms and conditions, which inter alia provided that the systems/equipment offered by the bidder should be a "proven product" and that it should be in operation in two or more international airports. The manner of proof was also adverted to in the said clause.

3.7 Clause 7.1 gave the right to AAI to accept the tender in full or in part, as also, the right not to accept the lowest tender or, to reject any or all the tenders without assigning any reason whatsoever.

3.8 Clause 7.2, conferred on AAI, the right that, in case, any particulars and prescribed information was found missing or, is incomplete, in any respect, or the prescribed conditions were not fulfilled, then AAI shall have the authority to treat the bid as non-responsive, and consequently, reject the same.

3.9 Clause 13.9 required as indicated above, in the context of clause 5.5, that the price bid would be submitted strictly as per the price schedule referred to in annexure "I".

4. There is under clause 17 a right conferred on AAI to inspect the factory of the bidder.

4.1 At this juncture one may also refer to annexure "VI", which sets out the proforma for submitting an undertaking by the bidder. Amongst other terms of the undertaking (given as per the said proforma) clause "I" required the bidder to undertake that it unconditionally accepted the tender conditions in its entirety qua the tendered work. The said clause expressly stipulates a prohibition against insertion of any condition(s) to the offer made and, in case, any condition(s) were found appended to the offer, the same were to be treated as withdrawn.

4.2 Similarly, the proforma for the Integrity Pact, adverted to above, is set out in annexure "VIII" appended to Tender. The appointment of an Independent External Monitor (in short "IEM") is provided for in clause 8.1 of the said Integrity Pact. Clause 8.5 of the Integrity Pact adverts to the fact that the IEM could make recommendation and/or give their suggestions to the management, i.e., AAI to either "discontinue" or "heal" the violation or, take other relevant action. Beyond this, the IEM is not conferred with any right to demand from the parties, either that it acts in a specific manner or, refrains from action or, even tolerates a particular action. The IEMs are required to submit their recommendation in the form of a written communication to the Chairperson, AAI.

5. It is in the context of the aforesaid broad terms and conditions that the petitioner and other five (5) entities which, included Eldis and Raytheon, filed their bid with the AAI. The other three (3) bidders apart from TAS, Eldis, Raytheon were Indra/NRP, Selex and GECI. For the sake of completion of narrative, it may be important at this stage itself, to note that AAI had issued four (4) corrigendums, which were really in the nature of amendments to the initial Tender.

6. It appears that during the evaluation of the submissions made vide envelopes "A", GECI was disqualified as it did not meet the eligibility criteria. Consequently, AAI appears to have proceeded to the next stage, that is, opening of the technical bids, which were contained in envelopes marked "B".

6.1 As per the averments made in the writ petition by end June, 2010, the Technical Evaluation Committee (in short "TEC"), set up by AAI, pruned the list of contenders in the race to, two entities, i.e., TAS and Raytheon. It is specifically averred in the writ petition that Eldis had been disqualified as it had not been found to be technically qualified, in view of the fact that the radars, offered by it, had not operated at major airports in accordance with requirements of clause 1.3 of the Tender conditions. It is thus the say of TAS, that it was surprised to find representatives of Eldis at the opening of the financial bids held on 30.9.2010. On the said date, admittedly, three (3) of the earlier six (6) bidders were invited, i.e., TAS, Eldis and Raytheon.

6.2 It is, however, not disputed by TAS that upon the price bids being opened it was found that Eldis had made the lowest bid, followed by, TAS and Raytheon.

6.3 It is at this stage that, TAS shot off a letter of even date, i.e., 30.9.2010 to AAI, alluding thereto, to the defects in the financial bid (envelope "C"), submitted by, Eldis. Broadly, TAS raised two objections. First, that the bid submitted by Eldis was not in consonance with the terms of clause 5.5 of Section A of the Tender, in as much as, the financial bid submitted by Eldis, in Envelope "C", was not sealed with wax. The second objection raised was that, the price bid of Eldis (which was to be filed in the prescribed format, i.e., annexure "I") did not comply with the template provided by AAI in the Tender and, in the corrigendum no. 2 issued by it, which was posted on AAI''s website, at the time of bid preparation. More specifically, it was pointed out that line no. 5 of the pricing schedule was missing; and this was, according to TAS, a clear violation of clause 5.5.1 and 5.5.4. It was stressed that in view of the above, clause 5.5.5 of Section A of the Tender would get triggered. The net effect of this, according to TAS, ought to have been that the bid of Eldis should have been rejected.

6.4 It would be important to note at this stage that, even though in the writ petition there is a specific averment to the effect that Eldis had got knocked out of the race, in June, 2010, purportedly on account of the fact that it failed to meet the technical criteria; there was no reference to the same by TAS, in its letter dated 30.9.2010. This aspect will have some bearing as much has been made out with regard to the fact that Eldis had been introduced by AAI, in a manner of speaking, through the back-door.

6.5 The objections, as adverted to above by us, were confined to the financial bid. The aforementioned letter of TAS, was followed by yet another letter dated 7.10.2010, wherein for the first time an objection was raised with regard to the purported failure of Eldis in having met the eligibility/ technical criteria as stipulated in clause 4.3 of Section E and clause 1.3 of Section B of the Tender which required the radars offered by the bidders, to have operated, at "major international airports". In support of its objection, a reference was made in this communication to the Airports Economic Regulatory Authority of India Act, 2008 (in short "AERA Act"), which according to it, defined what a major international airport would be. Based on the definition provided in the AERA Act, it was averred in the said communication that the radar offered by Eldis was evidently in operation at Pardubice Airport in Czech the Republic which recorded an annual traffic range of forty to sixty thousand passengers over the last five (5) years as against what was defined in the AERA Act which stipulated a minimum traffic of 1.5 million passengers.

