

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ W.P. (C) No.6730/2019, CM No.28291/2019 & CM
No.28290/2019

Judgment reserved on: 14.06.2019
Date of decision :14.06.2019

Reliance Jio Infocomm Ltd. Petitioner
Through: Mr. Ritin Raj, Sr. Adv. with
Mr. K.R. Sasiprabhu, Mr.
Aabhash Kshetrapal, Mr.
Tushar Bhardwaj, Advs.
versus
Punjab and Sind Bank Respondent
Through: Ms. Suruchii Aggarwal, Mr.
Suhaan Mukerji, Ms. Astha
Sharma, Mr. Ravinder Singh,
Ms. Kajal Dalal, Advs.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA
HON'BLE MR. JUSTICE TALWANT SINGH

JUDGMENT

ANU MALHOTRA, J.

CM No.28291/2019 (Exemption)

Exemption allowed, subject to just exceptions.

W.P. (C) No.6730/2019 & CM No.28290/2019

1. The petitioner vide the present petition has prayed for a declaration that paragraphs 5.2, 5.3, 5.8 & 5.9 of the Request for Proposal dated 09.04.2019 as issued by the respondent/ the Punjab and Sind Bank i.e. the Request for Proposal for selection of the Bandwidth Service Provider for providing data connectivity & network hardware at data centre & officers and management of network operation center

of the respondent were arbitrary, unconstitutional and violative of the rights of the petitioner under Articles 14, 19(1)(g) and 21 of the Constitution and also prayed that the respondent be directed to refrain from giving effect to paragraphs 5.2, 5.3, 5.8 & 5.9 of the Request for the said Proposal dated 09.04.2019.

2. CM APPL. 28290/2019 was filed by the petitioner seeking the grant of an ex-parte interim restraint against the respondent from acting in terms of or taking any steps pursuant to the said Request for Proposal dated 09.04.2019.

3. It has been submitted on behalf of the respondent that in terms of the directions of this Court dated 07.06.2019, the Board of the respondent has considered the contentions raised by the petitioner in the present petition and vide the comparison charts A & B that were submitted by the petitioner with respect to the impugned eligibility criteria fixed by the respondent and the corresponding eligibility fixed by the Corporation Bank, Bank of India, Software Technology Parks of India, Faridabad Smart City Limited & Airports Authority of India which were taken as a representation and in terms of the order dated 07.06.2019 of this Court, a reasoned decision in relation thereto has been taken by the respondent and the counter affidavit along with the decision of the Board of the respondent has since been placed on the record of the Court.

4. During the course of submissions that were made today, it was submitted by the learned Senior Counsel for the petitioner that the challenge to Paragraphs 5.8 & 5.9 of the Request for Proposal dated 09.04.2019 is now withdrawn. Paragraphs 5.2 & 5.3 of the Request for

Proposal put forth by the respondent for selection of the bandwidth service provider for providing data connectivity and network hardware at data centre & officers and management of network operation center read to the effect:

“5. Eligibility Criteria

	<i>Eligibility Criteria</i>	<i>Supporting Documents</i>
<i>2</i>	<i>Must have been in existence in business of MPLS services/ VPN services for a minimum period of 5 years in India (As on RFP date)</i>	<i>Certificate of Incorporation and A Purchase order of at least 100 locations of MPLS/VPN services.</i>
<i>3</i>	<i>Bidder should have minimum annual turnover of Rs.300 crore or above each from Indian business functions for the last three financial years (FY 2015-16, FY 2016-17 and FY 2017-18). In case of merger or acquisition, financials of merged or acquired companies may be considered in case of new companies.</i>	<i>Audited Balance Sheet and Profit and Loss Account Statement for last three years and CA certificate.</i>

5. It has been submitted on behalf of the petitioner that the said eligibility criteria prescribed in the Request for Proposal put forth by

the respondent is arbitrary and intentionally malafide and exclusionary to benefit only a few players in the market to the disadvantage of the petitioner at the cost of public interest. It has been submitted by the petitioner that it is one of the major stake holders in the market as being a service provider for providing data connectivity and network hardware and merely because it has not been in the business of MPLS/VPN service for a minimum period of five years as on the date of the Request for Proposal dated 09.04.2019, it cannot be excluded from participation in the said tender for selection of the bandwidth service provider as sought by the respondent in as much as the respondent thereby seeks to resort to obsolete technology. It has been submitted by the petitioner that the petitioner has provided the same and similar services to other organization, State Departments, entities, banks and is demonstrably eligible for participating in the RFP and that the petitioner is currently one of the largest telecom service providers in the country in terms of subscriber base and has the widest network in terms of infrastructure.

