

## **Issues in evaluation of bids for Delhi and Mumbai airports**

*- Comments of Gajendra Haldea, Planning Commission*

### **Background**

There have been several media reports on different aspects of the bid evaluation for award of long-term concessions for Delhi and Mumbai airports. Several issues and concerns are being widely debated and the bid evaluation process has acquired a great deal of visibility. Besides dealing with substantive issues, public perception would also need to be addressed.

### **Mandate for Evaluation of Technical Bids**

2. In the last meeting of the EGOM held on December 5, 2005, the Finance Minister had rightly raised the issue regarding the nature and extent of mandate for evaluation of technical bids. From the process point of view, this is an important issue that would determine the responsibility and accountability for bid evaluation. Independent of the substantive issues, this aspect has been examined and the following comments are submitted.

3. The RFP document approved by the EGOM (paragraph 5.1) refers to the approach to be applied by AAI and its advisers (emphasis added) when evaluating offers. If this is to be interpreted strictly, the responsibility and mandate for evaluation lies with the AAI. In any case, the primary responsibility for bid evaluation must rest with AAI since the airports are vested in AAI under the AAI Act and the lease is also to be granted by AAI under the provisions of section 12 A, *albeit* with prior permission of the Government under section 21. This position is consistent with the bidding process which has been undertaken in the name of AAI, and not the Central Government. Moreover, there is no precedent where bid evaluation or approval for a contract/ concession to be awarded by a Central Public Sector Undertaking (CPSU) or statutory body was considered by the Central Government without any recommendation of the concerned entity.

4. In view of the above, evaluation should be done by AAI (with the assistance of experts, if necessary) and its report should be considered and approved by the IMG/ EGOM. This would also enable AAI to discharge its statutory functions. The Government has the power to issue directions under section 40 of the Act and this power can be exercised for withdrawing bid

evaluation and award from AAI, but such an extraordinary step is not being contemplated.

5. It is also relevant to note here that the Terms of Reference (ToR) and Scope of Work of the legal consultants and the technical consultants (as approved by IMG/ EGOM) do not include evaluation. The ToR of the Financial Consultant does include evaluation but this can only mean provision of advisory/ consulting assistance to AAI, as distinct from the role of an evaluator. As the very nature of its assignment suggests, ABN Amro is meant to be *consulted* in its capacity as consultant; it is not a decision-maker and the role or responsibility of the government/ AAI cannot be delegated to it.

6. In view of the above, it is evident that (a) the responsibility and mandate for evaluation rests squarely with AAI; (b) there are no precedents in the government where bid evaluation has been withdrawn from the concerned CPSU/ statutory authority; and (c) there are no precedents in the government where bid evaluation has been outsourced to consultants. As such, bid evaluation in the present case should be undertaken by AAI, as specified in the RFP.

### **Conflict of Interest**

7. An advertisement issued recently by ABN Amro indicated that it had six large clients in India. Two of them happen to be bidders for Delhi and Mumbai airports, and they have also turned out to be the only bidders selected by ABN Amro, the consultant. One of the bidders has lodged a formal complaint alleging that the successful bidders are clients of M/s. ABN Amro and M/s. Amarchand Mangaldas (Legal Consultant). Based on the above, a note on conflict of interest was circulated for consideration of the IMG (copy enclosed at Annex-I).

8. Given the aforesaid conflict of interest, some aspects of bid evaluation were examined with a view to assessing whether an element of bias existed. In particular, the offer of Bidder E was selected for closer scrutiny as it had crossed the threshold only by a few decimal points. Some of the findings are briefly noted below.

### **Evaluation for absorption of AAI employees**

9. Key features of the Transaction are stated at pages 2-4 of the RFP document. It highlights only one element that would qualify for additional weightage in evaluation, viz. absorption of more than 40% of AAI employees in

the proposed JVC. It also states that any shortfall in the commitment made by the bidder would attract financial penalties. This indicates the importance attached by GoI/ AAI to the absorption of AAI employees in the JVC. Besides promoting employee welfare, a higher level of absorption will reduce the financial burden on AAI correspondingly.

10. On page 6 of the RFP document, two key strategic objectives have been stated viz. world class development and world class management. In addition, seven other Transaction objectives have been stated. One of these objectives is “fair and equitable treatment of AAI employees, including preservation of accrued entitlements”. It is further stated that these objectives “will provide the means of establishing the bid evaluation criteria”.