6.6 There were certain other objections raised with regard to the capacity of Eldis, to deliver eight (8) radars, as per the requirement of the Tender in issue. In this connection a reference was made to the fact that Eldis had produced a

very small number of co-mounted of radars; evidently being only two in number.

6.7 The thrust was that Eldis, did not have the industrial capability to support the supply of eight (8) radars, within, the stipulated period.

6.8 Objections in terms of clause 4.2 of Section E of the Tender, was also raised, vis-?-vis, the minimum financial turnover stipulated in the Tender. It was pointed out that in 2007, Eldis had reached a turnover of Rs 33 crores at the exchange rate obtaining as on 12.02.2010, whereas as per the Tender document it had to achieve a threshold of Rs 33.6 crores. The defects in the price bid alluded to in their communication of 30.9.2010, were also reiterated.

6.9 The sum and substance of the objections put forth was that, Eldis would not be in a position to install safe radars, especially, keeping in mind the fact that, in years to come, the Indian air space would be one of the busiest and most dense. In this regard, a specific reference was made to the airport at Mumbai.

7. It would be important to note at this juncture that a perusal of record would show that there is no dispute with regard to the fact that on 19.11.2010, at 1200 hours, a meeting of the Procurement Advisory Board (in short "PAB") was held under the aegis of the chairman of AAI. At this meeting the PAB, was apprised as regards the conditions appended in the price bid submitted by Eldis, one of which was regarding the fact that the supplied software product did not include the "source code" of individual modules and, hence the price of the source code was not included n the price offered by the Eldis. In view of the fact that PAB was advised that a conditional bid was violative of clause 5.5.6 of section A, the bid was declared invalid. There is also a reference in the official record to the fact that in the price bid there was an omission of one item in the price bid; in respect of which opinion of the legal department was sought which had opined that the objection being purely technical it may not sustain in court.

7.1 Thus in view of the fact that the bid of Eldis, which was declared invalid, and consequently rejected; the PAB recommended the acceptance of the bid offered by the TAS, which was quoted as Rs 121.91 crores; being 46% lower than the estimated cost pegged at Rs 225.5 crores. At this very meeting, a decision was also taken to call TAS for negotiations.

8. It is the say of TAS, that at this meeting all other bidders, in particular, Eldis got excluded, and it was, resultantly declared as L-1 by AAI. It is also the say of TAS that, it is because of this reason, vide a communication dated 19.11.2010 TAS was invited to the office of AAI for meeting on price negotiations, which was stated to be held on or before 23.11.2010.

9. What was perhaps not known to TAS was that, in the meanwhile, two complaints had been filed by Eldis. First one dated 05.11.2010, and the second dated 21.11.2010. In so far as that second complaint dated 21.11.2010 was concerned, it was filed by the Eldis with the Ministry Of Civil Aviation. In this complaint, it was alleged that undue favour had been shown to TAS, which was in effect L-2. It was further alleged that not only the bid filed by TAS was not in conformity with the Tender conditions; as they had changed the format of the bid

by providing for six (6) columns as against the prescribed five (5) columns in the Tender, in violation of clause 5.5.1 of part "A" and clause 13.9 of part "B", but also the fact that the bid of TAS was higher by almost Euro 1.92 million. It appears that the complainant Eldis, alleged that even if all taxes and costs of spares etc. was loaded on to its bid, it would be lower by approximately Rs 98 lacs as compared to the bid offered by TAS. The complaint apparently also alluded to the fact that TAS had executed several contracts with AAI, in the past, and to date, had failed to discharge its obligation, or execute the said contracts within the time frame stipulated in the contract.

10. On the basis of the complaint received in the Ministry Of Civil Aviation, a communique dated 24.11.2010, was issued to the Chairman, AAI requesting him to examine the allegations made in the complaint, with a report to them.

11. It appears that the complaints made by Eldis (in one on which, as noticed above, even the Ministry of Civil Aviation had sought examination) were sent to the IEM for their opinion.

12. Perhaps unaware of this development, TAS issued a communication dated 24.11.2010 to AAI, offering a reduction in price to the extent of Rs 125 lacs. It is claimed by TAS that, in the background of the price negotiation meeting, a second meeting was convened between the chairman of the AAI and the representatives of the TAS which included its Indian counterparts, i.e., the CEO and Managing Director, India respectively; on 9.12.2010. At this meeting, the issuance of LOA to TAS was apparently discussed and, according to TAS, an assurance was given that a LOA would be issued in its favour within less than a week.

13. On 07.12.2010, the matter was deliberated upon evidently by the IEM whereupon, after examining the view of various functionaries IEM opined as follows:

After detailed deliberations with IEMs, I am of the view that the tenders submitted by bidders had certain deviations from NIT documents which have made the evaluation rather ambiguous and also following deficiencies were noted in particular.

1. All columns/ rows of the price bid were not filled up.

2. Additional columns were created in price bid.

3. Additional notes made in price bid

4. Tax liability not clearly mentioned

5. Whether Source Code and other proprietary software included in the quotes or not is not clear.

Also, based on deliberations with other IEMs, a conscientious unanimous decision was arrived at, and accordingly, I recommend that the tender should be reinvited after making clear and unambiguous provisions so that the bidding process is objective, fair and transparent and in accordance with the CVC guidelines.

Short term bids are recommended in this case to minimize delay.

14. The aforementioned fact also appears to have, not come to the knowledge of the TAS. We have no way of knowing as to what transpired at the meeting of 09.12.2010 - with AAI denying this fact that any such commitment was made. What is evident from the record, though, is that the issue as regards the rejection of the financial bid of Eldis was under examination even prior to the meeting of 09.12.2010. As a matter of fact the first complaint of Eldis was made on 05.11.2010; a date as is evident much prior to the PAB meeting convened on 19.11.2010.

