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

% **Date of decision: 08.02.2022**

\+ **W.P.(C) 2986/2021 and C.M. No.9039/2021**

BRIGHT SHINE SERVICES .....Petitioner

Through: Mr. Umakant Mishra, Mr.Sibo Sanker Mishra, Mr.Niranjan Sahu, Advocates.

versus

UNION OF INDIA & ORS ..... Respondents

Through: Mr. Sonal Kumar Singh, Mr.Anshuman Gupta, Mr.Vignesh Raj, Ms. Aditi Mane, Advocates for respondents No.2 to 4.
Mr. Siddhant Buxy, Advocate for respondents No.5 & 6.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

JASMEET SINGH, J.(ORAL)

1. The Petition has been filed for the following substantial prayers:

"

a) pass appropriate writ, direction, order quashing the Order dated 28.01.2021 of the Respondent Authorities declaring Respondent no 5 LAS Ground Force Pvt Ltd as H1 in tender ID 2020_AAI_46811_1 for Udaipur, Group C Airport and/or;

b) pass appropriate writ, direction, order directing the respondent Authorities not to appoint/select Respondent no 5 as Concessionaire/Licensee by issue of Letter of Intent (LOIA), Letter of Award (LOA) or entering into a Concession Agreement and/or

c) pass appropriate writ, direction, order directing the Respondent Authorities to issue LoIA/LOA in favour of Petitioner being H2 and/or

d) pass appropriate writ, direction, order directing the Respondent Authorities to cancel all LoIA/LOA awarded to Respondent no 5 & 6 in other airports in Group A, B & C Airports..........”

2. The facts of the present petition in a nutshell are:

3. The Petitioner that is Bright Shine Services is a Partnership Firm with two partners and has been engaged in the business of providing different Ground based services at different airports for many years.

4. The Respondents 1 is the Union of India and is being sued through the Secretary, Ministry of Civil Aviation. Respondent no 2 is Airport Authority of India which is regulating and managing the aviation sector of the country including all the airports established in India. Respondent nos. 3 & 4 are officers of Respondent no. 2, AAI. Respondent no 5 & 6 are Livewel Group Companies and affiliates/associates of each other and are also engaged in the aviation sector providing different services like ground handling, aircraft cleaning etc. for last many years at different airports.

5. Ministry of Civil Aviation (“MoCA”) notified the Ministry of Civil Aviation (Ground Handling Services) Regulations, 2017 applicable to all Civil Airports and Civil Enclaves in the country. Thereafter MoCA notified the Ministry of Civil Aviation (Ground Handling Services) Regulation, 2018 on 26.10.2018 which stipulated that besides the GHAs (Ground Handling

Agency) of the Airport Operator or its JV or 100% subsidiary and Air India JV or 100% subsidiary, any other GHA will be appointed by the Airport Operator through a transparent bidding process.

6. The Respondent AAI, vide Tender Id_2020_AAI_46811_1 published Request for qualification (RFQ)/ tenders for Concession for ground handling services at AAI owned Group C Airports, on 15.04.2020. All airports in the country are classified in four groups i.e. A, B, C and D on the basis of revenue earned and the number of flights operating therefrom. Metro Airports are designated as Group A; airports at State capitals are Group B; airports at other important cities of the States are Group C, and rest of other regional and budget airports are designated as Group D airports, which generally cater to domestic, regional and non-scheduled flights involving smaller General Aviation Aircrafts.

7. Vide clause 2.2.1(g) of the impugned Tender/RFP, one of the essential conditions stipulated that if the bidder or its member/affiliated is an existing or past concessionaire or licensees of AAI intending to participate in the RFP, then the bidder or its member/affiliated should have 'Nil' outstanding dues for the period upto 31.12.2019 in respect of all the units of AAI where the participating tenderer is operating/had operated concessions/licenses as on the bid submission date. The stipulation of no outstanding dues to AAI also covered those firms/companies (other than the participating tenderer), where one of the directors/partners/proprietor is a director/partner or proprietor of the participating tenderer. The Bidders were required to submit No Dues Certificate (NDC) as prescribed in Appendix 9A & 9B of RFQ, at the time of Bid Submission. It was also stipulated that in the event of specific Order/judgment from the Judicial Court/ Arbitral

tribunal/ staying withholding the realization of certain dues, the adherence of above condition will be exempted and regulated in accordance with specific orders. Following is the clause 2.2.1(g) of the RFP:

> "*2.2.1 For determining the eligibility of bidders (**"Bidders"**) for their qualification hereunder, the following shall apply:*
>
> *g. If the Bidder or its Member or its Affiliates (whose experience is used for Technical and Financial Capacity) is an existing or past concessionaires or licensees of AAI intending to participate in response to RFP, then the Bidder or its Member or its Affiliates (whose experience is used for Technical and Financial Capacity) should have 'NIL' outstanding dues for the period upto 31st December 2019 in respect of all the units of AAI (where the participating tenderer is operating concessions/ licenses or had operated concessions/ licenses) as on the bid submission date.*"

8. Vide clause 2.7.3 and 2.7.4 it was stipulated that the bid is liable to be rejected and bid security appropriated if a material misrepresentation is made or uncovered at any time, or the bidder has given any materially incorrect or false information, the bidder shall be disqualified forthwith. These Clauses read as under:

> "*2.7.3 The Authority reserves the right to reject any Bid and appropriate the Bid Security, if:*
>
> > *(i) At any time, a material misrepresentation is made or uncovered, or*
> > *(ii) the Bidder does not provide, within the time specified by the Authority, the supplemental information sought by the Authority for evaluation of the Bid.*
> >
> > *Such misrepresentation/ improper response shall lead to the disqualification of the Bidder. If the Bidder is a Consortium, then the entire*

Consortium and each Member may be disqualified / rejected. If such disqualification/rejection occurs after the Bids have been opened and the Highest Bidder gets disqualified / rejected, then the Authority reserves the right to:

(I) invite the remaining Bidders to submit their Bids in accordance with RFP; or
(II) take any such measure as may be deemed fit in the sole discretion of the Authority, including annulment of the Bidding Process.

2.7.4. In case it is found during the evaluation or at any time before execution of the Concession Agreement or after its execution and during the period of subsistence thereof, including the Concession thereby granted by the Authority, that one or more of the conditions for shortlisting have not been met by the Bidder, or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith, if not yet appointed as the Concessionaire either by issue of the LOIA, LOA or entering into of the Concession Agreement, as the case may be, and if the Bidder/ SPV has already been issued the LOIA, LOA or has entered into the Concession Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by the Authority to the Bidder, without the Authority being liable in any manner whatsoever to the Bidder and without prejudice to any other right or remedy which the Authority may have under this RFP, the Bidding Documents, the Concession Agreement or under applicable laws.

The Authority reserves the right to verify all statements, information and documents submitted by the Bidder in response to the RFP. Any such verification or lack of such verification by the Authority shall not relieve the Bidder of its obligations or liabilities hereunder nor will it affect any rights of the Authority thereunder."

9. It is the Petitioner's submission that after publishing of the RFP, the Respondent no. 3, Jt. GM(Ops) Chennai Airport shot an email letter dated 02.07.2020 to all Contractors/GHAs demanding unjustly and unfairly, payment of differential Royalty amount apparently calculated at 32.5% since 23.07.2010, instead of 13%, as was being paid as per existing contracts. According to the Petitioner, the timing of the letter seemed to have an ulterior motive to prevent many of the existing service providers from bidding on the ground of inability to submit NDC because of the fresh demand raised. The petitioner submitted that since Respondent No. 6, affiliate company of Respondent no. 5 – a competitor, also worked in Chennai till 2013, one such demand ought to have been sent to Respondent no. 5, demanding differential liability.

10. Bid closing date and time for group C was subsequently changed to 14 August 2020 vide Corrigendum no. 4.

11. The Petitioner filed a Writ Petition (Civil) No. 10873 of 2020 in the High Court of Judicature at Madras, praying for, amongst other, for a direction to the respondents to permit the petitioner to participate in the Tender Id 2020_AAI_46811_1 and Tender Id 2020_AAI_53977_1 without insisting on the production of NDC pending disposal of the main petition. The Madras High Court vide Order dated 14.08.2020 directed that the petitioner shall be permitted to submit the tender to the Respondents 1 to 4, subject to the condition that in the event of failure in this writ petition, the petitioner will be bound to pay the disputed amount.

12. In response to the impugned RFP 2020_AAI_46811_1, 12 bidders – including the petitioner and Respondent no. 5 LAS Ground Force Pvt. Ltd., submitted their respective bids.

13. The Petitioner states that the Petitioner as well as some other Participant Bidders in Tender Id 2020_AAI_46811_1 submitted the Bid documents either making truthful declarations about their past activities as concessionaires/licensees service providers in different airports, and submitted the required Appendix 9A & 9B, or on the basis of orders on different dates of the High Court of Judicature at Madras, directing the Respondents nos. 2 to 4 to permit participation in the impugned Tender, they participated. However, Respondent no. 6, even though was an affiliate of Respondent no. 5, suppressed the pending dues; submitted vague and misleading Appendix 9A & 9B dated 10.08.2020, and; made material misrepresentation and furnished materially incorrect or false information.