6. The petitioner further submits that it operates the largest data network in the country and carried more mobile data than all American operators put together and that it as a Pan India fibre network, which is the densest, most reliable and capable of carrying multiple times current data traffic of all operators in the country and that the petitioner has the deepest intracity presence in India across 1600 towns with near ubiquitous coverage compared to the patchy, sporadic fibre network of legacy operators.

7. The petitioner has further submitted that it deploys the latest 4G voice technology which has resulted into a steep increase in the consumption of data services and sharp fall in the cost of data and that the petitioner in a short span of time has achieved much more than the networks that have been in existence for more than five years and that there is no ground to exclude the petitioner from the tender. The said contentions have been raised by the petitioner in relation to the eligibility criteria in 5.2 of the Request for Proposal.

8. As regards the eligibility criteria in para 5.3, It has been submitted by the petitioner to the effect:

“The Petitioner started its revenue realization only from 2017-18, and its turnover was Rs.20,158 crores in FY 17-18 and Rs.38,838 crores in FY 18-19 which clearly demonstrates the financial strength and stability of the Petitioner. The eligibility criteria does not even account for, or require, the turnover in FY 2018-19 which is the most recent financial year. The object of an annual turnover condition is not to disadvantage or exclude a bidder that is technically superior and indisputably has the financial wherewithal to execute the present Tender.”

9. The petitioner has further submitted through its charts A & B submitted on record as put forth to the effect that no similar requirements as sought through paragraphs 5.2, 5.3 in the RFP were sought by the Corporation Bank, Bank of India, Software Technology Parks of India, Faridabad Smart City Limited & Airports Authority of India in relation to their tenders on 12.04.2019, 21.02.2019, 16.01.2019, 13.12.2018 & 05.11.2018 and that the requirements in relation thereto were to the effect:

Paragraph No.	SIMILAR TENDERS	CORPORATION BANK (12.04.2019) (p.298/V2)	BANK OF INDIA (21.2.2019) (p.409/V3)	SOFTWARE TECHNOLOGY PARKS OF INDIA (16.1.2019) (p.499/V3_	FARIDABAD SMART CITY LIMITED (31.12.2018) (p.626/ V4)	AIRPORT AUTHORITY OF INDIA (WON) (5.11.2018) (p.751/V5)
	ELIGIBILITY CRITERIA (p. 31/VI)					
5.2	Must have been in existence in business of MPLS services / VTN services for a minimum period of 5 years in India (As on RFP date)" (p.31@p. 44/VI) [MPLS = Multiprotocol Label Switching; and VPN = Virtual Private Networks]	No similar requirement existed and all the tender required was that the bidder "should be a leading Telecommunication / Network Services / Company with MPLS /VPN/ 3G / 4G as its main business" (S. No. 1 / p. 298@ p. 311 / V2)	No similar requirement Existed and all the tender required was that the bidder have its "presence in India for more than 5 years", and be "registered in India" (S. No. 5 / p.;409 @p.464 /V3)	No similar requirement existed {See generally p. 499 @p. 502/ V3)	The eligibility criteria was Changed pursuant to RJIL's representation and the requirement of being "operational in the last 5 years was deleted (Original Criteria: S. No. 7 / p. 626 @p. 651 r/w Revised Criteria; S. No. 4 / 746	No similar requirement Existed {See generally S. No, 3.2/p. 751@ p. 761/ V5)

