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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on:24.02.2021

Date of Decision : 14.07.2021

\+ W.P.(C) 5722/2020 & CM APPL. 20676/2020

CENTRE FOR AVIATION POLICY, SAFETY AND RESEARCH CAPSR ..... Petitioner

Through: Mr.S.S.Mishra & Mr.Umakant Mishra, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Sanjay Jain, ASG, Mr. Asheesh Jain, CGSC with Mr. Adarsh Kumar Gupta, Mr. Sonal Kumar Singh, Mr. Anshuman Gupta, Mr. Aman Singh & Mr. Arkaj Kumar, Advs. for the respondents.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J

JUDGMENT

1. The present writ petition under Article 226 of the Constitution of India, filed by the Centre for Aviation Policy, Safety and Research (CAPSR), seeks quashing of the Requests For Proposal (RFPs) issued by the respondent no.2 for engaging agencies to provide Ground Handling Services at Groups C and D airports. The impugned RFP in respect of Group C airports was issued on 15.04.2020 bearing tender ID 2020_AAI_54002_1, whereas the impugned RFP of Groups D-1 and D-2 airports were issued on 28.07.2020 bearing tender ID 2020_AAI_46811_1.

2. The petitioner, a non-profit organization registered in 2012, claims to be carrying out independent research, advisory and advocacy in the field of civil aviation. As per the petitioner, its members comprise of firms and entities providing services in the aviation sector, including the micro, small and medium enterprises providing Ground Handling Services (hereinafter referred to as 'GHS') across the airports in the country. The petitioner's grievance against the impugned RFPs is that the eligibility criteria contained therein are not only a radical departure from the past, but also stipulate onerous technical and financial qualifications, thereby rendering most of the extant ground handling agencies ineligible to participate in the tender process, especially those which have been providing GHS at the smaller airports of the country, that fall under the categories of Groups C, D-1 and D-2 airports**,** for the last many years**.** The petitioner is also aggrieved that the prescribed technical and financial qualifications have no correlation with the ground handling services that the service providers are expected to provide at the Groups C, D-1 and D-2 airports, and that the same have been arbitrarily and whimsically tailored with a view to oust the existing GHS providers, who have been providing these services for years, without any complaint.

3. The respondent no.1 is the Ministry of Civil Aviation under the Government of India which is responsible for formulating national policies and programmes for development and regulation of the civil aviation sector, while respondent no.2 – the Airport Authority of India, a Category-I Public Sector Enterprise, is a statutory body established under the Airports Authority of India Act, 1994. The respondent no.2 works under the aegis of the respondent no.1 and is tasked with creating, maintaining, upgrading, and managing the civil aviation infrastructure in India; it controls and administers

nearly 83 domestic airports within the territory of India, which cater to both – scheduled and non-scheduled aircrafts.

4. The term 'Ground Handling Services' (GHS), which is the subject matter of the impugned RFPs, includes in its fold a wide array of activities integral to the smooth functioning of an aircraft, and crucial to the health of an airport and all aircrafts operating therein. On 15.12.2017, the respondent no.1 notified the 'Ministry of Civil Aviation (Ground Handling Services) Regulations 2017' (hereinafter referred to as '2017 Regulations'), that exhaustively specified and bifurcated the various services included under the term 'ground handling', one being that of 'Ramp Handling' and the other being 'Traffic Handling'. The 2017 Regulations were, however, superseded by the Airports Authority of India (Ground Handling Services) Regulations, 2018 issued by the respondent no.2 with the prior approval of the Central Government (hereinafter referred to as the '2018 Regulations'). Though the petitioner has only referred to the 2017 Regulations during the course of arguments, but since the clauses of the 2017 Regulations and the 2018 Regulations, that are relevant for the purpose of this decision, are in *pari materia*, we have only referred to the provisions of the 2018 Regulations.

5. Now, the GHS at all the airports controlled by the respondent no.2 were being provided by various ground handling agencies (which will henceforth be referred to individually as 'GHA'), which were selected by the airlines and then approved by the respondent no.2. The GHAs would also be issued a letter of engagement/permission by the respondent no.2 for the purpose of carrying out work in its airports. All the GHAs were also required, from time to time, to obtain security clearance from the Bureau of Civil Aviation Security (BCAS) and extensions from the respondent no.2.

6. The RFPs impugned herein were preceded by a global RFP issued by the respondent no.2 in August 2018, inviting applications from GHAs across the world to provide GHS at its airports. However, this RFP ran into trouble when the terms thereof were found to be prohibitive for local GHAs which led to the respondents repeatedly issuing corrigenda modifying the terms and conditions of this RFP. Subsequently some of the member-GHAs of the petitioner were able to participate in this global tender process and were apparently declared L-1 bidders for providing GHS. However, on 12.06.2019, the entire global tender process was abruptly scrapped by the respondent no.2. Consequently, fresh engagement of GHAs stood suspended, and the extant GHAs continued to serve at the airports under contractual extensions granted by the respondent no.2, with the final extension having been granted till 31.12.2020. It is when these extensions were still continuing, that the respondent no.2 issued once again issued fresh RFPs on different dates for the separate categories of airports between January-July 2020; the RFPs impugned herein, as noted hereinabove, relate to award of Concession for GHS at Groups C and D airports issued on 15.04.2020 and 28.07.2020 respectively.

7. As regards the 83 airports under its supervision, the respondent no.2 has classified them into four broad categories, viz., Groups A, B, C, and D; 'Group A' comprises of 4 airports situated in metropolitan cities, the 14 'Group B' airports are those located in State capital cities, the 15 'Group C' airports are situated in other remaining larger cities of a State and, finally, the 50 'Group D' airports comprising of 49 Group D-1 airports and 1 (one) Group D-2 airport, consists of regional and budget airports catering to domestic, regional and non-scheduled flights involving smaller, general aviation aircrafts. As noted earlier, in the present petition, the subject matter

of challenge is the criteria set by the respondent no.2 for grant of concession for providing GHS only in airports falling under Groups C and D.

8. For the purpose of the RFPs impugned herein, what needs to be noted is that the respondent no.2 has further categorised the 49 airports falling in Group D-1 into four sub-categories, by clustering the 49 airports in groups, and making it mandatory for interested parties to send their bids for an entire cluster, rather than a single airport – as had been the practice until then. It is an undisputed position that except for the airports falling in Group D-1, neither has only region-based sub-categorisation been carried out for any other group, nor have collective bids been called for any group of airports. At the heart of the petitioner's grievance is this policy decision of the respondent no.2 to cluster the 49 airports falling in Group D-1 into the following four region-wise sub-categories/clusters:

	Region
i.	Southern Region (10) - Rajahmundry, Tuticorin, Cuddapa, Belgaum, Hubli, Pondicherry, Mysore, Tirupathi, Salem, Kalaburgi (Gulbarga)
ii.	Northern Region (20) - Gaggal (Kangra), Gorakhpur, Allahabad, Jaisalmer, Leh, Jodhpur, Kanpur (Chakeri), Khajuraho, Bhuntar, Gwalior, Bikaner, Bhatinda, Agra, Pantnagar, Shimla, Ludhiana, Adampur (Jalandhar), Pathankot, Kishangarh, Hindon
iii.	Northeast Region (7)- Silchar, Dibrugarh, Dimapur, Jorhat, Shillong, Lilabari (Lakhmipur), Tezpur
iv.	Western Region (12) - Rajkot, Aurangabad, Juhu, Jabalpur, Bhuj, Jamnagar, Porbandar, Kandla, Bhavnagar, Diu, Kolhapur, Jalgaon

9. As a result of this clustering of 49 airports falling under Group D-1, the existing criteria which permitted a bidder to submit a single bid to provide GHS for an individual airport was radically altered inasmuch as no bidder was allowed to bid for a singular airport falling in this category. All bids were required to be placed for a specific region/cluster – which has multiple airports within it. However, the rules of the game remained unchanged for the other categories of airports; bids in the cases of Groups A, B, and C airports (D-2 comprised of a single airport), had to be placed for each airport individually. It is against this newly introduced backdrop of cluster-specific bid that the respondents have proceeded to prescribe the eligibility criteria for a bid, the relevant extract whereof is reproduced hereinafter.

10. The eligibility criteria laid down comprises of two components– the Technical Qualifications and the Financial Qualifications. As far as the former is concerned, the same reads as under:

> "***Criteria for Evaluation***
>
> * * * *
>
> ***3.2.1 Technical Capacity for Purpose of evaluation***
> *Subject to the provision of Clause 2.2, the following category of experience will qualify as eligible experience:*
>
> *I. To bid for any of the Airport listed in Schedule II*
> ***a. In the preceding 7 (seven) years from the Bid Due Date, the Bidders should have at least 36 (thirty-six) months' experience in providing three out of the seven Core Ground Handling Services as defined in Schedule I B.***
>
> *For avoidance of doubt, Bidder may showcase experience of providing Core Ground Handling Services through multiple set of airlines. For clarification, the Bidder might*

have undertaken some set of activities through one airline and balance set of activities through other airlines. Cumulatively the Bidder should be able to showcase all the Core Ground Handling Services through multiple airlines.

Bidder shall submit duly signed Standard Handling Agreement or Ground Handling Agreement to showcase provision of above-mentioned services in the last 7 years. In addition, Bidder needs to show experience of services performed for an airline which has ceased operations, the Bidder can provide duly signed SGHA/GHA and self-certified letter as per Annexure 5C.

It is hereby clarified that each Bidder must showcase their experience of undertaking three of the seven core activities mentioned in Schedule 1B for a period of at least 36 months in the past 7 years. It is further clarified that Bidder must showcase experience of providing at least two of three services defined as a sub-category in these Core Ground Handling Services; however, the sum total of the experience in these sub-categories under each of the three Core Ground Handling Services should be at least 36 months cumulatively.

A Bidder or its Affiliate (whose credentials are being used for fulfilling the Technical Capacity), who is showcasing experience of providing Core Ground Handling Services in India should submit proof of security clearance by BCAS for providing ground handling services. In case of a foreign Bidder, the Bidder must have security clearance/approval from an appropriate authority in their operating country for ground handling operations. In case of Consortium, security clearance of the Lead Member or its Affiliate (whose credentials are being used for fulfilling the technical Capacity) shall be evaluated. Appropriate proof from BCAS or from other appropriate authority is pending for renewal, proof for submission of such application for renewal of security clearance has to be submitted. Also, such Bidder would be required to submit proof of previous security clearance in such case. Authority if required will get all

documents of foreign Bidder checked by Indian Embassy."
(emphasis supplied)

11. Thus, the bidder was required to demonstrate prior relevant work experience in providing types of Ground Handling Services specified in Schedule IA of the RFP, as well as the Core Ground Handling Services specified in Schedule IB of the RFP. The Core GHS enlisted in Schedule IB read as follows:

"***SCHEDULE I B – CORE GROUND HANDLING SERVICES***
Seven core services include aircraft handling, aircraft servicing, loading and unloading, cargo handling at air side, terminal services, flight operations and service transport.

RAMP HANDLING
1. Aircraft Handling
a. Marshalling
b. Safety measures
c. Moving of aircraft
d. Ramp to flight check communication.
2. Aircraft Servicing
a. Cabin Equipment
b. Routine & Non-Routine Services

3. Loading and Unloading
a. Loading and unloading of passenger baggage
b. Transshipment of passenger baggage
c. Operation of loading/unloading equipment
d. Position and removing of passenger stairs/bridges
e. Emplane/deplane passengers
f. Break/make-up of baggage
g. Bussing of passengers/crew
h. Bulk loading/unloading of baggage
i. Load control

4. Cargo handling services at Airside (excluding Cargo Terminal/ Warehouse Activities; Cargo Terminals/Warehouse will include Domestic Air Cargo Terminal, International Cargo Terminal, Courier, Transit/Transshipment terminal and Cold Storages etc.)

a. Loading, off-loading, export, import and transshipment cargo to/from the aircraft.

b. Operate/provide/arrange essential equipment for handling of cargo

c. Transshipment of cargo

d. Bulk loading or unloading to/from the aircraft

TRAFFIC HANDLING

1. ***Terminal Services***

a. Handling documents and load control

b. Passenger and baggage handling at the airport terminals

c. Traffic services at the Airport terminals including passenger check-in

2. ***Flight Operations***

a. Flight preparation at the airport of departure

b. Communication system association with ground handling

3. ***Surface Transport***

a. Arrangement for the transportation of passengers/baggage and cargo between separate terminals at the same airport."

12. Further, to substantiate its claim of technical capacity, the bidder was required to self-certify that in the past 7 (seven) years, it had successfully managed to attain 36 (thirty-six) months' of experience in providing three out of the aforesaid 7 Core GHS. This self-certification was to be given as per a format contained in Annexure 5C of the RFP which reads as under:

"Annexure 5C
SELF CERTIFICATION
[On the letterhead of the GHA]

To,
Executive Director (Operations),
Airports Authority of India Rajiv Gandhi Bhawan,
Safdarjung Airport, New Delhi-110003

Sub: Self-Certification of experience for providing ground handling services

Dear Sir,

This is to certify that we, M/s…..has signed Standard Ground Handling Agreement/Ground Handling Agreement with …….airline,* ***for providing ground handling services to their international/domestic scheduled flights* at … airport.*** *The agreement is/was* valid from ……to …….*

The following ground handing services {name of specific services} were provided to the wide/narrow* body scheduled aircraft operating on international/domestic segment.

We also confirm that the information provided is correct and any false declaration made by us shall invite action as may be decided by the Authority including termination, debar, forfeiture of Bid Security.