14. It is the Petitioner's contention that the license was issued to Respondent No. 6 for cleaning of aircraft (interior) and providing terminal services at Chennai Airport for the year 2009, and was renewed from time to time till 2013, and BCAS security pass issued to Respondent no. 6 in 2013, clearly shows that Respondent no 6 had been providing services as a licensee at Chennai Airport.

15. Therefore, the Respondent nos. 5 & 6 misdeclared their position in Appendix 9A as regards having/had any contracts with airports/offices by AAI by simply declaring "NIL", despite having operated in Chennai, Leh, Pune, Goa etc. In Appendix 9B, Respondent no. 5, at 'Cl. 1 – Name of contract', intentionally and deliberately mis-declared the position as "*NOT APPLICABLE as LAS Ground Force Pvt Ltd or its Affiliate Livewel Aviation Service Pvt Ltd is not operating or had never operated in past at Trichy & Udaipur Airport as a concessionaire or licensee.*" Hence, Respondent nos. 5 & 6, suppressed their activities conducted in the past at Chennai, Pune, Goa,

Leh and other airports and the dues outstanding against them at those airports in Appendix 9A & 9B dated 10.08.2020.

16. Hence, the Petitioners submit that due to misrepresentation of information by Respondent no. 5 and 6, their bids should have been rejected by the Respondent Authorities.

17. The Petitioner by his email dated 16.10.2020 brought the defaults of Respondent no. 6, Affiliate/associate of Respondent no. 5 to the notice of the Chairman of Respondent AAI. The petitioner then followed up on his representation vide his emails dated 06.11.2020 & 19.11.2020 bringing to Respondent Authorities' notice, the violation of essential conditions by both Respondent nos. 5 and 6.

18. The Respondent Authorities issued a Shortfall Document Submission request on 25.11.2020 in Row 3 Column 4, asking Respondent no. 5 for clarification as under:

> "*Please clarify if LAS Ground Force or any of its associate (whose experience is used for evaluation of Technical and Financial Capacity under the terms and conditions of the RFP) (or Consortium members (if any) is either providing or had provided any services at AAI airports either through a direct contract or through a contract with airlines or any other party) in any capacity whatsoever and not being limited to as a role of a concessionaire or licensee of AAI). If yes, kindly provide no dues certificate for each of these airports for a period till 31st December 2019 (Note: Please strike if not applicable)….*".

19. The document submission end date was specified as 09.12.2020. As per Responded Short Fall Document report, the Respondent no 5 submitted No Dues Certificate letter, amongst other documents, and Appendix 10 on 07.12.2020. The Respondent no.6, affiliate of Respondent no. 5 still had

some dues pending at Leh Airport and Chennai Airport (due to differential calculation @32% from 2010 to 2013, which was not disclosed by Respondent nos. 5 and 6

20. It is the Petitioners submission that the action of the Respondent Authorities in giving opportunity to Respondent no. 5 to correct its defaults amounted to changing the Rules of the game after it has begun by adopting different tender conditions qua some bidders selectively. When no action was taken by the Respondent Authorities, the Petitioner escalated his grievance to the Hon'ble Minister, MoCA vide his email dated 03.12.2020 and 12.01.2021.

21. Financial Bids were not opened on 27.11.2020. However, another evaluation Report was issued by Respondents on 18.01.2021 declaring that – based on the representations of the bidders and facts ascertained, the disqualification order of Respondent no. 5 was reversed, and it was found to be qualified and eligible for opening of its financial bid.

22. Respondent no. 6 wrote several emails/letters from 28.09.2020 and 06.10.2020 to Jt.GM, Ops, Chennai, requesting for issue of NDC expeditiously as the last date of submission was 09.10.2020. The Petitioner stated that in Respondent no. 6's letter dated 03.10.2020 to Sh. Sanjay Dularrey, Jt.GM(Ops) AAI, Pune they, inter alia, stated that their company M/s Livewel Aviation Services Pvt. Ltd. is not providing, or had provided, any services at AAI Airports either through a direct contract with AAI Airports, or through a contract with Airlines or any other party in any capacity whatsoever, and not being limited to as a role of a concessionaire or licensee of AAI. In this view of the matter, the Respondent no. 6 requested

that a No Dues Certificate be issued from AAI. This, according to the Petitioner, was an incorrect assertion.