11. The importance of this parameter is further reinforced by the provision that in the event two or more bidders make the same offers and also have an equal equity holding of the Airport Operator, the bidder who offers to absorb a higher percentage of AAI employees would be given preference (see p. 22 of the RFP document).

12. The above indicates the high priority attached to absorption of AAI employees by the JVC. On the other hand, the consultants seem to have adopted a somewhat contrary approach as would be evident from the following.

13. The maximum marks for parameter “3.1 – HR Approach” have been fixed at 12.5. Under this parameter, two factors have been stated viz.

“3.1.1 Approach to and level of commitment to the Integration of AAI airport employees into the JVC”, and

“3.1.2 Proportion of AAI staff targeted for integration into the JVC by year 3”.

14. Despite the priority attached to absorption of AAI employees, the Consultants have allocated 9.4 marks to factor 3.1.1 while assigning only 3.1 marks to factor 3.1.2. For all other parameters, marks have been divided equally among all factors. This is the sole case of unequal distribution in the entire evaluation matrix. It may be noted that the evaluation framework specified in the Request for Proposals (RFP) consists of two heads and seven parameters which are further divided into 59 factors. The maximum marks for each of the two

heads as well as the seven parameters have been specified in the RFP but no marks have been specified for individual factors under each parameter. However, the Consultants have chosen to divide the marks for each parameter equally among the factors, but an exception has been made for the two factors relating to HR Approach where marks have been split in the ratio of 3:1 instead of 1:1. This deviation is material because it has enabled Bidder E to qualify.

15. It may be noted that factor 3.1.1 inevitably involves a subjective evaluation while factor 3.1.2 enables an objective assessment based on quantitative responses. Moving the weightage significantly away from an objective parameter, which has been emphasised in the key features, is open to question.

16. The manner in which Bidder E has been given 8.44 marks (90%) out of 9.4 through a subjective determination under parameter 3.1.1, coupled with the shifting of weightage from parameter 3.1.2 to parameter 3.1.1, suggests that the approach adopted by the consultants is not just and fair, particularly because it does not conform to the RFP which assigns a significant weightage to absorption of AAI employees by the JVC.

17. Even if it were assumed that the percentage of marks awarded by the consultants remained the same, an equal distribution of marks between factors 3.1.1 and 3.1.2 (i.e. 6.25 marks for each factor) would have reduced the total marks given to Bidder E from 80.2 to 79.6, which would disqualify Bidder E.

18. Moreover, the impact of reduced marks for factor 3.1.2 has been further accentuated by awarding 50% marks for meeting the minimum prescribed criteria of absorbing 40% of the AAI employees. Logically, no marks should be given for meeting the minimum prescribed requirement since the alternative is disqualification. However, every bidder who has fulfilled the prescribed minimum has secured 1.55 marks out of 3.1. The balance left is only 1.55 marks and this is the total weightage that a bidder would get if he were to absorb 100% of the AAI employees. Thus the sole bidding criterion highlighted in the key features and having a material effect on employee welfare as well as AAI finances has been reduced to 1.55 marks out of 100, which seems contrary to the intent of AAI/ GoI, as reflected in the RFP document. This would also seem anomalous considering that a bidder who meets the mandatory requirement of

40% would get 1.55 marks while another bidder who offers an additional 60% would only get an extra 1.55 marks.

19. By following the above approach, Bidder E, who has offered to absorb 60% of the AAI employees, has secured 2.19 marks (1.55 for 40% and 0.64 for the additional 20%) while bidder C who has offered to absorb 95.4% of the employees got 2.97 marks (1.55 for 40% and 1.42 for additional 55.4%). As such, a bidder who has offered to absorb 139% above the mandatory number gets 0.78 marks more than a bidder who exceeds this number by 50%.

20. In view of the above, Bidder C could legitimately argue that given the importance attached to absorption of AAI employees, it was his legitimate expectation that offering to absorb a higher proportion would earn him a substantially higher score. If there were any indication that exceeding the minimum by 139% would only fetch an additional 1.4 marks out of 100, he might not have offered to absorb such a high number that would imply a great deal of additional financial burden for the bidders, including penalties for failure to comply.