(Signed and sealed by the authorized signatory of the Ground Handling Company)

Name:
Designation:
Company name:
Date:
Place:
**Please strike out if not applicable*
Note: For proof of ground handling services, the Bidder shall also produce documentary proof from the concerned airlines along with the Standard Ground Handling Agreement/Ground Handling Agreement

executed with the airlines within India or abroad, as the case may be." (emphasis supplied)

13. We may now refer to the criteria relating to the Financial Capacity of the bidder, as prescribed in the RFP, which reads as under:

> *"**3.2.2 Financial Capacity for purposes of evaluation***
> *(i) To be eligible, the Bidders, at the close of the preceding financial year, should have positive Net Worth and, in any one of the last three financial years, the annual turnover of Rs. 30 crore (thirty crore).*
> *The Bidder shall enclose with its Bid certificate(s) from statutory auditors of the Bidder or its Associates specifying the Net Worth of the Bidder, as at the close of the preceding financial year, and also specifying that the methodology adopted for calculating such Net Worth conforms to the provisions of the Clause 3.2.2 (ii)*
> *(ii) For the purposes of this RFP, net worth (the "Net Worth") shall mean the aggregate value of the paid-up share capital and all reserves created out of profits and security premium account and debit or credit balance of profit and loss account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation."*
> (emphasis supplied)

14. What emerges is that in order to demonstrate that it had the financial capacity for carrying out the work set out under these impugned tenders, the bidder was required to not only have a positive net-worth at the close of the preceding financial year, but also an annual turnover of INR 30 crore in any one of the preceding 3 financial years. The bidders were further required to secure their bids by furnishing an EMD of INR 35 lakh in favour of the

respondent no.2, in respect of each region or cluster that they were placing the bid for.

15. Aggrieved by these conditions, the petitioner society as also some of its member-GHAs sent detailed representations to the Chairman of the respondent no.2, raising their objections to these stipulations in the RFPs. In their representations, they also requested respondent no.2 to grant all the stakeholders for Groups C and D airports an opportunity to be heard, so as to enable them to air their concerns. As these representations went unanswered, the present petition came to be filed assailing the RFP in respect of Groups C and D airports.

16. In its writ petition, the petitioner has assailed the eligibility criteria set out in the impugned RFPs as unreasonably restrictive and anti-competitive, and has prayed that the respondents be directed to change them so as to ensure participation without discrimination. The petitioner has also prayed for a direction for extending the timeline of the bidding process in relation to these tenders, till the immediate impact of the pandemic has weaned to some extent, until some stability is restored in the aviation sector. It appears that after the institution of this petition, and while the petition was being heard, the respondent no.2 decided to relax the EMD as well as the Annual Turnover requirements from the bidders of Group-D Airports, the details whereof would be addressed in greater detail in the submissions of the parties recorded hereinbelow.

17. In support of this petition, Mr. Umakant Mishra, learned counsel for the petitioner submitted that the impugned tenders were unsustainable and, besides being radically different from past practices, imposed onerous and exclusionary eligibility criteria which intended to benefit the bigger businesses and automatically worked to exclude the petitioner's members, at

the preliminary level itself, from participating in the tender process entirely. Firstly, notwithstanding the existing classification of the country's airports, the respondent no.2 chose to abruptly and randomly, without any basis, further divide the 49 airports falling under the category of Group D1 into four sub-categories. It was submitted that while the respondent no.2 claimed that the same was done for ease of administration, in reality, this sub-categorization involved the clustering of airports that were spatially and geographically distant, of different sizes and capacity – neither of which could be deemed convenient. The respondent no.2 failed to show any rationale for arriving upon this decision. It was further submitted that the said respondent's decision to then rely on this random and patently unjust sub-categorization, for seeking consolidated region-wise bids for each of the four sub-regions in Group D1 effectively drove up the investment required to be made by a bidder. Now, a bidder who could previously submit its bid for providing GHS to a single Group D-1 airport after investing a certain amount, can only place bids for a sub-region, and is being forced to either meet the hefty investment requirements on its own, or form coalitions with other small-time GHS providers, to even be recognized as a contender in the bidding process. It was submitted that the micro and small sized enterprises were being actively prejudiced by this policy decision and that they would no longer be able to sustain their businesses on their own. Instead, they are being compelled into forced partnerships/consortiums if they wanted to ensure the survival of their businesses. Pertinently, as per the present classification of Micro, Small and Medium Enterprises, the total turnover permitted for micro enterprises must be below INR 5 crore. Thus, even if 3 micro enterprises were to form a consortium, as per the stipulations of Clause 2.2.1(a) of the

tender, even then they would be unable to meet the initial turnover criterion of INR 30 crore, or even the reduced one of INR 18 crore.

18. Mr Mishra then submitted that while, on the one hand, the Central Government has repeatedly touted the importance of domestic sufficiency and fostering of local businesses as a part of its domestic and international policy, and to that end made it obligatory for all Government Departments to procure atleast 25% of the goods and services required from Micro, Small and Medium Enterprises, on the other hand – the civil aviation body comprising of the respondents has developed a policy which would cripple such enterprises. It was, thus, submitted that by adopting such practices in its tenders, the respondent no.2, a Government body, had completely violated the directions contained in the circulars issued by the Central Government. It was also contended that this decision of the respondent no. 2 to first club and, thereafter, prescribe such onerous criteria of having at least three years experience in handling GHS for scheduled airlines was patently unreasonable, arbitrary and unfair. It was also submitted that the subsequent action of the respondent no.2, to relax the financial requirements under the tenders, based on the observations made by this Court after the present petition was instituted, itself demonstrates that such stringent conditions were prescribed arbitrarily, without due application of mind and that the same had no correlation to the nature and scope of the obligations to be performed by the successful bidder upon award of the contract. It also shows that the onerous conditions were never necessary to begin with, and substantiate the petitioner's stand that they served to cripple the micro and small enterprises from participating at all. It was submitted that ultimately, these tenders were a matter of livelihood for the micro and small business enterprises who have been satisfactorily servicing these airports over the years, and they could not

be permitted to be excluded in such an arbitrary manner by way of prejudicial government policies which would drive them out of business. In support of his contention, Mr. Mishra relied on the judgment passed by the Supreme Court on 26.03.2012 in ***Saroj Screens Pvt. Ltd. Vs. Ghanshyam & Ors.*** *(2012) 11 SCC 434* to contend that in situations where a State or its instrumentality seeks to confer benefits on the basis of guidelines/policies which are not based on relevant, non-discriminatory and non–arbitrary criteria, the Courts can and ought to interfere.

19. The final contention of Mr Mishra was that the distinction created in the impugned tenders, between the prior work experience of providing GHS in scheduled airports and non-scheduled airports was artificial, since no such distinction existed in the respondents' own Regulations, DGCA circulars, or the IATA guidelines. It remains a matter of fact that all scheduled airlines are permitted to handle their GHS requirements on their own, barring any security functions that are required in the course of such services, and as a matter of fact most scheduled airlines were fulfilling their GHS requirements through their own personnel; resultantly, most of the petitioner's members were unable to get any experience in handling GHS for scheduled airlines at these airports, which eliminates any opportunity for the members of the petitioner to be engaged in or collect any significant, prolonged and continuous experience as GHS providers for scheduled aircrafts. Thus, all technical criteria set down by the respondent, which despite being diluted after the institution of the present petition, remain exclusionary to the prejudice of the small and medium-GHS providers. In these circumstances, he prays that the impugned tenders be set aside, and that the respondents be directed to alter the eligibility criteria so as to ensure that all stakeholders,

including existing GHAs, are able to participate in the tender process without discrimination.