23. Petitioner further states that as per declaration made by Respondent no. 5 to the Respondent no. 3 in their letter dated 05.12.2020, they admitted that on 26.11.2020, AAI had raised a bill on account of Cargo supervisory Services provided to Go Airlines vide an agreement with Go Airlines for Leh Airport, which was paid by them immediately on 28.11.2020, and obtained the NDC from Leh Airport. However, NDC issued by the Airport Director Leh Airport on the request of Respondent no. 6 is dated 27.11.2020, one day before the payment was, admittedly, made. This not only shows that dues at Leh Airport was pending, but that the Respondents nos. 5 & 6 were being given special consideration by issuing NDCs to participate in the tender process, even though dues were pending.

24. After evaluation of the bids in Tender Id 2020_AAI_46811_1, the Respondent Authorities issued an Evaluation Summary Report on 25.01.2021, where they declared that 11 bidders – including Petitioner and Respondent no. 5, were found qualified and eligible for opening their Financial Bid. On 28.01.2021, Respondent Tendering Authority published the Financial Bids submitted by different bidders in Tender Id 2020_AAI_46811_1 for Group C Airports for concession for Ground Handling services, and Respondent no. 5 emerged as the Highest Bidder H1 for Udaipur Airport with a bid amount Rs.1,25,57,755/-, while the Petitioner remained as the next highest bidder H2 with Rs.78,00,000/- as the bid amount.

25. The petitioner again wrote to the Civil Aviation Minister on 28.01.2021, requesting him to scrutinize Respondent no. 5 and its affiliate Respondent No. 6 with respect to NDC from Chennai Airport.

26. In this background, the petitioner has approached this court.

27. The Petitioner has relied upon ***Ramana Dayaram Shetty v. International Airport Authority of India and Others,*** (1979) 3 SCC 489; ***Dutta Associates Pvt. Ltd. v. Indo Mercantile Pvt. Ltd. and Others,*** (1997) 1 SCC 53, to state that whatever procedure the Government proposes to follow in accepting a tender, must be clearly stated in the tender notice and the consideration of tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open. The Petitioner also relied on ***Educomp Solutions Ltd. and Others v. State of Assam,*** (2006) 3 GauLR 117 (Gau), wherein a Division Bench of the Gauhati Court has held that it would not be permissible for the authorities to evaluate the bids by employing hidden criteria that was not made known to the bidders prior to submission of the tender.

28. The Respondent no. 2 to 4 have filed in their Counter Affidavit claiming that the Petitioner has raised various misguided allegations against the Respondents, without any proof and with the sole intention of ousting the successful bidders of the RFP, that would benefit Petitioner, who was declared as H2 bidder for Udaipur airport vide the financial bid report dated 28.01.2021.

29. Following are the submissions of Respondents 2 to 4:

(i) <u>Respondent No. 6 is neither an existing/past concessionaire nor an existing/past licensee of Respondent No. 2.</u>

It was submitted that Respondent No. 6, an affiliate of Respondent No. 5, was neither a concessionaire nor a licensee of Respondent No. 2, and had not entered into any contract with airports/offices controlled by Respondent No. 2. On a bare reading of the RFP conditions, Respondent No. 5 opined that it was not required to disclose any details of past or present contracts that had been entered into by Respondent No. 6 with entities, other than Respondent No. 2.

In Appendix 9A submitted by Respondent No. 5 on 10.08.2020, it declared that it, or its affiliates, had no contracts with airports/offices controlled by Respondent No. 2. In the Appendix 9B submitted by Respondent No. 5, it was stated that neither Respondent No. 5, nor Respondent No. 6 were operating, or ever had operated at the Udaipur and Trichy airports as concessionaires or licensees. It is reiterated that Respondent No. 5 had submitted its bid for Udaipur and Trichy airports.

(ii) <u>Shortfall documents were requested from all the bidders, including Respondent No.5.</u>

After internal discussion, it was observed by Respondent No. 2 that the language of Appendix 9A of the RFP might have led bidders to believe that they were only obligated to disclose details of their contracts with AAI, or that of their affiliates, as concessionaires/licensees of Respondent No. 2, and not the details of their contracts as a non-entitled entity (entity not having a direct contract with Respondent No. 2).

It was advised to the Respondent No. 2, that they seek clarification in this regard from bidders and, therefore, Respondent No. 2 requested submission of shortfall documents from Respondent No. 5 as well as from petitioner. Respondent No. 2, inter-alia, requested Respondent No. 5 to confirm whether the latter – or any of its affiliates, was either providing or had provided any services at airports operated by Respondent No. 2, either through a direct contract with Respondent No. 2 or through a contract with any airline or any other party. In case the answer to the aforesaid question was in the affirmative, Respondent No. 5 was requested to provide NDCs upto 31.12.2019 for each airport where it, or its affiliate, operates/operated. It is submitted that the deadline for submission of the aforementioned shortfall documents was 09.12.2020.