15. The official record shows that there was a divergence in the opinion rendered by IEM and the Directorate within the AAI, i.e., the CNS-P Directorate. This cleavage of views propelled the Chairman of AAI to refer the matter to the Central Vigilance Commission (in short, CVC) for its advice on the matter in particular its perception of the "evaluation process" adopted in the background of the provisions of the Tender. Accordingly, a communication dated 21.12.2010 was issued by the Chief Vigilance Officer (in short "CVO") of the AAI seeking the advice of the CVC. Alongwith the said communication, the necessary documents were enclosed for the CVC''s perusal. Amongst other documents, the report of the IEM as well as a copy of the comments of CNS-P Directorate / Chairman of AAI were also enclosed.

16. It appears that the CVC did not oblige and accordingly vide a office memorandum dated 14.01.2011, remitted the matter to the AAI with the observation that the tenders were required to be evaluated in a transparent and equitable manner, as per the laid down policy; and that rendering advice in respect of a specific tender would amount to interference in the work of the executive. Since the matter was at a "pre-decision stage", the CVC did not deem it fit to involve itself in the decision making process, and consequently, advised the AAI, to take an appropriate decision in the matter. A contrary averment in the writ petition by TAS to the effect that CVC had given its stamp of approval to the process adopted, is not borne out from the record.

17. In view of this development, AAI once again approached the Ministry of Civil Aviation for advice and guidance for processing the Tender, further. A communication in this regard was sent on 02.02.2011. In this letter, AAI adverted to the fact that it had referred the matter to the CVC on 21.12.2010 (with regard to which a communication was sent to the Ministry of Civil Aviation on 28.12.2010). In this very letter, a brief reference was also given of the advice rendered by the CVC vide its letter dated 14.01.2011.

18. The Ministry of Civil Aviation, however, in the fitness of things, informed the Chairman of AAI vide letter dated 22.02.2011, that the AAI should take an

administrative decision in the matter keeping in view of the directions / circulars of the CVC, in respect of, such like matters.

19. The ball, in a manner of speaking, having been put back in the court of AAI, a meeting of the PAB was convened by the Chairman of AAI on 28.2.2011. After recording the background in which the meeting had been convened and the events that had transpired in the past, it took note of the following discrepancies in the bids of all three (3) technically qualified bidders i.e., TAS, Eldis and Raytheon. The minutes being crucial to the adjudication of the case, the relevant portion is extracted hereunder for the sake of convenience:-

In the PAB meeting held on 28.02.2011, ED(CNS-P) informed about the urgent requirement of 8 nos. Of ASR/MSSR at various airports in India. He also highlighted the importance of ASR/MSSR as a necessary surveillance sensor for ensuring safe, efficient capacity handling of air traffic. It was also emphasized that augmentation of Delhi and Mumbai ASR/MSR had become an immediate necessity of considering the density of air traffic at those airports as also new ASR/MSSRs at Cochin and Amritsar where traffic has increased, resulting in air space complexities. In addition there is requirement of ASR/MSSR at Chennai, Kolkata, Ahmedabad and Trivandrum also which are nearing the end of their life (about 13 to 15 years old).

PAB took note of the fact that the "Notes" contained in the price bid of M/s ELDIS was also mentioned in the technical bid in the "Bill of Quantities", which was not brought out in the technical evaluation report (not only in this tender but in the earlier tender of SITC of 9 MSSRs also).

PAB also took note of the fact that price quoted by M/s ELDIS in their price bid is indeterminate and the bid conditional in nature as the "Notes" had stipulated conditions (Software products in this bid do not contain source code of individual modules, these being proprietary items of M/s ELDIS) which had a financial impact. M/s ELDIS, have stated in their letter dt. 29.11.2010, after opening of the price bid that source code will be available free of cost. However, the other two bidders have not indicated explicitly, about supply of source code. As a practice, all ICDs (interface Control Documents) of Radar Data formats are included in the quoted price, along with source codes. But since M/s ELDIS had mentioned about source codes and the other two bidders have not explicitly mentioned anything about source code in their quote, therefore there is an element of uncertainty in their quote, which requires confirmation.

PAB deliberated at length on the issue considering all the pros and cons in light in CVC''s directions/ guidelines and IEM''s report and came to the conclusion that inviting of snap bids from technically qualified bidders of the subject tender would be appropriate under the circumstances which will provide level playing field for all the technically qualified bidders in a equitable manner.

PAB approved:

(i) Invitation of snap bids (in view of the urgent requirement of ASR/MSSRs) with clear and unambiguous provisions from technically qualified bidders of the subject tender after re-working the price schedule suitably.

(ii) Adequate legal precautionary measures shall be taken so that the tender process is not unduly delayed, in view of the urgent nature of the project.

PAB also instructed that the technical evaluation team should be suitably cautioned/ instructed to be more cautions in evaluating technical bids in future an suitable Technical Instruction issued in this regard.

(Emphasis is ours)

20. Since a decision had been taken to invite "snap bids" from technically qualified bidders, the impugned communication dated 04.03.2011 was issued to each of the three (3) bidders, calling for their revised bids. It was also indicated therein, that the revised bids should be submitted on 25.03.2011 upto 1130 hours, and that bids would be opened on the same date, at 1200 hours.

21. Being aggrieved, TAS moved this court on 22.03.2011 when; after hearing the counsels for UOI and AAI, an interim order was passed directing stay of the operation of the impugned letter dated 04.03.2011. On 27.09.2011 the writ petition was admitted and since final hearing in the matter had commenced, interim orders were made absolute during the pendency of the petition on the said date.

21.1 In opposition to the writ petition, counter affidavits were filed by all respondents.

21.2 In rebuttal, rejoinders were filed by the petitioner. In so far as AAI is concerned, in their counter affidavit, they have justified their decision to invite snap bids from technically qualified bidders. The reason articulated is that, given the urgency of obtaining the radars and, given the fact that the defects were found in the price bids of all three technically qualified bidders, it would only be fair that a snap bids are invited in respect of the Tender in issue, as it would both be pragmatic and equitable qua the concerned parties.