20. Opposing the petition, Mr. Sanjay Jain, the learned Additional Solicitor General appearing for the respondents began by urging that the petition failed to raise any question of public importance and also that the petitioner had failed to demonstrate its locus standi to file the same. It was then submitted that the decision of respondent no.2 to group the 49 airports into four regions was with the intent to increase the ease of doing business and reduce overhead costs, bearing in mind the basic principle of increasing regional connectivity. As far as the issues relating to the eligibility conditions prescribed in the tender were concerned, it was submitted that the intention thereof was not to exclude small businesses, but to exclude GHAs which lacked the requisite expertise and infrastructure. It was submitted that prescribing the qualifying experience was a necessity in the light of the success of the regional connectivity scheme, which is going to increase the number of large aircrafts that land in the Groups C and D-1 Airports. As a result, all GHAs at these airports are to necessarily be equipped to satisfy the kind of workload, specialized knowledge and facilities that follow as a consequence of large aircraft traffic. In any event, the present tenders were only floated for the purpose of providing GHS to scheduled airlines and, consequently, only prior GHS-providing experience with scheduled airlines was counted for the purpose of technical eligibility. It was submitted that scheduled operations required the deployment of permanent personnel and equipment, and also required the GHAs to remain in a state of continuous readiness. By relying on a comparison of the nature of services provided by a non-scheduled GHA, as opposed to those provided by scheduled GHA - which were far more numerous and specialised, it was submitted that the two

could not be equated at all. For this reason, the bidders had to demonstrate, at the time of placing their bids, that they not only had the resources to cope with these increased responsibilities, they also – far more importantly – had the know-how for providing GHS for scheduled aircrafts. It was submitted that even otherwise, since aerodromes are sensitive areas and few of the airports in question also serve in some capacity for the Indian Air Force, the respondent had chalked out a policy to ensure regulation in the GHS supply sector and that no agency lacking experience and expertise succeeded in getting the tenders for these spaces by quoting lowest bids on account of the casual and unskilled labour they engaged. It was further submitted that in the light of the growing rate of major incidents in the country's airports, it was felt necessary to regulate the GHS tendering process in this manner so to ensure national security. It was then submitted that in any event, the respondents had accommodated the possible lack in experience of Group D GHAs, by requiring them to have 36 months' experience in the preceding seven years, in providing only 3 out of the 7 core GHS detailed in Schedule IB of the impugned RFPs, as opposed to having them meet the criteria in entirety for the whole seven-year period.

21. Mr. Jain also submitted that the financial requirements in the impugned tenders could not be regarded as oppressive in any manner; the decision to carry out region-wise sub-categorisation of the airports falling in Group D-1 category, made in the interest of efficiency in overall management and administration of the 49 airports, and the consequent decision to prescribe Annual Turnover Criterion on that basis were all so that the bidder could establish the financial competence for providing GHS to an entire region/cluster rather than a single airport. Since that was the case, the decision to carry out sub-categorisation could not be labelled as being

arbitrary, discriminatory, shocking or unconscionable in any manner and, as a consequence, did not warrant any interference by this Court. For this purpose, he relied on the decisions of the Supreme Court in ***Directorate of Education & Ors. Vs. Educomp Datamatics Ltd. & Ors.*** *(2004) 4 SCC 19* and ***S.S. & Company Vs. Orissa Mining Corporation Limited*** *(2008) 5 SCC 772.* Similarly, it was submitted that notwithstanding the Annual Turnover and the Earnest Money Deposit Criterion, the terms of the impugned tenders allowed all prospective bidders to team up together, three at a time, and form a consortium for the purpose of placing their bids. Thus, the EMD of INR 35 lakh was not necessarily expected out of a single bidder, multiple bidders could team up to meet this requirement. Not to mention, the EMD could be given in the form of a Bank Guarantee against which, as a general banking practice, the prospective bidder could deposit about 25% of this sum as margin money. This meant that the extent of the EMD could not be deemed to be prohibitive or exclusionary in any manner. It was submitted that even otherwise, in response to the observations made by this Court when this petition was initially heard, the respondent no.2 had already made certain concessions and scaled down the financial eligibility criteria for bidders of Group D airports; the Annual Turnover requirement had been reduced from INR 30 crore to INR 18 crore, whereas the EMD requirement had been decreased from INR 35 lakh per region to INR 15 lakh per region.

22. Mr. Jain then submitted that, contrary to the averments of the petitioner, there was no question of the impugned tenders being in violation of the Government's 2012 MSME policy or the amended 2018 policy, rather there was no question of any application of those circulars in the instant case at all. While the MSME Orders 2012 and 2018 issued certain directions to all government offices as regards procurement of goods and services, the

impugned RFPs are completely unrelated since, by virtue of these RFPs, the respondent no. 2 was not procuring any services, but was in fact selling licenses to qualified bidders for providing GHS to airlines; this license meant that the GHAs could provide the required services and remit monies to the respondent no.2 for doing so. It was also submitted, without prejudice to the aforesaid, that even if the conditions of the tender made it difficult for a consortium of micro enterprises to apply, the tender conditions clearly went ahead to accommodate the micro and small businesses by permitting them to partner with other small and medium enterprises, who were squarely within the ambit of the eligibility criteria, to form consortiums and place common bids by pooling their resources together. He submitted that some member-GHAs of the petitioner had already availed of this option to submit their collective bids as a consortium, and, to that end, provided the examples of M/s Sri Sai Sampath Aviation Handling Services, M/s Vision Aviation Private Limited and M/s Aurea Aviation Private Limited. It was submitted that, even otherwise, the concerned GHAs were not taken by surprise by the implementation of this policy, since they were always aware that the same was going to be introduced.

23. Finally, Mr. Jain dealt with the petitioner's ground that the bids were invited at a time when the COVID-19 pandemic was at its peak, and businesses were experiencing an all-time low – thereby making it impossible for the members of the petitioner association to place a bid by forming a consortium, or arrange for the huge EMD requirement. Mr. Jain submitted that in the present case, the present tenders were issued at a time when (i) the adverse effect of the pandemic had significantly eased, and businesses had returned to near normalcy; and: (ii) the respondent had already relaxed the financial criteria to now require the bidders to show an annual turnover

criteria of INR 18 crore, rather than that of INR 30 crore, there was no reason for this Court to continue entertaining this petition. He further submitted that, in any event, under Clause 3(5) of the 2018 Regulations, all airports with a footfall of less than 10 million passengers per annum, could now only engage 3 GHAs – which may be the GHA of the airport operator, or the JV subsidiary of AAI, or a third party GHA selected through a bidding process. He contends that that the presently impugned tender process was initiated strictly with these provisions as also in consonance with National Civil Aviation Policy dated 15th June, 2016, which was given a green signal by the Supreme Court on 06.03.2017. Considering that the number of GHA engagements, under the 2018 Regulations, was always low for most airports falling under the Group-D category, all the members of the petitioner remained aware that this was a niche business and if they wanted to continue flourishing, they had to manage to meet the stipulations set down by the respondent no.2. Those GHAs which failed to do so are now estopped from blaming the tender conditions for the failure of their business. He, thus, prays that the present petition be dismissed with costs.