This opportunity for submission of shortfall documents were extended to all bidders, and Clause 2.21.1 of the RFP empowered Respondent No. 2 to request clarifications from bidders in the course of evaluation.

(iii) Respondent No. 5 had no outstanding dues towards any airport controlled by Respondent No. 2.

Respondent No. 6 had been issued an NDC by Respondent No. 2 on 05.02.2019 in respect of the dues payable up to 30.04.2018 for the Northern region, and after issuance of the aforesaid NDC, Respondent No. 6 had not carried out any business activity at any airports operated by Respondent No. 2 – either under a direct contract with Respondent No. 2, or through a contract with airlines or any other party.

Kolkata airport issued an NDC in favour of Respondent No. 6 on 05.10.2020, confirming that no dues were outstanding against Respondent No. 6 as far as Kolkata airport was concerned.

AAI Cargo Logistics & Allied Services Company Limited ("AAICLAS"), a separate entity, incorporated for managing the development of air cargo business at airports, also issued an NDC in favour of Respondent No. 6 on 07.10.2020. It confirmed, after due perusal of its financial records, that Respondent No. 6 had no pending dues towards AAICLAS for any of the airports operated by Respondent No. 2.

Pune airport issued an NDC in favour of Respondent No. 6 on 14.10.2020, confirming that there were no pending dues of Respondent No. 6 with respect to the Pune airport.

Goa airport issued an NDC in favour of Respondent No. 6 on 16.10.2020. In this NDC, it was confirmed that Respondent No. 6 had provided services to National Aviation Company of India Ltd from October, 2014 to April, 2015 at the Goa airport.

On 05.12.2020, Respondent No. 5 submitted its shortfall documents to Respondent No. 3, wherein Respondent No. 5 informed that Respondent No. 6 had been issued an NDC by Respondent No. 2 on 05.02.2019. Respondent No. 5 further highlighted that Respondent No. 6 had been issued an NDC by AAICLAS for cargo services provided to Go Air. It was also informed by Respondent No. 5 that the requisite NDC had also been issued by Leh airport in favour Respondent No. 6.

Upon verification from other airports, Respondent No. 2 was able to confirm that there were no pending dues of Respondent No. 6 with respect to the aforesaid airports.Since Respondent No. 2 had duly confirmed and satisfied itself of the fact that Respondent Nos. 5 and 6 had no outstanding dues towards any airport controlled by Respondent No. 2, there was no reason for Respondent No. 2 to disallow Respondent No. 5 from participating in the RFP. Neither Respondent No. 5, nor Respondent No. 6, were habitual defaulters, having cleared all their outstanding dues with respect to Respondent No. 2. Therefore, the bid of Respondent No. 5 was declared to be technically eligible in the notification dated 25.01.2021.

(iv) **Respondent No. 6 had no outstanding dues with respect to Chennai airport.**

On 16.10.2020, Respondent No. 4 issued an email to Respondent No. 5, stating that Respondent No. 6 had provided manpower for cabin cleaning services to several airlines such Air Arabia, Air Deccan, Air India, Air India Express, Air Mauritius, Gulf Air, Indian Airlines, Kuwait Airways, Lufthansa, Saudi Airlines and Thai Airways in the 2008, and to National Aviation Company of India Ltd. in the year 2010-2011. As per information received from the cargo department, Respondent No. 6 had signed a cargo supervision agreement with M/s Go Air valid from 01.11.2017 for a period of two years, by way of which Respondent No. 6 was offering cargo assistance to M/s Go Air.

On 17.10.2020, Respondent No. 5 replied to the email of Respondent No. 4 dated 16.10.2020, and informed that it did not have records pertaining to cabin cleaning services provided by Respondent No. 6 to various airlines in 2008 and 2010-2011, as these records were old. It was however stated that the aforementioned services rendered by Respondent No. 6 must have been considered by Respondent No. 2, when it issued an NDC in favour of Respondent No. 6 on 05.02.2019. It was also clarified therein that Respondent No. 6 had operated under AAICLAS in Chennai from 15.01.2018 to 07.12.2019, and that AAICLAS had already issued an NDC in favour of Respondent No. 6 with respect to cargo services provided by Respondent No. 6 at Chennai airport.