### **Experience of Airport Operator**

21. In view of the key objective of creating world-class airports at Delhi and Mumbai, the experience of the Airport Operator has been given significant importance in the RFP documents. Out of 100 marks kept for 'management capability, commitment and value add', 25 marks have been earmarked for 'Experience of the nominated Airport Operator'. Nine factors have been mentioned under this head.

22. It could be argued that these nine factors are not necessarily equal in importance. For example, the factor relating to "service quality performance" or "track record in route and traffic development" would seem far more important compared to "experience, if any, with operating a multi airport system". As such, marks should have been awarded on the basis of overall experience of the Airport Operator rather than relying on a mechanical division of marks among the nine factors. A plain reading of the RFP suggests that marks should have been awarded against the parameter as a whole and while making an evaluation, the factors listed under the parameter should have been borne in mind. Strictly speaking, allocation of equal marks for each individual factor went beyond the RFP and is open to question.

23. The above approach seems to have thrown up somewhat surprising outcomes. The marks given by the Consultants compare with world rankings as follows:

<b>Airport Operator</b>	<b>Marks Awarded</b>	<b>Skytrax World Rank 2005</b>
Frankfurt	22.5	42
Mexico	19.7	119
Paris	19.7	95
Johannesburg	17.1	39
Munich	16.7	4
Istanbul Ataturk	6.7	46

24. The above indicates that Mexico airport (Rank 119) has scored 3 marks above Munich (Rank 4) and 2.6 marks above Johannesburg (Rank 39). Similarly, Mexico has scored 13 marks more than Istanbul (Rank 46). The above marking seems subjective and based on the judgement of AAI's consultants as compared to world rankings which are based on widely accepted industry standards. It may be noted that Mumbai ranked 120 in 2004. (There are two other ratings viz. AETRA and JD Power but their results are not readily available.)

25. Another example of arbitrary evaluation relates to "The performance of commercial operations at major airports managed by the Airport Operator, covering retail, property and other commercial operations, focusing on airports where non-aeronautical revenue is 40% or more of total revenue". The words to be noted here are "40% or more" which implies that 40% is the cut-off level for giving weightage/ marks for this factor. Though Mexico's non-aeronautical revenue is only 37%, yet the consultants have awarded 75% marks to Mexico on this account.

26. Yet another example of arbitrary evaluation relates to the factor "Experience in operating and developing airports in non-OECD countries and a track record in improved performance". The consultants have awarded 80% marks to Mexico airport even though Mexico is a OECD country.

### **Arbitrary Treatment of Property and Infrastructure Experience**

27. The Consultants have clubbed "1.2.2 Experience with major property development" and "1.2.3 Experience with major infrastructure development". At no other place have the Consultants clubbed two factors into one. Such clubbing

would evidently benefit those bidders who would have scored low on property development. It so happens that Bidders B and E have little to show under property development and as such, they would benefit most by clubbing property development with infrastructure.

28. When the IMG asked the Consultants to split the two factors in line with the approach adopted for all other factors, they complied but instead of splitting the two equally, they assigned 25% weightage to property development and 75% to infrastructure development. This arrangement would continue to benefit the bidders who are deficient in property related experience. If both the factors are assigned equal weightage (3.125 marks each) consistent with the approach adopted for other factors, the score of Bidder E would go down to 79.80, which would disqualify Bidder E.

29. It is also puzzling how Bidder B has been awarded 90% marks for property development, even though it has not cited any experience under this factor.

30. Further, one-half of the 12.5 marks allocated for parameter 1.2 are to be separately awarded to non-Indian Prime Members. Though Bidder E has no such member, yet it has scored 90% marks on this account. This is puzzling and leads to the perception of inconsistency in the definition and treatment of this parameter by the consultants. This observation would also apply equally to Bidder B.

### **Raising of marks**

31. It is interesting to note that for factors 1.1.6 and 1.1.7, the Consultants have awarded 3.75 marks each (on a scale of 5) to Bidder E. Nowhere else have the Consultants awarded 3.75 marks; they have awarded either 3.5 or 4 marks. It could be argued that instead of awarding 3.5 marks, the consultants have awarded 3.75 marks to enable Bidder E to cross the threshold. If they had awarded 3.5 marks as per usual practice, Bidder E would have secured 79.96 marks for Delhi airport and got disqualified. This raises suspicions of bias in favour of Bidder E.