21.3 The AAI has denied allegations of illegality levelled against it qua the purported re-induction of Eldis in the fray by means which were not in accordance with the provisions of the Tender. It is because of the urgency that AAI, based on the advice of the PAB, has taken the route of inviting snap bids in preference to the recommendation of the IEM to annul the Tender in issue and to recommence the entire process. In this connection, AAI has explained its stand vis-a-vis the allegation raised by TAS, that Eldis, did not meet the eligibility criteria, in as much as, its radars did not operate at major international airports. It was averred that the definition given in the AERA Act did not have any bearing on the issue, and that, in any event, the radars proposed to be supplied by Eldis were operating at two major international airports, namely, Pardubice International Airport in the Czech Republic, and Surapaya International Airport, in Indonesia. In this regard, it was sought to be explained by AAI that when this issue cropped up at TEC meet, (at the stage of evaluation of technical bids) it had indeed rejected the bid of Eldis on the ground that it radars did not operate at two major international airports by adopting the very same arguments put forth by TAS; which was, that it ought to operate at a major international airport, which met the criteria as defined for such an airport under the AERA Act. This decision of the TEC was reviewed by the management of AAI, on the ground that the Tender did not stipulate a criteria for categorising an airport as a major international airport, and also that, the definition in the AERA Act (which defined a major airport on the basis of passenger footfalls) would have no relevance to the performance of radars which Eldis or any one of the other bidder hoped to supply to AAI. Based on this decision, a two (2) member committee was constituted to evaluate at site, the performance of the radar offered by Eldis. The two (2) member committee comprised of Mr. S. Sundraraman, Execute Director (CNS-P) and Sh. P.K. Mishra, General Manager (ATM), IGIA. These two gentlemen did not form part of the original TEC, which had in the first instance evaluated the technical bids. On a physical inspection, a report dated 10.09.2010 was generated, whereby a recommendation was made that the radar which Eldis offered matched the Tender requirements of AAI. The report further adverted to the fact that the radars supplied by Eldis were working at seven (7) locations; even while its radars were undergoing installation in two other locations. This apart, Eldis had also signed a contract with Republic of China for one radar of the type offered to AAI.

22. On the other hand, Eldis while generally contesting the averments made in the writ petition, specifically adverted to the fact that at no stage, did AAI communicate to it, that it had not met the technical specifications.

22.1 It was stressed that the TAS had infact suppressed the fact that vide its complaints dated 05.11.2010 and 21.11.2010, Eldis had brought to the notice of the concerned authorities in the AAI issues as regards substantial non compliance of the requirements of financial bid by TAS. In this regard, reference was also made to the findings of the IEM, who had adverted to the gaps in the financial bid filed by TAS.

22.2 Eldis contested the averment of TAS that AAI at any stage, had conveyed its intention to award the contract to TAS or that process adopted at the meeting of PAB held on 19.11.2010 had received the imprimatur of the CVC or, even that of the Ministry of Civil Aviation.

22.3 It was also averred that, in case, as averred, Eldis had been disqualified at the stage of evaluation of the technical bids, then TAS ought to have approached the court in September, 2010 itself, and not waited till March, 2011. The financial bids, which were opened on 30.09.2010; as per the terms of contract, could have been opened only vis-a-vis in those bidders, who had qualified the technical evaluation round.

22.4 The fact that TAS had violated the clauses 5.5.1 and 13.9 of the Tender by inserting extra columns in the price bid was clearly accepted by the IEM as well as PAB in its meeting held on 28.02.2011. Eldis, asserted its right in having the contract awarded to it, as it was not only technically qualified but also the L-1, in view of the fact that its financial bid was admittedly lower than that of TAS.

23. On the other hand, Raytheon while supporting the action of AAI in calling for snap bids and rebutting most of the pleas taken by TAS in the writ petition was, as was expected, guarded about the eligibility of Eldis. Raytheon, took the stand that it had no knowledge of any communication pertaining to disqualification of Eldis for the alleged reason of failing to meet eligibility criteria. In any event, on the issue as to whether Eldis was technically qualified having regard to the fact that a fresh assessment was carried out by a two member committee; Raytheon chose to reserve its comments.

24. The UOI largely adopted the stand of AAI.

25. In the rejoinder, as expected, the petitioner rebutted the stand of the respondents herein.

Submissions of Counsels

26. In the background of the pleadings filed in the matter; arguments on behalf of the petitioner were addressed by Sh. V.P. Singh, Sr. Advocate assisted by Ms. Taslim Ahmadi, Advocate, the UOI was represented by Mr. Sachin Datt; AAI was represented by Mr. Sandeep Sethi, Sr. Advocate, assisted by Mr. Digvijay Rai; Mr. Kamal Mehta addressed arguments on behalf of Eldis; while Mr. Suhail Dutt, Sr. Advocate assisted by Mr. Ujjwal Sharma and Mr. Vishal Dass, represented Raytheon.

27. Briefly, apart from what is stated in the pleadings filed by TAS, Mr. Singh stressed the fact that a two member committee was propped up, to somehow, re-induct Eldis in the fray by giving it a clean chit with regard to what was a clear violation of the eligibility/technical parameters set forth in the Tender, that is, the radar offered by the bidders should have been in operation in at least two major international airports. Mr. Singh, as noticed by us hereinabove, while referring to the averments made in the writ petition adverted to section 2(i) of the AERA Act. Mr. Singh submitted that TAS, became aware that Eldis had been re-inducted into the race only when its representatives participated in the opening of financial bids, on 30.09.2010. The fact that Eldis did not conform to the Tender requirements was brought to the notice of AAI immediately thereafter vide letters dated 30.09.2010 and 07.10.2010. Mr. Singh thus contended that the objections raised by TAS had merit, in as much as, the PAB in its meeting dated 19.11.2010, had expressly rejected the bid of Eldis.