By way of a clarificatory letter dated 05.01.2021, the Airport Director, Chennai airport informed Respondent No. 3 that Respondent No. 6 had no outstanding dues towards Respondent No. 2 with respect to the Chennai airport.

(v) **Respondent No. 6 did not have any outstanding dues towards Respondent No. 2 in respect of Leh airport.**

On 25.11.2020, Respondent No. 5 was declared to be ineligible for the tender for Group B 1 airports on account of outstanding dues of Respondent No. 6 towards the Leh airport. Pursuant to the same, Respondent No. 5 raised the issue of its disqualification with the Chairman of Respondent No. 2, and the CEO of AAICLAS by way of email dated 26.11.2020, claiming that Respondent No. 6 had not provided any GHS at Leh airport, but was rather engaged in the provision of cargo supervision services, which was under the sole domain of AAICLAS. Therefore, it was claimed by Respondent No. 5 that the pending dues of Respondent No. 6 in respect to the Leh airport, if any, were dues of AAICLAS and not Respondent No. 2.

In order to prevent Respondent No. 5 from getting disqualified from the tender for Group B1 airports, Respondent No. 6 sought to clear the dues payable in respect to the Leh airport. It is submitted that Respondent No. 2 informed Respondent No. 6 vide email dated 26.11.2020 that an amount of Rs. 3,17,703/- remained payable on part of Respondent No. 6 in respect of the Leh airport. Accordingly, Respondent No. 6 made the payment of Rs. 3,17,703/- to the bank account of Respondent No. 2 on 26.11.2020 under protest. The payment was confirmed by finance department of Respondent No. 2 on 27.11.2020.Accordingly, an NDC dated 27.11.2020 was issued in favour of Respondent No. 6 by Leh airport, confirming that Respondent No. 6 had no pending dues towards Respondent No. 2 in respect of the Leh airport.

On 08.01.2021, Leh airport informed Respondent No. 2 that some invoices were inadvertently raised on Respondent No. 6 in respect of the Leh airport. It was also confirmed therein that Respondent No. 6 was not involved in providing GHS at Leh airport, and that the same was handled by one Mis Trikuta.

Based on the aforesaid communications, Respondent No. 5 was considered to be eligible for participating in the tender for Group B1 airports on 18.01.2021.

(vi) **<u>Issue regarding outstanding dues of any entity is under the sole domain of Respondent No. 2.</u>**

Respondent nos. 2 to 4 submit that the entire purpose of Clause 2.2.1 (g) of the RFP is to ensure that habitual defaulters are prevented from taking part in government tenders. Besides the above, the requirement of producing NDCs is also a mechanism used by public authorities for recovery of its outstanding dues.

A similar issue had arisen before a Division Bench of this Court in *ARTNC Incorporated v. A.A.I. and Anr,* W.P. (C) 8485/2011. The Division Bench had categorically held that the issue of any outstanding dues of a bidder, and the issue of whether, or not, such bidder should be allowed to participate in a tender process, is within the domain of Respondent No. 2 i.e. the Airports Authority of India, and no third party has any say or interest in the same.

Respondent No. 5 is not a persistent defaulter as far as Respondent No. 2 is concerned, and its affiliate, Respondent No. 6, has been issued NDCs by all the concerned airports. Even if it is assumed that there were outstanding dues pending against Respondent No. 5, or its affiliates, the decision to allow Respondent No. 5 to participate in the RFP is within the sole domain of Respondent No. 2 and is beyond interference at the instance of third parties.

30. The Respondent no. 2 also submits that on 07.10.2020, it wrote an email to Respondent Nos. 5 and 6, asking them to clarify their position regarding the on-going investigation by CBI. In response to the email dated 07.10.2020, Respondent No. 5 wrote an email to Respondent No. 2 on 09.10.2020, clarifying that the aforesaid CBI investigation was against M/s Livewel Airteam Pvt. Ltd., and that the ownership of Respondent Nos. 5 and 6 was completely different from that of M/s Livewel Airteam Pvt. Ltd. It was also confirmed that there were no common directors between the Board of Directors of Respondent Nos. 5 and 6, and that of M/s Livewel Airteam Pvt. ltd. On 12.10.2020, Respondent No. 5 also submitted lists from the

Registrar of Companies, which confirmed the directors of Respondent Nos. 5 and 6.

31. Respondent no. 5 and 6 have also filed their affidavit in response to the writ petition and their submissions are in line with that of Respondents 2 to 4. Respondents 5 to 6 have also stated that the tendering authority have considered the form and time of submission of NDC as non-essential conditions, that requires only substantial compliance. Though the tendering authority, i.e. Respondent Nos. 2 to 4 have not taken the said position.