### **Imbalanced Marking**

32. In several cases where the element of subjective judgement is high, Bidder E has been awarded very high marks. For example, out of 8.9 marks for

“Long Term Vision”, Bidder E has been awarded 8.31. Others have scored much less. In the case of “Development Path”, Bidder E has scored 8.9 out of 8.9 marks while all others have got a significantly low score (the next being 60%). For “Flexibility”, Bidder E has again scored 8.9 out of 8.9. The next best is only 65%. Yet again, Bidder E has scored 8.9 out of 8.9 for “Aeronautical Operations”. The next best is 80%. Under Development Initiatives, Bidder E has been awarded 8.01 out of 8.9, though two others have also scored high.

33. The above five parameters fall under the larger sub-head of “Development Value Add (Vision)” and account for 44.5 marks out of the 100 marks kept for “Airport Development Capability, Commitment and Value Add”. Under this head, Bidder E has scored 81 marks in Delhi and 80.2 in Mumbai. It could be argued that without such an exceptionally high marking (43 out of 44.5 marks or 97%) for these subjective parameters, Bidder E would not have qualified because its score in the remaining parameters that account for 55.5 marks viz. Development Capability (Experience), Development Commitment and Business Plan, is only 68%.

34. The high marks awarded to Bidder E are shown in a tabular form below:

**Development Value Add (Vision): Evaluation of Bidder E**

<b>Parameter</b>	<b>Max. Marks</b>	<b>Marks awarded`</b>	<b>%</b>
Long term Vision	8.9	8.3	93%
Development Path	8.9	8.9	100%
Flexibility	8.9	8.9	100%
Aeronautical Operations	8.9	8.9	100%
Development Initiatives	8.9	8.0	90%
<b>Total</b>	<b>44.5</b>	<b>43</b>	<b>97%</b>

**Possible bias against Bidder C and F**

35. Bidder C is ranked at number 3 in the evaluation for Delhi Airport. Though it has a first rate Airport Operator (Munich ranks number 4 in world rankings) and also has considerable Indian experience, it has not been qualified by the consultants. A quick overview of the evaluation suggests that on several counts, particularly those that are subjective in nature, the treatment of Bidder C is somewhat harsh as compared to Bidders B and E. This calls for a fresh

evaluation of Bidder C. Similarly, Bidder F ranks number 3 in Mumbai and deserves to be evaluated afresh.

### **Evaluation of Bidder D**

36. Bidder D has lost out even though its Airport Operator has received very high marks. One of the main reasons for this outcome is that the Indian sponsor is a shell company which cannot be given any marks in evaluation. Legal opinion has been sought on this account. Thereafter, explanation of the Bidder should also be sought before disqualifying him. Seeking a clarification would be consistent with the RFP and would also enhance transparency.

### **Evaluation of Bidder A**

37. During the course of discussion in the IMG meeting held on December 12, 2005, it was indicated by the consultants that Bidder A had no Airport Operator in its consortium, as TAV was only a Terminal Operator. This raises the issue of lack of due diligence by the Consultants in admitting this Bidder at the pre-qualification stage. The Consultants have been asked to clarify this inconsistency, as pre-qualification was based on their advice.

### **Evaluation of Bidder B**

38. At several places, it appears that the evaluation of Bidder B has been more than generous. As pointed out above, it has been given 90% marks for property development even though it has cited no cases of property development. When viewed in the context of the aforesaid conflict of interest, it seems necessary to undertake a fresh evaluation of Bidder B.

### **Conclusion**

39. In sum, the above analysis suggests a bias in favour of Bidder E. This impression is reinforced when viewed in juxtaposition of the conflict of interest arising from Bidder E being one of the largest customers of ABN Amro (the manager consultant). A similar bias could be alleged in favour of Bidder B, who is also one of the largest customers of ABN Amro. Further, the legal consultants are also said to be working for one of the successful bidders. This compounds the concerns relating to conflict of interest.