					@p. 747/V4)	
5.3	“Bidder should have minimum annual turnover of Rs. 300 crore or above each from Indian business functions for the last three financial years (FY 2015-16, FY, 2016-17 and FY 2017-18). In case of merger or acquisition, financials of merged or acquired companies may be considered in case of new	The minimum turnover requirement was changed from FYs 16-17 & 17-18 to the average turnover for the last 2 FYs, i.e., 17-18 & 18-19 of INR 20 Crores (Original Criteria: S. No. 3 / p. 298 @ p. 311 r/w Revised Criteria: S. No. 3 / 397@ p. 403 / V2)	No similar requirement existed and all the tender required was that the bidder should be "making Net Profit / positive Net Worth for the last 3 Balance Sheets, i.e., 2015-2016, 2016-2017 and 2017-2018" (S. No. 10 / p. 409 @p. 464 / V3)	The minimum turnover requirement was changed from minimum individual turnover for FYs 16-17 & 17-18 to minimum Average turnover FYs 16- 17 & 17-18 of INR 50 Crores (Original Criteria: S. No. 3.37 p. ,499 @ P-502 r/w Revised Criteria; S. No. 3.3 / 565 @ p. 567/Y3)-	The minimum turnover requirement was hanged from minimum individual, turnover for FYs 15-16, 16-17 & 17-18 to minimum average turnover for FYs 15-16, 16-17-&. 17-18 of INR 200 Crores (Original Criteria; S. No. 2 / p. 626 p. 650 r/w Revised Criteria; S. No. 1 / 746 @ p. 746/V4)	The tender required that the bidder should have "should have annualized average financial turnover of at least Rs. 11,13,96,50 3" or equivalent during last 3 years. (S. No. 3.2.7 / p. 751 @p. 761 / V5)

	companies (p. 31 @ p. 44 / VI)					
5.8	Bidder must have Primary & Secondary Network Operation Centre that is operational for the last 2 years. The NOC facilities should be ISO 9001 (must) and should be either ISO 20000 or ISO 27001 Certified" (p.31@p. 44 / VI)	No similar requirement existed {See generally p. 298 @p. 311 / V2)	No similar requirement existed and all the tender required was that the bidder should have "valid certification s (ISO 9001:2008 or ISO 27001 / BS 7799 and TL 9000" (S. No. 14 / p. 409 @ p. 465, /V3)	No similar requirement existed and all the tender required was that the bidder should have "valid quality certifications like ISO 9001 / ISO 27000" (S.No. 3.9 / p. 499 @p. 503 /V3)	No similar requirement existed {See generally p. 626 @p. 650 / V4)	No similar requirement existed {See generally S. No. 3.2/p. 751@p. 761/ V5)
5.9	Bidder must have implemented and managing	The minimum requirement of commissioning "2000 MPLS, links" in any"	The minimum requirement of commission	No similar requirement existed {See generally p. 499 @p. 502	No similar requirement existed {See generally p.	No similar requirement existed (See generally S. No.3.2/p.

at least 2500 managed MPLS links out of which at least 1000 link should be for 1 Scheduled Commercial Bank in India" (p. 31@ p. 45 / VI)	PSU/ Bank / Financial Institution" was revised to "1000 MPLS links" in any "PSU / Bank / Financial Institution/ Govt. Organisation / Information Technology Services Organisation" (Original Criteria: S. No. S / p. 298 @ p. 312 r/w Revised Criteria: S. No. 8 / 397@ p. 404 / V2)	ing "2000 MPLS VPN Layer 3 link[s]" in any "single banking and Financial Services Institution / Organisation" was revised to "2000 MPLS VPN Layer 3 link[s]" in any "single banking and Financial Services institution / Organisation / Fortune 500 Company" (Original Criteria: S. No. 11 / p. 409@p 464 r/w Revised Criteria: S. No. 11 /	/ V3)	626 @p. 650 / V4)	751@p. 761/ V5)
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			498 p. 498 / V3)			
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10. As regards para 5.2, it was also submitted by the petitioner that the eligibility criteria in para 5.2 in the RFP excludes all new entrants in the market notwithstanding the expertise, efficiency and new technology without any rational reason. As regards para 5.3, the petitioner submits that the said eligibility criteria does not even take into account the turnover of the FY 2018-19.