32. In the Rejoinder, the Petitioner has reiterated the same position i.e. that the Respondent Nos. 2 to 4 have not been fair, transparent and reasonable and relied on the judgment of ***Michigan Rubber India Ltd. v. State of Karnataka,***(2012) 8 SCC 216, and also on ***Maa Binda Express Carrier and Anr. v. North East Frontier Railway and Ors,*** (2014) 3 SCC 760, to state that the actions of the Respondents are amenable to judicial review as they have acted for an ulterior purpose.

33. The Ld. Counsel for the Petitioner also submitted that clause 2.2.1(g)(a) expressly obligated the Respondent 2 to 4 to reject the bid in view of the non-submission of NDC, and misrepresentation/false declaration made by respondent no. 5. This dishonesty on part of Respondents Nos. 5 to 6 should have been a decisive factor for rejecting the bid, especially when other bidders had been honest/ forthcoming with the required information.

34. On 10.03.2021, when the case was heard, on prima facie view that there was merit in the submission of the petitioner, Respondent nos. 2 to 4, were restrained from proceeding to award the tender to, or signing any contract with, the respondent no. 5 till the next date.

35. On 08.12.2021, we took notice of the counter affidavit of respondent Nos. 2 to 4, wherein they clearly stated that no outstanding dues were payable by respondent No.6 in respect of – either the Leh Airport, or Chennai Airport. Since the respondent authorities stated the said position on affidavit, there was no reason for us to not accept the same. We, therefore, while giving time to the Petitioners to file the Rejoinder, vacated the interim stay.

36. On 08.02.2022, we dismissed the petition and recorded that the reasons will be given later.

ANALYSIS:-

37. We have heard the arguments of the learned counsels for the parties as well as perused the documents on record.

38. We are concerned with the following questions:

a) Whether the Respondent Nos. 2 to 4 have wrongly issued NDCs to Respondent 5 and 6 in violation of clause 2.2.1(g) and, consequently, Respondent 5 and 6 were ineligible to participate in tender no.2020_AAI_46811_1 as per clause 2.2.1(g)?

b) Whether Respondents Nos. 5 and 6 have mis-represented and given wrong information in Appendix 9A and 9B, and violated clause 2.7.3 and 2.7.4?

c) Whether Respondent 2 to 4 have acted in an arbitrary, unreasonable, illegal or *malafide* manner by giving the Respondents Nos. 5 to 6 an opportunity to file shortfall documents and accepting its bid?

39. We have previously discussed the scope of judicial review in tender matters in our judgment, ***VF Worldwide Holdings Ltd. v. Ministry of External Affairs, Government of India and Others,*** 2021 SCC OnLine Del 5065., wherein we have observed, following the Supreme Court decisions:

> "***45.*** *At the outset, we would like to reiterate the extent of judicial review in tender matters as laid down by the Supreme Court in a catena of cases. The guiding principles are as under:*
>
> > *1) The tender floating authority is the best judge of its requirements and the best judge to interpret its tender conditions. The same has been observed by the Supreme Court in Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.[1] wherein it has been held:—*
> >
> > > *"15. We may add that* ***the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions.*** *It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."*
> >
> > *2) The scope of judicial review and scrutiny encompasses arbitrariness, unreasonableness, and illegal treatment by the tender floating authority. In Tata Cellular v. Union of India[2] it was held -*

> *"77. ...*
>
> *Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:*
>
> *(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.*
>
> *(ii) Irrationality, namely, Wednesbury unreasonableness.*
>
> *(iii) Procedural impropriety."*

*3) The scope of judicial review does not include the determination of soundness of the decision. As stated in Jagdish Mandal v. State of Orissa*3, *the court in exercise of its power of judicial review can examine whether the process adopted, or decision made by the authority is mala fide, or intended to favour someone, or the process or the decision is arbitrary and irrational. The following was observed:*

> *"***22.** *Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial*

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

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

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

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

40. As per clause 2.2.1(g), the Respondent no. 5 filled Appendix 9A and 9B in the following manner:

"L A S	*LAS Ground Force Pvt. Ltd.*
GROUND FORCE	*301, The Glacis Tower, Above IndusInd Bank,*
	Linking Road, Khar West, Mumbai – 400 052
	T : 022 62453444

Appendix

Undertaking with information on contracts with AAI

I/ We hereby declare that we are having / had the following contracts with Airports / Offices controlled by Airports Authority of India: NIL