27.1 It is because of this circumstance that at the meeting of PAB dated 19.11.2010, TAS was declared L-1 and was invited for price negotiations. These price negotiations were held on 23.11.2010, whereupon TAS by a letter dated

24.11.2010, offered a reduction in its quoted bid. Mr. Singh, contended, given this background, there was no justification in the AAI, calling for revised bids. The justification given in paragraph 2 of counter affidavit filed by the AAI, to the effect, that the Ministry Of Civil Aviation had received complaints, and that IEM, had found discrepancies in the bid filed by various bidders was not sustainable. In this regard, Mr. Singh contended that IEM had no authority or mandate to review financial bids. It was next contended that, in any event, the recommendation of IEM was not given effect to as AAI had ultimately not annulled the Tender, but called for revised bids. Mr. Singh also adverted to the letter of the CVC dated 14.01.2011, whereby it had refused to interfere in the Tender process. It was submitted on behalf of TAS that the decision of the PAB dated 28.02.2011, was contrary to, its own decision dated 19.11.2010. Mr. Singh submitted that the decision taken in the PAB meeting of 28.02.2011, was based on an erroneous premise, that the bidders had not indicated as to whether they would supply the source code, when in the meeting of 19.11.2010 it was recorded, that the source code was a critical element in the software module of the radars and hence, needed no explicit indication as the software cannot function without the source code. For these reasons, Mr. Singh submitted that the impugned decision to call for revised bids was clearly arbitrary, and an exhibition of, unbridled executive act, tailored to favour Eldis. It was contended that the impugned decision deserves to be set aside.

28. On behalf of Eldis, Mr Kamal Mehta submitted that TAS had been less than candid in the averments made in the writ petition. It was the submission of Mr Mehta that contrary to what has been averred in the writ petition there was no approval granted in favour of the petitioner either by the CVC or the Joint Secretary and Secretary to the Govt, of India in the Ministry Of Civil Aviation. There was nothing on record to show, according to Mr Mehta, that a decision was taken to issue a LOA in favour of TAS. It was thus contended that the writ petition deserves to be dismissed on the ground that it seeks to enforce the terms of the tender. The TAS, according to Mr Mehta, had not acquired any enforceable legal right merely by being declared as L-1 in the PAB meeting of 19.10.2010; albeit by an erroneous decision, which involved, the illegal exclusion of Eldis. It was asserted that TAS, who is involved in several projects with AAI had exerted, as it appears now, undue influence over the TEC, constituted by AAI, while the process of evaluation was under way. This had in fact, resulted in, the TEC coming up with an undefined criteria to oust Eldis from the race. The criteria adopted that the radars offered by bidders ought to have operated at major airports, did not have the backing of a defined standard against which this specific attribute could be measured. TEC, according to Mr Mehta, therefore, at the behest of the representatives of TAS adopted the definition of AERA Act which, in no way, could be the basis for assessing the performance/ capability of a radar. It is to correct this error, that AAI perhaps, constituted a two-member team to assess the performance of the radar offered by Eldis, in exercise of power contained in clause 2.3 of Section A of the Tender. Mr Mehta, however,

stressed the point that Eldis by itself was never communicated any shortcoming or any decision purportedly taken to reject its technical bid. Therefore, the presence of its representative at the meeting held on 30.09.2010, to open financial bids, was legitimate. It was submitted that at this meeting, undoubtedly, Eldis was found to be the lowest bidder, and having been confronted with this fact, TAS shot off its letters dated 30.09.2010 and 7.10.2010 to AAI, seeking the ouster of Eldis from the fray. To give sustenance to its campaign against Eldis, TAS inspired media reports, including the one datelined 08.10.2010, which is dutifully appended to the writ petition. According to Mr Mehta, this campaign led to the flawed decision, of the PAB, taken at its meeting dated 19.11.2010; whereby Eldis was sought to be excluded on a ex facie flimsy ground that, its financial bid had conditions attached to it. The PAB, in coming to this decision, chose to ignore the fact that Eldis had on 05.11.2010 already instituted a complaint vis-a-vis TAS. It was this complaint, as well as that, which followed the PAB meeting, i.e., the complaint dated 21.11.2010 made to the Ministry Of Civil Aviation, the CVC and other concerned authorities, which resulted in the re-examination of the entire issue. The fact that the financial bid of TAS, was itself in breach of the provisions of Clause 5.5.1 of part A and clause 13.9 of part B of the Tender, had been overlooked. On the other hand, Eldis in its financial bid, indicated, only by way of clarification, that the source code was not included in the software; which for reasons best known to the authorities concerned was categorized, unfairly, as a condition appended to its financial bid. In including such a note, Eldis only sought to clarify that the source code of an individual module, being a proprietary item, which ordinarily is not included in the sale of a software product, would be supplied free of cost. Therefore, such a note could not have been construed in the first place as a condition appended to the financial bid, and then, being used to oust Eldis. It was pointed out that the said note, existed even at the time when the technical evaluation of the bids was carried out. Mr Mehta, next contended that a bidder in any event could not have been ousted on the ground of having appended such a note/condition, when in terms of the undertaking executed by the bidder in accordance with annexure VI of the Tender the same stood automatically withdrawn. Since all these factors put forth by the representatives of Eldis did not find necessary favour with the concerned authorities at AAI, Eldis was left with no option but to escalate the matter by writing to superior authorities, which included the CVC, the Ministry of Civil Aviation as also the External Monitor, i.e., IEM. This error was finally corrected with the report of IEM dated 7.12.2010; though the remedy offered by it involved cancellation of the Tender. While, the report of IEM was broadly accepted by the PAB in its meeting of 28.2.2011, the conclusion arrived at was different, in as much as, a decision was taken to invite snap bids from technically qualified bidders, keeping in mind the urgency in the matter. This decision of the official respondents, according to Mr Mehta, cannot be found fault with.