24. We have heard learned counsel for the parties and perused the record.

25. At the outset, we may note that while the petition has been preferred against the tenders/RFPs issued for inviting suppliers of GHS for Group C airports as well, during the course of arguments the petitioner confined its challenge to the criteria prescribed in the RFP issued for Group D-1 airports. From the submissions made at the Bar, we find that the factual position is not really in dispute and the parties are in fact *ad item* that by virtue of the impugned RFP/tender, it was incumbent upon the bidder to submit its bid, not for an individual Group D-1 airport in one of the region-based sub-categories, but rather for an entire region itself. It is also undisputed that the fixation of

the Annual Turnover criteria of INR 30 crore, now revised to INR 18 crore - being higher than before, was done on the premise that the successful bidder would be rendering GHS for an entire region of Group D-1, which could comprise of any number of airports ranging between 7 and 20, and had to show that it had the financial wherewithal to handle such a responsibility. Then, there is also no dispute that the prescribed technical criteria requires a bidder to show that it had spent three years, out of the preceding seven, providing certain core ground handling services to any *scheduled airline*. It is also an admitted fact, and a matter of record, that scheduled airlines were not plying, until quite recently, to many of the 49 airports which fall under the D-1 category. In the light of this position, it is clear that with these criteria, the respondent no.2 had sought to fundamentally alter the eligibility criteria whereunder bids for GHS were being invited earlier to service the very same Group D-1 airports.

26. The petitioner contended that the classification and clustering of 49 spatially and geographically distant airports within a single category, and its subsequent sub-categorisation into four regions is not rational by any standard, and overlooks the fact that services like those provided by the GHS service provider involve rendering physical assistance by providing infrastructure /equipment and on-site man power, all of which have to be locally sourced. The contention, in essence, is that the clustering of airports with different sizes, capacities, financial viabilities, and different locations which are separated by hundreds of kilometres, is not at all based on any rational basis and does not have any nexus with the object of the 2016 National Civil Aviation Policy of promoting regional connectivity. Insofar as the technical criterion of showing prior experience in providing core GHS to scheduled airlines was concerned, the petitioner contended that the same also

operated to exclude many local GHAs, including some members of the petitioner organisation, since they solely plied at D-1 airports which saw more traffic from non-scheduled airlines than scheduled ones – and, resultantly, the criteria appeared to contravene the 2018 Regulations. *Per contra*, the respondent defended this criterion as being rational, and with the aim of promoting regional connectivity and avoiding the cumbersome administrative task of inviting and dealing with separate tenders for each of the 49 airports under the D-1 category. The respondent then drew on these reasons to claim that such classification and clustering could not be viewed as arbitrary, but rather ought to be regarded as reasonable administrative decisions taken for improving the overall functioning of the country's airports which is a part of the steps being taken by the respondents to strengthen the civil aviation industry in the country.

27. Before we delve into these issues, we must emphasise that the submissions of the respondents as regards the limited scope of the interference that can be wielded by the Court in matters of public policy, as well as their reliance on the decisions of the Supreme Court in ***Educomp Datamatics*** *(Supra)* and ***S.S. & Company*** *(Supra)* are not lost on us. In fact, we find it apposite to revisit the astute observations made by Lord Denning that found mention in the decision of the Supreme Court in ***Transport and Dock Workers Union & Ors. Vs. Mumbai Port Trust & Anr.*** *(2011) 2 SCC 575* and read as under:

> *"40. As Lord Denning observed:*
> *This power to overturn executive decision must be exercised very carefully, because you have got to remember that the executive and the local authorities have their very own responsibilities and they have the right to make decisions. The Courts should be very wary about interfering and only interfere in extreme cases, that is, cases where the Court is*

sure they have gone wrong in law or they have been utterly unreasonable. Otherwise you would get a conflict between the courts and the government and the authorities, which would be most undesirable. The courts must act very warily in this matter." (See `Judging the World' by Garry Sturgess Philip Chubb).”

28. Thus, while sounding a note of caution in respect of the Court interfering in any policy matter, the principle that the Supreme Court ultimately espoused was that any interference with respect to the terms of a tender can be made, only if the Court finds that the considerations on which they are founded are wholly un-reasonable, and have no nexus at all with the object sought to be achieved. This appeared to be the principle espoused in an earlier decision of the Supreme Court in ***Academy of Nutrition Improvement and Ors. Vs. Union of India*** *WP(C) No. 80/2006* dated 04.07.2011, as well as a succeeding one in ***Internet and Mobile Association of India Vs. Reserve Bank of India***, *WP(C) No. 528/2018* dated 04.03.2020.

29. Now, turning to the decision to cluster the 49 Group D-1 airports, and to exclude any bidder who had not spent enough time providing GHS to scheduled airlines, it requires consideration as to what were the respondent’s reasons for those decisions, and could the same be labelled as arbitrary?

30. We begin by taking note of the following extracts from the National Civil Aviation Policy published by the Central Government in the year 2016, which is relevant to this decision, because it is one of the first formal declarations of the ‘Regional Connectivity Scheme’ that was going to be pursued by the respondents over the course of the next few years and, thus, forms the starting point of many of the policy decisions taken by the respondents subsequently, including those which led to the RFPs under challenge.

"1.3 The Government has proposed to take flying to the masses by making it affordable and convenient. For example, if every Indian in middle class income bracket takes just one flight in a year, it would result in a sale of 35 crore tickets, a big jump from 7 crore domestic tickets sold in 2014-15. This will be possible if the air-fares, especially on the regional routes, are brought down to an affordable level. · The reduction in costs will require concessions by the Central and State Governments and Airport Operators."

1.4 "Systems and processes which affect this sector will need to be simplified and made more transparent with greater use of technology without compromising on safety and security. The growth in aviation will create a large multiplier effect in terms of investments, tourism and employment generation, especially for unskilled and semi-skilled worker."

*"**2. NCAP 2016 - Vision, mission and objectives***

*a) **Vision:** To create an eco-system to make flying affordable for the masses and to enable 30 crore domestic ticketing by 2022 and 50 crore by 2027, and international ticketing to increase to 20 crore by 2027. Similarly, cargo volumes should increase to 10 million tonnes by 2027.*

xxx

4. Regional Connectivity

xxx

c) This will be implemented by way of:

i) Revival of un-served or under-served airports/ routes, including routes connecting Agatti and Leh,

ii) Concessions by different stakeholders,

iii) Viability Gap Funding (VGF) for operators under RCS

iv) Cost-effective security solutions by Bureau of Civil Aviation Security (BCAS) and State Governments.