Sno.	Airport Name	Facility/contract	Contract Period	
			From	To
	NA			

Date: 10th August 2020

Signature
Name: HUMIN B DAVER
Designation: DIRECTOR
Address: 301, The Glacis Tower,
Above IndusInd Bank
Linking Road, Khar West
Mumbai: 400 052
Seal of the Member"

"L A S GROUND FORCE

LAS Ground Force Pvt. Ltd.
301, The Glacis Tower, Above IndusInd Bank,
Linking Road, Khar West, Mumbai – 400 052
T : 022 62453444

Appendix 9B

1	*Name of Contract*	*NOT APPLICABLE as LAS Ground Force Pvt. Ltd or its affiliate Livewel Aviation Services Pvt Ltd is not operating or had never operated in past in Trichy & Udaipur Airport as a concessionaire Licensees*
2	*Agreement No.*	*NA*

3	*Stipulated Date of Start of Contract*	*NA*
4	*Actual Date of Start*	*NA*
5	*Date of Completion / Termination*	*NA*
6	*Amount of SD available with validity period*	*NA*
7	*Amount of outstanding dues upto 30/09/2019 (Disputed and un-disputed amounts to be shown separately)*	*NA*

Item	*Disputed Amount (Rs.)*	*Un-disputed Amount (Rs.)*	*Remarks*
License Fee			
Space Rent			
Utility Charges			
Interest			
Any other item			
Total			

FORMAT OF OUTSTANDING DUES / NO DUES CERTIFICATE

8 Details of any arbitration / litigation : NA

For LAS Ground Force Pvt Ltd
Signature of Authorised
Name: HUMIN B DAVER
Designation: DIRECTOR

Signature of Airport Director
Signatory
Name [.]
Designation [.]
……..Airport"

41. A bare perusal of form clearly shows that Respondent no. 5 has given information truthfully as per its understanding.

42. The Respondent no. 2 realizing that some bidders have misinterpreted the form and have filled the form with respect to only Trichy and Udaipur Airport, by email dated 19.11.2020 asked for shortfall documents from all the bidders.

43. Realizing the inadequacy in their documents, Respondent nos. 5 and 6 duly cleared their dues and obtained NDCs from all the airports they had contracts in the past – which was duly confirmed by Respondents no. 2 to 4 in their counter affidavit. Therefore, the tendering authority who are the best judge and interpreters of the tender conditions, satisfied themselves that Respondents nos. 5 and 6 had no pending dues and are not habitual defaulters.

44. It will be useful to rely on the observation of a coordinate bench of this court in ***ARINC Incorporated v. A.A.I. and Anr.***, W.P.(C) 8485/2011, decided on 02.12.2011, wherein it was observed:

> "*We fail to appreciate the aforesaid plea for the reason that there may be various reasons at a stage where some amounts may be outstanding from a party.* ***The objective of including such a clause is that a persistent defaulter should not claim the right to contract from the principal who should be entitled to reject such a bid even if the party is L-1. Thus, this issue really falls within the domain of the respondents to determine whether the outstandings, details of which are not available with the petitioner, do exist*** *and are such that the respondents do not want to deal with M/s. SITA.*"

45. Therefore, the matter pertaining to dues – about which the Petitioner cannot have the full information available with it – lies solely within the

domain of the tendering authority, i.e. Respondent no. 2 to 4. Respondent no. 2 to 4 have stated on affidavit that there are no dues outstanding against Respondents nos. 5 and 6 and we have no reason to doubt or disbelief.

46. The precedents cited by the Petitioner and the legal principles laid therein are well settled, but are inapplicable to the facts of the present case. Hence, the reliance by the Ld. Counsel for the Petitioner on these authorities is misconceived. We do not see any arbitrariness, *mala fide*, or unreasonableness with Respondent no. 2 to giving an opportunity to the bidders to file shortfall documents as the opportunity was afforded to all the bidders without discrimination. The rules of the game have not been changed as alleged by the Petitioner, as the Respondent no. 2 has simply removed the confusion and sought clarification from all the bidders uniformly. Additionally, the Respondent no. 5 to 6 were not the only bidders that were held qualified after being disqualified initially. M/s J.P. Aviation Services Pvt. Ltd. was also later held to be qualified.

47. Hence, seeing no arbitrariness, unreasonableness, illegality, or *mala fides* in the decision of holding Respondent nos. 5 to 6 as H1 bidders, or the process adopted by Respondent nos. 2 to 4, we find no merit in this petition.

48. Therefore, we dismiss this petition, leaving the parties to bear their own costs.

JASMEET SINGH, J

VIPIN SANGHI, J

FEBRUARY 08, 2022