40. Besides conflict of interest, the bid evaluation process is also flawed owing to the absence of a mandate for evaluation by the consultants. In addition,

the process would have to be owned and driven by AAI under the overall guidance of MoCA. For these reasons, the evaluation process is unlikely to be perceived as a fair and transparent exercise. The serious gaps noted above could invite legitimate criticism, and judicial intervention could also expose the entire process to risk. To prevent the process from being jeopardized and with a view to containing any possible damage, it may be prudent to set aside the evaluation report of the Consultants. Further, in terms of Rule 152 of the GF&AR, technical evaluation is required to be undertaken by the competent authority, which is AAI in this case. There seems no reason for overlooking this Rule and that too without prior concurrence of the Department of Expenditure. AAI should, therefore, undertake this evaluation and submit its recommendations to the IMG. For this purpose, it may obtain such expert assistance as may be necessary.

41. Before concluding, it may be clarified that this note is primarily a comment on the bid evaluation process and should not be construed as a comment on the merits of any bid. In particular, the illustrations given above should not be viewed as an independent evaluation of any bidder. Nor is it being suggested that any particular bidder should be qualified or disqualified on the basis of above observations. The limited objective of these illustrations is to point out that the bid evaluation by consultants seems flawed on several counts and, therefore, deserves to be set aside. That would provide a clean slate for fresh evaluation of the bids without in any way pre-judging the outcome of such an evaluation.

**Views expressed by Gajendra Haldea, Adviser to Deputy Chairman, Planning Commission in the meeting of IMG for restructuring of Delhi and Mumbai airports held at 11.30 a.m. on December 9, 2005**

In the last meeting of the IMG, the explanation given by the financial and legal consultants regarding their conflict of interest was recorded. Representative of the Planning Commission raised the issue again and stated that these consultants were the affected parties and their explanation could not be taken as final. Government would have to take a view on this issue.

Representative of PC stated that an advertisement was recently published by ABN Amro in a leading business daily where it had named six of its top clients in India. Two of them were Reliance Industries and GMR. These were also the only two bidders that have been evaluated by ABN Amro as eligible for award of concessions for the Delhi and Mumbai airports. This has raised serious doubts about the credibility of the entire process of evaluation.

Since the abovenamed bidders were among the largest clients of ABN Amro, it could be argued that ABN Amro would have much to gain by promoting their interests, and could fear the loss of business if it were to reject these clients in evaluation. Even if ABN Amro had acted in a fair manner, it would not carry conviction with others. As the adage goes, justice should not only be done, it should also appear to be done.

In the famous case of Arthur Anderson of USA, it was found that while acting as the auditors of Enron, another arm of this firm had benefited from consulting assignments given by Enron. This was perceived as a conflict of interest amounting to professional misconduct. The firm was penalized and the disrepute that followed led to its winding up altogether. It would be recalled that when the Finance Ministry were looking for a law firm in London to defend the Government in the arbitration proceedings initiated by GE and Bechtel, several law firms declined to accept the brief because they had represented these firms in other matters. As was well known, after assuming office as the Union Finance Minister in 1996 and again in 2004, Shri P. Chidambaram recused himself from dealing with matters relating to Enron because he had earlier represented this firm in his capacity as a Senior Advocate in the Supreme Court. These examples should suffice to indicate the gravity of the matter.

It could be argued by ABN Amro that their staff working on this assignment have not been associated with the banking business relating to the said two bidders. This argument is entirely specious. The staff working on this assignment did not have any identity independent of ABN Amro. The above examples, relating to Arthur Anderson and international law firms would also establish this proposition.

In all fairness and conforming to good practices, ABN Amro should not have acted even as consultants, leave apart evaluators. In a complex bidding process such as the present one, the extent and timing of information to be made available to each bidder could make or mar his chances. Preferential access to information could create an asymmetry of information that might alter the outcome. Other bidders would also have a legitimate suspicion that by virtue of being the privileged clients of ABN Amro, the two bidders would have gained preferential access to information relating to the bidding process, thus acquiring an unfair advantage.

In view of the foregoing, the evaluation exercise undertaken by ABN Amro should be nullified in totality as it was unlikely to sustain a judicial scrutiny, particularly because one of the bidders has already lodged a written protest. It would not be prudent to jeopardize the entire process by relying on this flawed evaluation. In case there was any doubt on this account, advice of the Attorney General should be obtained before proceeding any further. The matter should also be brought to the attention of EGOM with all the pros and cons since it would affect the integrity of the entire process.

According to the representative of PC, the correct course would be to ask the AAI to complete the evaluation, as categorically indicated in the RFP document.