*d) **Currently around 75 out of 450 airstrips/airports have scheduled operations. Revival of the remaining air strips and airports will be "demand driven", depending on firm demand from airline operators, as No-Frills Airports will be done at an indicative cost of Rs 50 crore to Rs100 crore, without insisting on its financial viability. Inputs from and willingness of the State Governments will be taken before revival of any airport is undertaken. AAI/ State Govts can explore possibilities of***

developing these airports through PPP also.*"*

(emphasis supplied)

31. It appears that as per the original intent reflected in the 2016 National Civil Aviation Policy, which discussed active encouragement of air travel and making the same affordable, it was considered manifest to make airports locally accessible and several steps were proposed in this direction. These involved reviving defunct, rural air travel networks, and crafting concessionary policies to serve that purpose. Smaller airports, being the central point of this discussion, were expressly planned as 'No-Frills' airports, and their revival was envisioned by proposing adoption of development policies that were financially accommodating of smaller players. At this time, the policy stance of the Government appeared to spring from an acute awareness of the disparity in scheduled and non-scheduled air traffic at these smaller airports.

32. The ensuing 2018 Regulations, which superseded the 2017 Regulations, by virtue of having defined and carved the scope and extent of activities falling under the ambit of the term 'ground handling', are also relevant to this discussion:

> *"Clause 2 (b)*
> *ground handling means service necessary for an aircraft's arrival at, and departure from, an airport other than air traffic control and it includes-*
> *(i) ramp handling including activities as specified in Schedule I;*
> *(ii) traffic handling including activities as specified in Schedule II; and*
> *(iii) any other activity specified by the Central Government from time to time;"*

33. Essentially, all activities falling under GHS are distributed under the two broad terms of Ramp Handling and Traffic Handling activities. However, what catches the eye is that nowhere in this definition of the 2018 Regulations is there a distinction drawn between the GHS provided to scheduled and non-scheduled airlines. Therefore, as per the 2018 Regulations, for all intents and purposes, any prior experience of providing GHS to scheduled and non-scheduled airlines stand at an equal footing. This position assumes significance in the light of the fact that as per the petitioner, one of the two biggest obstacles in this tender process that has been faced by its members lies in the technical criteria stipulated in the RFP, which ousts them from the bidding process owing to lack of experience in providing GHS to scheduled airlines. As mentioned previously, they were small enterprises that were associated with D-1 airports, which receive more non-scheduled flights than scheduled ones.

34. When we found no explanation in the 2018 Regulations, or the 2016 National Civil Aviation Policy, to back the decision of the respondents to form these sub-categories or regional clusters of the 49 airports in Group D-1, we called for the original record pertaining to the framing of the terms and conditions of the impugned tenders. Having perused the same, we deem it appropriate to reproduce relevant extracts of the same, which read as under:

> *"5. The number of Airport under category D are 52 across India. These airports under this category are smaller airports with limited number of flights. In case AAI initiate tender for these airports separately then the tender process would result in a cumbersome and will be difficult to oversee and dealing separately with 52 concessionaires. Moreover, each concessionaire would be a separate 'Special Purpose Vehicle' company. To avoid this, these airports are clubbed into grounds – Region wise and controlling of these concessions will be under*

Regional Head Quarters. This reduces the number of groups to five.

6. Grouping of airports as Region wise would allow the concessionaires to optimize its CAPEX and also enjoy economy of scales benefit at regional level thereby making the overall better value position for AAI. This has been discussed in video conference with all AAI officials handling GHS Concession by Consultancy on grouping of airports in category D. An email received from Consultant are enclosed as Annexure-I."

35. While there is absolutely no discussion which may throw any light on the distinction drawn between scheduled and unscheduled flights for the purpose of the impugned tenders, it is with regret that we note that the original record does not at all support the claim made by the learned ASG before us, that the 2016 National Civil Aviation Policy was the primary motivation for sub-categorising the 49 airports falling under Category D-1. In fact, barring the pretext that accepting individual bids for every airport would be cumbersome for the officials of respondent no.2, and that the concessionaires could reap the combined advantage of optimising their CAPEX and enjoying economy of scales, there is no other explanation advanced by the respondents for deciding to form region-based clusters of these airports. Historically, these Group D-1 airports have been serviced by the GHAs as standalone units/organisations. Even otherwise, with distances between the regionally grouped airports running into hundreds of kilometres, on what basis the respondents have assumed that they may be able to pool in their resources, is not known. There is no background material or concrete basis to support this assumption. We call it an 'assumption', because there is no prior example cited by the respondents, and this view appears to have been formed without any consultation with the GHAs and the field experts. Thus, while the original record maintains a noticeable silence as regards the

reasons for setting out the technical criteria, the reasons given for fixing such financial criteria appear to be lacking as well.

36. Curiously, when neither the National Civil Aviation Policy released by the respondent no.1 in 2016, nor the 2018 Regulations differentiate between the GHS provided to a scheduled vis-a-vis non-scheduled airline, the impugned RFP have gone ahead and done so. We find it intriguing that this stipulation was not mentioned *anywhere* in the main, primary body of the RFPs; rather it was introduced in the self-certification format provided in Annexure 5C that was required to be furnished by all bidders. In a strangely surreptitious manner, the respondents have hidden this requirement in a single sentence in the body of the format which goes on to read as under:

> *"This is to certify that we, M/s…..has signed Standard Ground Handling Agreement/Ground Handling Agreement* with …….airline, for providing* ***ground handling services to their international/domestic scheduled flights**** *at … airport. The agreement is/was* valid from ……to ……."* (emphasis supplied)

37. Thus, despite being an important, game-changing criterion which completely narrowed down the playing field to a few participants, the respondents did not deem it necessary to state the same explicitly in the separate, comprehensive, especially dedicated portions of the RFP which set down the Technical Qualifications or Technical Criteria. It was, instead, written out as a statement of truth that the bidder was offering of its own volition to the respondents. In our view, this appears to be an under-handed tactic which, when seen in the light of the observation made by the respondent no.1 itself in the 2016 National Civil Aviation Policy - that scheduled airlines were only operating in about 75 of the total 450

airports/airstrips in the country, is manifestly arbitrary and completely defies logic.

38. In fact, the actual impact of this differentiation carved out by the respondents was that it did not only make the right to bid illusory for potential, small-time bidders who had successfully been providing GHS to individual airports for several years, it also made them ineligible - even though their past experience made them far more suitable for the purpose of rendering such services at the Group D-1 airports. In our view, these circumstances clearly betray the respondents' disregard for material considerations at the time of framing the technical conditions in the impugned tenders.

39. The respondents have sought to justify their action of stipulating past experience of handling scheduled airlines by contending that such airlines operate larger aircrafts and the number of flights, passengers and amount of cargo would increase in future with the opening up of the aviation sector. Even if the above were true, the respondents could have laid down minimum technical specifications to address each of such concerns. The GHA handling non-scheduled flights/airlines essentially perform all the activities, which another GHA handling scheduled airline does. The respondents could have laid down criteria of higher capacity to handle higher traffic; greater experience; higher technical qualification of personally rendering technical services so that the existing GHAs could upgrade their infrastructure, experience and skills, rather than being completely driven out of business.