29. Mr Suhail Dutt, who appeared for Raytheon largely relied upon the stand taken by the said respondent in the counter affidavit filed on its behalf.

30. Mr Sachin Dutta, who appeared for the UOI, supported the stand taken by the counsel for AAI.

REASONS

31. Having perused the record and heard learned counsels for the parties, in our view, the following undisputed facts have emerged. Against the Tender dated 16.12.2009, six (6) companies had submitted their bids. These bids were submitted in three (3) separate envelopes marked "A", "B" and "C". Envelope marked "A" contained submissions qua eligibility criteria; envelope marked B contained the bidder''s submissions vis-a-vis its technical qualification; while envelope marked "C" included a bidder''s financial offer. Out of the six (6) bidders, one (1) bidder, i.e., GECI was disqualified in the first round of evaluation which pertained to eligibility criteria.

31.1 It appears that by the time the evaluation process reached the assessment of technical bids, only three (3) bidders remained in the fray, which included TAS, Eldis and Raytheon. This is evident from the fact that at the meeting held on 30.09.2010, the representatives of, the aforementioned bidders, were present.

31.2 The submission of Mr Singh that Eldis was eliminated from the race, so to speak, at the end of June, 2010, is not quite accurate; what emerges on perusal of the record is as follows:-

31.3 In and around 21.6.2010 the TEC, which was charged with the responsibility of evaluating the technical bids, short-listed only Raytheon and TAS, while excluding the others which included Eldis. The evaluation of the TEC was put up before the Member (Planning). The Member (Planning), however, after evaluating the view of the TEC, raised the following issues:

(i) whether the definition of "major airport" found in the AERA Act could be used to oust the bidders, when that definition did not get reflected in the Tender document;

(ii) whether the performance of a radar can be assessed on the basis of passenger movement in the airports; and

(iii) whether it would be advisable to seek performance assessment from an independent body or, in the alternative, a team of officer(s) ought to be deputed for an on-site study at the airport, where the offered radars are installed, for a performance evaluation.

31.4 These views were put up before the Chairman of AAI, who constituted a fresh team of two members, comprising of Mr Sundara Raman, ED (CNS-P and Mr P.K. Mishra, GM (ATM), IGI Airport, to conduct an on-site study; in consonance with the power conferred on AAI in terms of clause 2.3 of Section A of the Tender. This resulted in the said team visiting the Pardubice airport in the Czech Republic, and the consequent, generation of a report dated 10.09.2010. By virtue of the said report the said team, came to a conclusion that Eldis met the technical specifications referred to in the Tender. As a matter of fact, we had sought information from AAI as to the qualification of the two member team. The information supplied to us demonstrated that the members of the team were eminently qualified to carry out the inspection at site. It may be pertinent to point out that during the course of argument before us no cavil was raised vis-a-vis the professional qualification of the team which visited the Pardubice airport for an on-site inspection; perhaps for a very wise reason since one of the persons who made the on-site inspection was Mr. Sundara Raman, Executive Director, (CNS-P) Directorate. Mr Sundara Raman was also one of the members of the PAB meeting held on 19.11.2010 on which great store has been laid by TAS.

31.5 We must note at this juncture the submission advanced by Mr Singh that there was no power or mandate conferred on the two-member team to carry out such an inspection, post an evaluation by the TEC. We are not persuaded by the said submission for the following reason. The power to carry out an on-site inspection is contained in clause 2.3 of Section A of the Tender, which reads as follows:

Bidder may be required to demonstrate/ practically verify the specific/ all features of the equipment as deemed fit by AAI, for evaluation of the bid.

31.6 The point to be noted is that the evaluation is for the benefit of the AAI. AAI for its convenience has constituted a committee; titled as TEC. The process of evaluation of technical bids is internal to the institution and, in the process of evaluation, views are often obtained from various other branches / wings of an institution. The contemporaneous discussion, on the record, shows that the rationale adopted by the TEC for ousting the two bidders including Eldis was differed with, by Member (Planning), on the ground that a criteria adopted was not defined in the Tender. This led to an on-site inspection, for a real time performance evaluation, of the radars, being offered by the said bidder, i.e., Eldis. Such an on-site inspection was well within the ambit of the provisions of the Tender. Therefore, merely because a fresh two-member team was constituted by AAI to make an on-site assessment of the radars offered by Eldis, the decision of AAI cannot be found fault with on this score.

31.7 The submission of Mr. Singh that the definition given in the AERA Act pertaining to the term "major airport" ought to have been applied in determining whether Eldis met the eligibility/ technical criteria stipulated in the Tender is, according to us, completely misconceived. The AERA Act has been enacted to regulate tariff and other charges vis-?-vis aeronautical services rendered at airports and, to monitor performance of standards of airports. The definition of the term major airport (to be noted the definition does not refer to the term major international airport as was alluded to by the complainant/TAS) provided in section 2(i) of the AERA Act could not have been imported as a part of Tender conditions in ascertaining the performance of radars offered by various bidders. The management of AAI in its wisdom adopted this course. We can hardly find fault with the course adopted in law or otherwise. It would, as has been very felicitously observed by Lord Loreburn in Macbeth & Co. Vs Chislett (1910) A.C. 220, be a "new terror" in interpretation of statutes (the same principle would apply to our minds to Tender documents) to import a definition given in one Act of the Parliament into another statute, to define terms and expression given in that statute, which are neither incorporated or referred to, without regard to the setting, context and the background in which the statutes have been enacted. This dicta has been cited with approval in CIT vs Jaswant Singh Charan Singh (1967) 2 SCR 720.