11. Through the counter affidavit of the Chief Manager (IT) of the respondent, it is submitted that the gist of the RFP is as below:

“i. Supply and implement bandwidth link; around 3300 spread across geographies of India which includes branches (1500+), other offices, offsite ATM locations, third party links like ATM Switch, UPI, NPCI, RBI and Data Centre, Disaster Recovery, Near DC locations.

ii. Supply, implement and management of Network equipment(s), related software(s) at the PAN India locations.

iii. NOC Management and Facility Management for all scope items.

iv. The Tenure of the project is 5 years which is extendable further for 2 years.

e) The RFP was designed to ensure dual links through a Bandwidth Service Provider who is eminent and has experience in a Scheduled Commercial Bank in India and capable of handling issues which are prominent in Banking Industry.

f) Moreover, looking at the criticality of the nature of business of Respondent Bank, the objective was to ensure single point of accountability to overcome issues caused due to failure of single link causing not just operational

hazards but also reputational loss and customer inconvenience.

g) The Network & Bandwidth tender was drafted by A Consultant M/s KPMG in consultation with the IT Department officials of Respondent Bank and independent IT advisors i.e. Mr. Huzur Saran, and Mr. Naresh Kalra, Professors from IIT Delhi. The clauses are made in line with market trend and neutrality. It was ensured that there is no bias. The same is reflected in the fact that large number of prospective bidders attended Prebid meetings and did not raise any objection to tender clauses (except relaxations sought by RJIL Petitioner)."

12. *Inter alia* the respondent has submitted that pursuant to directions of the Court dated 07.06.2019, the Board of the respondent Bank has considered the contention of the petitioner in the Writ Petition and in the comparison charts as a representation and the Board Resolution was passed to the effect:

"Approval be and is hereby accorded to decline the relaxation in certain eligibility clauses sought by M/s Reliance Jio Infocomm Ltd. (RJIL) as proposed in the note and to file the counter affidavit in the Hon'ble Delhi High Court accordingly."

13. The respondent has further submitted through its counter affidavit to the effect:

"10. That the reasoning in the Board Note as approved by the Board of the Respondent is as follows:-

a) Petitioner's comparison of RFP of Respondent Bank with RFPs of others having unmatched scope is illogical and cannot be justified. Petitioner has submitted the reference of the following RFPs as a part of Writ Petition before this Hon'ble Court:-

- 1. Bank of India*
- 2. Corporation Bank*

3. Software Technology Parks of India
4. Faridabad Smart City Limited
5. Airports Authority of India

b) It is pertinent to mention at the outset that Software Technology Parks of India, Faridabad Smart City Limited and Airports Authority of India(as referred in the petition) are Non-Banking entities. The requirements of Banking entities like Respondent Bank is entirely different from Nonbanking entities and comparing the Eligibility requirements of such tenders with the current tender is not justified.

c) Some of the key differences are –

i) Core Transactional and non-transactional banking from Branch banking is to have an un-interrupted network for business hours (8X5 or 8X6 according to designated Saturday). Most of the bank branches are in remote places and require previous experience of providing network in those far flung areas. The locations are spread across varied geographical locations such as Metro, Urban, Semi-urban, Rural, across the length & breadth of the country and in no way can be compared with providing network for Smart city. Airport Authority and STPI.

ii) Banking operations are versatile and deal with public money and need to be available 24X7 through various channels.

iii) The petitioner has asked for Eligibility dilution for four of the Eligibility Criterion and such a dilution would defeat the purpose of having a Competent and Experienced Organization providing the services.

iv) The Eligibility criteria are incorporated after considering the Organization and requirement complexity and to ensure that competent and experienced organizations compete in a competitive environment.