40. Now we come to the financial criterion which had been prescribed under the RFP by the respondents by resorting to clustering of airports, knowing fully well that the same would lead to the automatic ouster of smaller enterprises who could provide the very same services at lesser cost.

This process requiring a bidder to place a bid for all the airports of a single region, which could haphazardly range between 7 airports in the north east region, to 20 airports in the northern region, demanded strong financial capacity from the bidders. This was used by the respondent no.2 as the reason for prescribing a high Annual Turnover of INR 30 crore in the RFP. This would necessarily imply that only those bidders with higher annual turnover would be in a position to bid.

41. In response, the respondents have contended that since the Annual Turnover was initially prescribed as INR 30 crore, and had subsequently been scaled down to INR 18 crore, all grievances of the petitioner in this regard stood addressed. In fact, it also emerges that the respondents themselves were not blind to the possibility that these criteria had the effect of excluding smaller players since their defence was that, even if a micro or small enterprise felt walled-in by these criteria, the option to create a consortium with other similarly situated parties had been especially carved out, was ideal for remedying this select issue, and was open for them to avail.

42. However, this line of argument has to be examined in the light of the innate, underlying spirit which motivates and propels an entrepreneurial venture forward – the desire for independent function. The encouragement and protection of independent business was the platform on which the Central Government had rigorously pursued the message of *Atmanirbhar Bharat* or self-reliant India, and these micro and small enterprises, which have approached us today were touted to be the primary beneficiaries of this initiative. At this stage, we may also take note of Clause 3 of the MSME Order 2012, which made it binding for all ministries, departments and public sector undertaking to procure at least 20% of its annual products and services' needs, from micro and small enterprises. This Order of 2012

underwent a revision in 2018 to increase the procurement margin to 25%, these orders of 2012 and 2018 read as under:

a. MSME Order 2012

"3. Mandatory procurement from Micro Small Enterprises - (1) Every Central Ministry or Department or Public Sector Undertaking shall set an annual goal of procurement from Micro and Small Enterprises from the financial year 2012-2013 and onwards, with the objective of achieving an overall procurement of minimum of 20 per cent, of total annual purchases of products reduced and services rendered by Micro and Small Enterprises in a period of three years.

(2) Annual goal of procurement also include sub-contracts to Micro and Small Enterprises by large enterprises and consortia of Micro and Small Enterprises formed by National Small Industries Corporation.

(3) After a period of three years i.e. from 1st April 2015, overall procurement goal of minimum of 20 per cent shall be made mandatory.

(4) The Central Ministries, Departments and Public Sector Undertakings which fail to meet the annual goal shall substantiate with reasons to Review Committee headed by Secretary (Micro, Small, Medium Enterprises), constituted in Ministry of Micro, Small and Medium Enterprises, under this Policy."

b. MSME Order 2018

"3. The amendments made in the PPP are as follows:-

a. Increase in percentage of procurement of goods and services by government departments/CPSEs from MSEs from the present at least 20% to at least 25% of their total procurement; and

b. Provide a minimum 3% reservation for women owned MSEs within the above mentioned 25% reservation."

43. The respondents have sought to contend that these orders are not applicable to the facts of the present case, by urging that the tenders in question have been issued with the purpose of selecting GHA for providing

GHS, which service is in fact akin to grant of a license to the GHA, as opposed to procurement of any goods and services that form the crux of the MSME orders. We are unable to agree with this interpretation. The use of the term 'procurement of services' in these orders has to be given its ordinary, commonly understood meaning, rather than the restrictive meaning sought to be urged by the respondents. The GHAs who are awarded the tender would ultimately be only rendering their services for a charge. Merely because their selection and licensing comes about by way of a tendering process, the nature of their enterprise does not change. They have been rendering, and would continue to provide services in the field of GHS at airports. Therefore, we have no doubt that at the time of framing the impugned RFPs, it was incumbent for the respondents to be mindful to the principle reflected in the executive orders relating to protection and promotion of MSMEs.

44. In fact, against this backdrop, any framing of criteria that attempts to rob the autonomy from a local entrepreneur and posits, after leaving them without any other option, the formation of consortium with other larger entrepreneurs who have deeper pockets and vaster experience of acting as GHAs in respect of scheduled airlines, as the only remedy, ought to be resting on a strong rationale. The collective dream of national self-sufficiency is incapable of being realised without having all hands on deck; the dream is bound to collapse in entirety under the weight of policies that are drafted to *prevent all hands from being on deck.* The policy implemented by incorporating the offending terms and conditions that we have taken note of hereinabove, not only stares in the face of the proclaimed *Atmanirbhar* policy, but also mocks it. It stifles all attempts of smaller entrepreneurs to dream bigger, let alone big.

45. A bare perusal of the extracts from the original record which were placed before us by the respondents show that, notwithstanding the express intention revealed from the 2016 National Civil Aviation Policy for economising air travel and the consequent need to reduce all related costs, including those incurred in providing GHS, the decision to cluster D-1 airports regionally was not motivated by any sound, carefully considered, economically sensitive reasons. Rather, the respondent no.2 sought to club the smaller airports falling in Group D-1 into four regions primarily to decrease its workload in dealing with bidders and to put it in its own words 'make it less cumbersome' for itself. That can hardly be a valid reason for the respondents to club together far flung airports, spread over hundreds – if not thousands of kilometres apart, which have nothing in common – except the fact that it is the respondent no.2 who is seeking to appoint the GHAs for all Group D-1 airports through a common tender.

46. For starters, this thoughtlessly pursued policy had the effect of strangulating the already-existing narrow margin of opportunities that were available to GHAs at Group D airports, under the terms of the 2018 Regulations. In fact, Clause 3(1) of the 2018 Regulations entitled scheduled airlines and helicopters to carry out self-handling, which reduced business opportunity for any third party GHAs in those cases. There was an additional restriction placed by Clause 3(5) of the 2018 Regulations, and the same is extracted hereinbelow for the purpose of our discussion:

> *"Clause 3- Ground Handling services at airports- (1) All domestic scheduled airline operators and scheduled helicopter operators will be free to carry out self-handling at all airports including civil enclaves.*
>
> *x x x*
>
> *(5) At the airports having annual passenger throughput of less than 10 million passengers per annum, based on the traffic*

output and airside and terminal building capacity, the airport operator may decide on the number of ground handling agencies, not exceeding three, including that of, - (a) the airport operator or its joint venture or its hundred percent owned subsidiary; (b) a Joint Venture or a subsidiary of Air India; and (c) any other ground handling agency appointed by the airport operator through a transparent bidding process."

47. Thus, in the case of airports having a footfall of less than 10 million passengers per annum – which would include most, if not all, of the airports categorised under Group D – the respondent no.2 had the discretion to decide how many GHAs were to function therein, which number could not exceed three (3), and had to be either the GHA of the airport operator, or the GHA of a JV or subsidiary of Air India, or a *third party GHA*. Without the clustering, every individual airport out of the 49 airports under Group D-1 was open to engaging a third party GHA; in the aftermath of the cluster, there would be now, in effect, only four such opportunities for the bidders.