31.8 The management of AAI therefore correctly overrode the decision of TEC to apply the definition of "Major Airport" given in section 2(i) of the AERA Act to oust Eldis. Furthermore, the said decision also pre-empted, a possible challenge, by Eldis on the ground that an undefined criteria had been applied to oust it from the race. AAI, in our view, adopted a correct approach by having conducted an on-site study of the radar offered by Eldis. The record shows, that the team vide its report of 10.09.2010, gave a thumbs-up to Eldis in so far as technical specifications were concerned. That, AAI possessed such a power to order an on-site inspection, cannot be doubted, in view of the provision of clause 2.3 of Section A of the Tender.

31.9 If that be so, surely it does not lie within the domain of the court to examine the results of the evaluation carried out by a team of experts. The court by itself has no expertise in the field. There are no malafides urged qua the two experts. Thus, logically our scrutiny must end here, as regards whether or not Eldis met eligibility / technical criteria. The experts having stated so, in the affirmative; in the absence of malafides, coupled with our lack of expertise and absence of any material to the contrary; we must respect their assessment. That Eldis met the eligibility/ technical criteria is, evident from the fact that it continued to be in the fray till 19.11.2010, when it was sought to be excluded on account of purported conditions attached to its price bid.

32. What surprises us is that, even though, TAS appears to have had knowledge of the exclusion of Eldis from the fray, it chose not to take recourse to legal remedies till March, 2011. TAS, claims that it became aware of this fact only on 30.09.2011, when the representatives of Eldis were found present at the meeting fixed for opening financial bids. Assuming this to be correct, it still does not explain the delay between September, 2010 and March, 2011.

33. The fact remains that pursuant to the report dated 10.09.2010, Eldis alongwith TAS and Raytheon was cleared to the third and final stage, i.e., the stage for processing financial bids. Consequently, the representatives of the said bidders were called to the meeting fixed for 30.09.2010, convened for opening financial bids. The comparative evaluation of the price bids of Eldis, TAS and Raytheon threw up the following broad discrepancies: While Eldis had inserted in its price bid, in row 5, particulars, regarding taxes and duties; TAS had done the same in respect of components quoted in Euros. Furthermore, TAS had not

shown the correct amount of service charge, which was, evidently pegged at 10.33%, qua services quoted in Indian rupees. Similarly, Raytheon had committed a similar error in respect of services rendered in India which were quoted in CAD.

33.1 These discrepancies emerged in an internal assessment carried out on 05.10.2010. In this assessment, the contents of TAS''s representation, not only with regard to the aforementioned omission in the price bid of Eldis, but also, as regards the fact that the price bid was not sealed with wax, was also noticed. In respect of the aforesaid observations, it emerges, that Eldis had deleted row no. 5 from its price schedule, TAS had not quoted service tax for services quoted in Euros, and Raytheon, while quoting service tax, had decided not to quote service tax at the rate of 10.33% on the services rendered in India. As regards the failure of Eldis in not sealing its price bid with wax, the final observation was that the bid submitted by Eldis was sealed with a tape and the folds of the bid bore the stamp of Eldis. It was also pointed out that when the Tender was opened for the first time on 12.2.2010, when none of the representative of the bidder present including TAS raised objections with regard to the failure of Eldis in sealing its envelope marked "C" with wax. Consequently, the financial bids of all participants were put in a carton, which was, sealed with tapes and the said carton was signed by the representatives of the bidders in the presence of AAI officers. The financial bids were thus taken out of the said carton only on 30.09.2010, in the presence of the bidders" representatives, after due verification.

33.2 From the record, it emerges, that a further assessment was carried out on 18.10.2010, when it came to light that the price bid of Eldis contained certain notes. It was pointed out in this assessment that this was in violation of section 5.5.1. of Section A of the Tender and therefore the bid could be considered as non-responsive and liable for rejection. In this connection reference was also made to clauses 5.5.5, 5.5.6 and 5.5.8 of the Tender. Accordingly, the financial bid of Eldis was not taken up for comparison. This consequently left, only TAS and Raytheon in the fray. On a comparison of the two price bids, it was found that on the basis of net cost to AAI (excluding service tax) the bid of TAS in the sum of Rs 121.8834 crores, was lower than that, quoted by Raytheon. On the very same basis, Raytheon''s bid was quantified at Rs 164.0152 crores. It was also noted that, TAS''s bid was 46% lower than the estimated cost for the said Tender, which was pegged at Rs 225.50 cores. 33.3 The record shows that both the department of Finance and the department of Law differed with the view taken by the Directorate of CNS-P. They took pains to point out that there were flaws in the price bid of all three bidders, i.e., TAS, Eldis and Raytheon. As a matter of fact the department of Law was of the view that the merits and demerits of a Tender should be examined collectively and not in isolation. The opinion of the department of law veered around the position that exclusion of Eldis on this ground, was "highly technical" and would not sustain in court.

33.4 The Executive Director (in short "ED"), CNS-P, however, took the view that the missing information in row 5 of the price bid submitted by Eldis had made it difficult to evaluate the bid, coupled with the fact that there were certain notes appended to the price bid of Eldis, which made it conditional. For all these reasons, the said officer, was of the view that the bid of Eldis was non-responsive. On the other hand, the discrepancy in the bid of TAS, which included insertion of additional columns, ED (CNS-P), was not material as despite the said discrepancy it was still possible to ascertain the price quoted by TAS. Somewhat similar was the view expressed qua the bid of the Raytheon. The aforementioned view finally found approval with the PAB, in its meeting dated 19.11.2010.