11. It is pertinent to mention that there are some key differences between RFPs of Corporation Bank and Bank of India RFP (as referred in the petition) with that of RFP of Respondent Bank. The core difference is that the P&SB

(Respondent Bank's) RFP is inviting offers for MPLS network from two separate service providers and the networks should be completely independent from one another. The differences are listed below:-

Sr. No.	Scope line items	Punjab &Sind Bank RFP	Bank of India RFP	Corporation Bank RPF
1	Supply, Implementation & maintenance of Primary Link at Branches & other offices	Bidder is required to provide primary Link from either themselves or through another service provider on 85% wired connectivity	Already Available with Bank from BSNL & MTNL and not in scope of the bidder in the said RFP	Already Available with bank from BSNL & MTNL and not in scope of the bidder in the said RFP
2	Supply, Implementation & maintenance of Primary Link at Branch Routers & Switches	To be provided by the bidder	Not in Scope of the bidder. Only configuration of router/switch for enabling secondary link	Not in scope of the bidder. Only configuration of router/switch for enabling secondary link.
3	Supply, Implementation & Maintenance of Data Centre & Disaster Recovery Site's WAN & LAN Networking hardware &	To be provided by the bidder	Not in scope of the bidder	Not in scope of the bidder

	Software			
4	Facility Management for Data Centre & DR Site networking Hardware & Software	To be provided by the bidder	Not in scope of the bidder	Not in scope of the bidder.

12. That therefore, it is clear that the Respondent Bank is seeking to hire a Single Service Provider who will be responsible for end to end connectivity & networks for the bank including the following:

- *Redundant links at Bank's branches & offices (one link from the bidder & one link through another service provider),*
- *Backhaul Links*
- *Replication Links between DC, DR, Near Site*
- *Branch routers and switches*
- *Data Center (DC) & Disaster Recovery (DR) Networking equipment and software*
- *Facility Management Support at DC, DR for Network equipment & software*
- *NOC Services for Links.”*

14. The respondent has thus submitted that the scope of the RFP of the respondent is vast and more critical than the scope of the Bank of India and Corporation Bank RFPs. *Inter alia* the respondent has submitted to the effect:

“14. That any downtime in critical DC/DR networking equipment may lead to non-availability of its Banking services to its customers & branches, even though the banking applications may be up and running in the DC/DR site.

15. That Public Sector Banks these days are facing tremendous competition from New Age Banks & Private Banks and customers have enhanced expectations and as such Respondent Bank has undertaken this Networks Transformation Project to have redundant links in branches and is looking for experienced service providers with banking experience in scheduled commercial banks to undertake this project. Respondent Bank has also taken into consideration Eligibility Criteria of a few PSU banks published RFPs while drafting the Eligibility Criteria of our RFP.

16. Hence, with reference to the above precedents, experience in similar critical nature of banking were asked for as part of the eligibility criteria business and wide suite of applications, the credentials.

17. Regarding requirement of ISO Certification of NOC (Network Operation Centre) an expert opinion has been obtained from an IIT Delhi Professor in computer services.

18. That pursuant to the order dated 7.6.2019 passed by this Hon'ble Court, w.r.t the Network Tender, the IT department officials met with Bank's IT Advisor: IIT Professor (Sh. Huzur Saran) on 08.06.2019 and the matter was deliberated in detail.

19. The summary of meeting is as below:
The eligibility criteria with respect to ISO certification of NOC and experience of 1000 branches in any Scheduled Commercial Bank are of technical nature and the IT advisor opined that the same is very much essential keeping in view Bank's secured financial transactions which flow through MPLS network and Bank has placed only minimum security requirements which shall be met and all other prospective bidders have no issue regarding the same. As RJIL (Petitioner) is such a big organization,

such minimum-security hygiene must be maintained and easily acquired by RJIL(Petitioner).

20. That M/s KPMG(IT Consultant of the Respondent) is . also of the opinion that all eligibility criterion are neutral and in line with market trends to allow maximum participants with reasonable experience in the desired field.

21. It is thus represented that the all eligibility criterion are neutral for all prospective bidders and in line with market trends to allow maximum participants with reasonable experience in the desired field. The department has kept in mind CVC guidelines and the RFP is in conformity with the same.”

15. The respondent has also submitted its justification for inclusion for eligibility clauses 5.2 and 5.3 in the RFP and has also put forth the precedent of banking and financial institutions of similar shape and size for similar experience of five years.