48. All the more importantly, the clustering did not only lead to the confusing and pointless result of having twenty (20) airports in the Northern Region, ten (10) in the Southern region, seven (7) in the Northeast region, and twelve (12) in the Western region, but it also increased the annual turnover criteria which came to be fixed. Micro and small enterprises struggled to meet these enhanced costs, thereby restricting their ability to freely participate in a tender for an activity that actually depended on locally available trained personnel. Thus, it resiled from the originally expressed policy of an *Atmanirbhar Bharat* and stifled an equal playing field, to the obvious detriment of businesses with limited resources. Considering that all of this was done for the sake of 'decreased workload', as per the own showing of respondent no.2, we find the decision of the clustering to be arbitrary and unreasonable. It clearly is actuated by considerations which are

not germane to the real cause viz. to select the GHA who can render the service locally; efficiently; at a reasonable cost; and while protecting the local, medium and small scale sector.

49. Even though the requirement to show an Annual Turnover amount of INR 30 crore, was reduced to INR 18 crore, it still continued to be a significant and prohibitive sum for any micro and small enterprise, practically impossible for them to meet. The original record furnished by the respondent before us also shows that the total cost of the Ground Handling equipment required per aircraft, as also the total CAPEX required to be undertaken by the GHA for each airport in Category D was estimated to be INR 1-1.5 crore. This meant that the capital required to be invested for each region ranged between INR 20-20.5 crore for the northern region, INR 10-10.5 crore for the southern region, INR 7-7.5 crores for the northeast region and INR 12-12.5 crore for the western region. Yet, despite this knowledge, the respondents had prescribed a uniform, flat, unusually high annual turnover requirement of INR 30 crore for all the regions. We were neither provided with a reason for this decision at the time of arguments, nor did we find one on a perusal of the record. Today, the respondents' decision to reduce this amount to INR 18 crore has also not been substantiated by any reasons. This shift in the decision of the respondent no.2 itself shows that the Annual Turnover requirement was stipulated – both initially, and even at the time of revision, completely mindlessly and arbitrarily, with no correlation to the scale of operations that the successful bidder would have to undertake once the contract is awarded. At this point, reference may be made to a decision of a Coordinate Bench of this Court in ***Dhingra Construction Company Vs. Municipal Corporation of Delhi & Ors.*** *2005 (79) DRJ 383 (DB)* wherein the following observations had been made:

"*35. As noticed earlier, the Government or its agencies while acting in the contractual field have considerable latitude or elbow room in finalizing the "terms of engagement" if one could use that expression. However, equally the requirement fairness and non-arbitrariness cannot be lost sight of; there can be no lowering or compromise with those constitutionally sanctioned standards.* ***The fixation of an unrealistic or exaggerated threshold as the basis for estimating similar works, or eligibility criteria which has no reasonable correlation with the value of the contract, in our view adversely impacts on the need to have fair and wide participation in a public tendering process.*** *What has happened in the present case is that the basis [of similar works] has not been on any objective material, or after consideration of any estimate. Even this is not borne out from the record; we are left to surmise this. When the actual figures were made available along with the fact that only five firms (of whom two could not be regarded as eligible) had the requisite experience as per the impugned policy, and that the three eligible firms in the opinion of the committee could not possibly execute the works, the MCD nevertheless decided to proceed with the process of finalizing tenders for different works.*

36. ***After giving our anxious consideration, we cannot but hold that the impugned policy in effect subverts rather than subserves the purpose of fair competition based upon a reasonable estimate of what constitutes similar works. It effectively eliminates a wider participation, and keeps out parties who are otherwise eligible, on unreasonable considerations. By drawing a very high threshold or eligibility condition (contained,; in Para 3(viii), i.e. three similar completed works during the last three years not less than Rs. 480 lakhs; or worth Rs. 6 crores each for two years or worth Rs. 9.6 crore in any one year) the impugned policy is unreasonable and arbitrary.***

37. ***The public interest in a fair competition, in this case, in our view, based upon a reasonable and fair assessment of all factors that are relevant, and germane, far outweighs the interest of the State agency in being left alone to formulate its policies, with sufficient "elbow room".*** *The*

> *considerations that seemed to weigh with MCD while fixing the criteria in the impugned policy were based on non-existing, or irrelevant factors. This led to elimination of a large number of tenderers, even though the actual estimated work was far less than Rs. 12 crores. If the estimate for fixing similar works were based upon figures that had some semblance of relationship with the actual estimates, this result would not have ensued.* ***The impugned condition in our view is based upon an assumption or conclusion so unreasonable which no reasonable authority or person could ever have come to having regard to the facts presented in this case. Accordingly, we hold that the overwhelming public interest requires our intervention, under Article 226 of the Constitution***." (emphasis supplied)

50. Fair competition, the anvil upon which the ratio of the aforesaid decision rests, becomes an equally important consideration in the facts of the present case. The decisions to cluster the airports and fix an exorbitant and prohibitive Annual Turnover criterion appeared to have been taken in a complete vacuum; they were an antithesis to the *Atmanirbhar Bharat* policy, far removed from a rational nexus with the national civil aviation policy of the respondent no.1 or, any meaningful explanations. The impugned conditions also stare in the face of the MSME Order of 2018.

51. We also do not find any merit in the contentions of the respondents that since all bidders were permitted to form consortiums, by pooling in their resources and their turnover numbers to meet the eligibility criteria of the RFP in question, it could not be said that the micro and small enterprises were prevented from participating in the bids. Keeping in view the fact that even under the notification issued by the Ministry of Micro, Small and Medium Enterprises on 01.06.2020 revising the parameters of classification of MSMEs, a micro enterprise cannot have an Annual Turnover exceeding INR 5 crore – even if three micro enterprises meeting this classification were

to form such a consortium for the purpose of submitting a bid under the impugned RFP, they would still be short of meeting the annual turnover mark prescribed. Therefore, it is evident that the financial criteria prescribed are designed to virtually prohibit the participation of micro enterprises.

52. For the aforesaid reasons, we are of the view that the decision to carry out region-wise sub-categorisation of the 49 airports falling under Group D-1; the stipulation that only previous work experience in respect of providing GHS to scheduled aircrafts shall be considered acceptable for the purpose of the impugned tender/RFP and the revised minimum Annual Turnover criteria of INR 18 crore are discriminatory and arbitrary and, require to be struck down.

53. The fundamental structure of the tender/RFP in question in respect of Group D-1 airports having been found to be offensive, the entire tender/RFP would fall to the ground, as the offensive parts cannot be culled out for the purpose of saving the rest of the tender/RFP. We, accordingly, quash the tender/RFP in question in respect of Group D-1 airports and permit the respondents to come up with a fresh tender process keeping in view our aforesaid findings.

54. The writ petition is, therefore, allowed in the above terms with costs quantified at Rs. 1 lakh.

(REKHA PALLI)
JUDGE

(VIPIN SANGHI)
JUDGE

JULY 14, 2021/kk