33.5 It emerges from the record is that while this process was on, both TAS and Eldis, had in the meanwhile made complaints against each other. TAS, as indicated above had lodged two complaints 30.09.2010 and 7.10.2010. On the other hand, Eldis had made a complaint on 05.11.2010, followed by, a complaint dated 21.11.2010 pursuant to the decision taken by the TEC. What is noticeable from the complaint of TAS dated 30.09.2010, no issue with regard to technical qualification of Eldis was raised. The allegations were confined to the price bid, which have been noticed by us hereinabove. For the first time allegations with regard to the purported failure of Eldis in meeting eligibility/ technical criteria, stipulated in the tender was raised in the letter dated 7.10.2010, which incidentally also alluded to the allegations raised in the earlier letter dated 30.09.2010. In our view, the allegations with regard to Eldis meeting the eligibility/technical criteria had been adequately resolved internally by AAI. These allegations in the month of October, 2010 by TAS, were an after thought, which obviously has its genesis, in the information made available to TAS, by an insider; who though employed with AAI, conveniently passed on crucial commercial information to TAS.

33.6 This singular act according to us speaks volumes about the failure on the part of the officers to maintain sanctity of the institutional decision making process. We are constrained to observe this, as it is reflective of the prevalent atmosphere in the commercial world where, every fair and unfair means are employed to gather information on rivals in the trade. This is despite the fact that there are, at least, in today''s times, adequate legitimate means available to gather most, if not all, relevant information. Therefore, such dubious practice adopted by some commercial entities, deserves to be deprecated.

33.7 Coming back to the issue, the complaint of Eldis dated 05.11.2010 and 21.11.2010 formed the basis of the examination by the IEM. In accordance with the terms of the Integrity Pact, executed by the bidders, a report was generated by IEM, which found that there were flaws in the price bids of all bidders; this included TAS. Consequently, the IEM advised that the Tender be cancelled. In order to minimize delay, the IEM, recommended short term bids.

33.8 In view of the difference of opinion in the view of ED (CNS-P) and that taken by the IEM, AAI referred the matter to the CVC. The CVC refused to intervene in the matter, as did the Ministry of Civil Aviation, which resulted in a situation that AAI, had to take a decision in the matter. It is important to note that view held by ED (CNS-P) was largely reflected in the decision taken at PAB meeting of 19.11.2010.

33.9 This resulted in the meeting of PAB dated 28.02.2011. Significantly, the members of this PAB, except two members out of the six, who were part of the previous PAB of 19.11.2010, were the same. The two members, who were not part of PAB of 28.02.2011, were those belonging to Finance and Law Departments, both of which had expressed their view against exclusion of Eldis. At this meeting after due deliberation, a decision was taken to call for "snap bids" taking into account various factors, including the ambiguity in the Tender with regard to inclusion of source code. We may emphasise that Mr Sundara Raman was a member of this PAB meeting as well. At this meeting, a decision was taken to invite snap bids from the three (3) technically qualified bidders. It is pertinent to note that the PAB took this opportunity to caution the TEC in future evaluation of technical bids.

33.10 In effect the decision taken at PAB meeting of 19.11.2010 was reviewed by PAB in their subsequent meeting of 28.02.2011. The question is: was there material available on record for review? A perusal of the minutes of the meeting of PAB of 28.02.2011, would show that they had, apart from anything else, the benefit of the IEM report of 07.12.2010. The fact that the department of Finance and Law were not ad-idem with ED(CNS-P) is also apparent from a perusal of the record, as noticed by us hereinabove.

34. The argument advanced by Mr Singh touching upon the meeting held on 23.11.2010 between the representatives of TAS and AAI, and the consequent reduction in price offered by TAS, are of no relevance for the following reasons: Firstly, the assertion of TAS that a representation had been made on behalf of AAI to issue a LOA in its favour is stoutly denied by AAI. There is nothing on record to establish otherwise. Secondly, an internal decision taken at the meeting of PAB held on 19.11.2010 would not be enforceable unless it had the institutional approval and was formally communicated to the concerned parties; in this case TAS. Therefore, the offer of TAS to reduce its price was a unilateral act which did not give rise to any binding legal relationship.

35. Thus, having perused the record and considered the views and counter-views expressed institutionally, by various department of the AAI, we are not persuaded to hold that the decision taken at the meeting of the PAB, on 28.02.2011, was arrived at for an oblique motive, or was violative of any provision(s) of the Tender. Amongst other aspects, PAB had at its meeting of 28.02.2011, attached criticality to an express inclusion of the source code in the price bid. Before that, IEM in its report dated 07.12.2010 had highlighted, amongst others, this aspect of the matter. In this context, the argument of Mr Singh that the source code being a critical element of the software modules to be supplied, was impliedly included in the price offered by various bidders, does not

impress us. The fact that it is critical would have us believe, that the terms of the Tender qua the price bids should expressly refer to the same. A critical component of the financial bid cannot be assumed to be included on the basis of assumptions as, this could lead to disruption in the execution of the Tender, at some later stage. For the aforesaid reasons, we do not find any merit in the submissions made on behalf of the TAS that decision made at the meeting of the PAB held on 28.02.2011, was flawed. Therefore, the decision to call for snap bids as against cancellation of the Tender, can also not be found fault with in view of the urgency expressed in both meetings of the PAB. The petitioner before us also, did not make any submission on these lines. Therefore, the necessary corollary of this would be that the impugned letter dated 04.03.2011 would have to be sustained. We hold accordingly.

36. For the foregoing reasons the writ petition is according to us, devoid of merits and hence, deserves to be dismissed. It is ordered accordingly.

37. The record shows that there have been six (6) effective hearings in the matter. The petitioner having failed; therefore, as a natural consequence of the result, ought to bear a portion of the cost. The respondents have engaged senior counsel as well as instructing counsels in the matter. Accordingly, we quantify the cost at Rs 3,00,000/-. The petitioner will pay a sum of Rs 20,000/- to UOI; while the balance sum will be paid in equal proportion to AAI, Eldis and Raytheon. The said costs shall be paid within two weeks.