16. In support of its contentions, reliance was placed on behalf of the petitioner on the verdict of this Court in ***Dhingra Construction Co. Vs. Municipal Corporation of Delhi & Ors. 2004 SCC Online Del 1096*** to contend that arbitral eligibility conditions had been put forth by the respondent. Reliance was also placed on behalf of the petitioner on the verdict of the Hon’ble Supreme Court in ***Tata Cellular Vs. Union of India (1994) 6 SCC 651*** with specific reference to para 94 of the said verdict which reads to the effect:

“94. The principles deducible from the above are:

(1) The modem trend points to judicial restraint in administrative action.

(2) *The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*

(3) *The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*

(4) *The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.*

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) *The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.*

(6) *Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”*

17. On behalf of the petitioner reliance was also placed on the verdict of this Court in ***Allied Integrated Society (Regd.) and Ors. Vs. The State (NCT of Delhi) 2018 SCC Online Del 9472*** and on the verdict of this Court in ***Gharda Chemicals Limited Vs. Central Warehousing Corporation 2005 (80) DRJ 542 (DB)*** with specific reference to para 6 of the said verdict which reads to the effect:

“6. The petitioner is aggrieved by the following eligibility criteria, as contained in the NIT:

"Tenders for Chemical will be accepted only from the licensed technical-grade manufacturers, who are actually manufacturing technical formulation and must be having experience of at least 3 years manufacturing of ISI marked Chemical. Proof of the same must be enclosed with the tender. The parties shall offer the material strictly conforming in the specifications, terms and conditions of the tender enquiry. The tender not conforming strictly to specifications, other terms and conditions of the tender enquiry and incomplete/conditional tender will summarily be rejected as invalid. Further in order to assess manufacturing facilities available with the tenderers, the inspection facilities may be required and to be arranged by the party at the discretion of the Corporation...."

18. On behalf of the respondent reliance was placed on the verdict of the Hon'ble High Court of Madras in ***Polaris Financial Technology Limited Vs. Corporation Bank***, a verdict dated 27.06.2013 in Writ Petition No.2869/2013 with specific reference to para 20 thereof which reads to the effect:

"20.The following decisions have been relied on by the learned counsel for the petitioner in support of his contentions:

1.In 2004 (4) SCC 19 (Directorate of Education and others vs. Educomp Datamatics Limited and others), the Hon'ble Supreme Court has held as follows:

"9. It is well settled now that the courts can scrutinise the award of the contracts by the government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular vs. Union

of India. After examining the entire case law the following principles have been deduced (SCC pp 687-88, para 94).

"94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.*
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi- administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.*
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. [Emphasis supplied]....., "*

19. Reliance was also placed on behalf of the respondent on the verdict of ***Jagdish Mandal Vs. State of Orissa and Ors. (2007) 14 SCC 517*** with specific reference to para 22 thereof, which reads to the effect:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the

decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) *Whether public interest is affected.*

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

20. Taking into account the factum that the respondent is an instrumentality of the State, it has been considered appropriate to take up the petition for consideration and it is taken up for consideration.

21. Taking the totality of the contentions that have been put forth on behalf the either side and the averments put forth on behalf of the respondent and the reasoned decision of the Board of the respondent pursuant to the order dated 07.06.2019 of this Court, there is nothing on the record to bring forth that the terms of para 5.2 & 5.3 of the RFP dated 09.04.2019 of the respondent can in any manner be termed to be arbitrary or mala fide or deliberately exclusionary of any person and rather the reasons set forth in the short counter affidavit of the respondent, which have been delineated hereinabove, explain the reasons that the respondent has chosen experience of a period of five years and the essential necessity of a turnover of the three financial years of 2015-16, 2016-17 and 2017-18 of being of more than Rs.300

crores from the Indian business functions for the apparent maintenance of credibility and confidentiality of the service provider.

22. In view thereof, there is no merit whatsoever in the prayer made by the petitioner through the petition nor through the interim application.

23. The petition and the accompanying application are declined.

24. Copy of the order be given Dasti under the signatures of the Court Master, as prayed.

JUNE 14th 2019/vm

**ANU MALHOTRA, J
(VACATION JUDGE)**

**TALWANT SINGH, J
(VACATION JUDGE)**