



COMPETITION COMMISSION OF INDIA

Case No. 07 of 2014

In Re:

M/s NexTenders (India) Private Limited

Informant

And

**1. Ministry of Communication and
Information Technology**

Opposite Party No. 1

2. Ministry of Commerce

Opposite Party No. 2

3. National Informatics Centre

Opposite Party No. 3

4. National Informatics Services Inc.

Opposite Party No. 4

5. M/s ITI Limited

Opposite Party No. 5

**6. M/s Karnataka State Electronics Development
Corporation Ltd.**

Opposite Party No. 6

CORAM

**Mr. Ashok Chawla
Chairperson**

**Mr. Anurag Goel
Member**

**Mr. M. L. Tayal
Member**



**Mr. S. L. Bunker
Member**

Appearances: Ms. Tasneem Ahmadi, Advocate for the informant.

Order under section 26(2) of the Competition Act, 2002

The present information has been filed under section 19(1)(a) of the Competition Act, 2002 ('the Act') by M/s NexTenders (India) Private Limited ('the informant') against Ministry of Communication and Information Technology ('the opposite party No.1'), Ministry of Commerce ('the opposite party No.2'), National Informatics Centre ('the opposite party No.3'/ NIC), National Informatics Services Inc. ('the opposite party No.4'/ NICSI), M/s ITI Limited ('the opposite party No.5'/ ITI) and M/s Karnataka State Electronics Development Corporation Ltd ('the opposite party No. 6'/ KEONICS) alleging *inter alia* contravention of the provisions of sections 4 of the Act.

2. Factual matrix, as culled out from the information and the documents filed therewith, may be briefly noted.

3. The informant is a company incorporated under the Companies Act, 1956 with its registered office at Mumbai. It is stated to be engaged in the business of providing application software solutions and services, particularly to the agencies of the Government of India, State Governments, UTs, PSUs, semi-government agencies etc.

4. The opposite party No. 1 *i.e.* Ministry of Communications & Information Technology frames policies in respect of software, information technology and e-governance including the National e-Governance Plan of the Government of India.



5. The opposite party No. 2 *i.e.* Ministry of Commerce is tasked with the implementation of the e-procurement Mission Mode Project under the National e-Governance Plan of the Government of India.

6. The opposite party No. 3 *i.e.* NIC is an independent unit/ directorate of the opposite party No.1. It provides e-Government/ e-Governance Solutions services and solutions in the government sector.

7. The opposite party No. 4 *i.e.* NICS is the commercial and services arm of NIC.

8. The opposite party No. 5 *i.e.* ITI is a public sector undertaking and markets inter alia e- tendering systems commercially.

9. The opposite party No. 6 *i.e.* KEONICS is a public sector undertaking of the state of Karnataka with a primary function to provide IT services to the State Government, Departments, Corporations *etc.*

10. Facts, as stated in the information, may be briefly noted.

11. It has been stated in the information that under the National e-Governance Plan (NeGP) of the Government of India, various projects known as Mission Mode Projects have been identified that form the core of the Government of India's e-governance plans over the coming years. It is further stated that one of these Mission Mode Projects is e-procurement, which is considered an "Integrated Project" because of its need for multiple implementations at the Central and State levels in order to cater to each government agency's requirements and business rules.

12. It is averred that Government e-Procurement being relatively new area, only few private software owners/ vendors (including the informant) were



present in the market in the year 2002. It is, however, stated that this market has now evolved considerably and various suppliers are offering a wide range of solutions and revenue models. It has also been stated that in the last few years, some government and public sector companies including the opposite party Nos. 3, 4, 5 and 6 have also entered this field either by developing their own solutions or by tying-up exclusively with a private software owner/vendor.

13. The informant appears to be aggrieved by the purported abuse of dominant position by the opposite parties in entering into contracts for providing e-tendering solutions to various government agencies and PSUs without an open tender or any competitive bidding. It is alleged that by masking the transaction as a Government to Government transaction, the opposite parties are trying to justify the lack of tendering or bidding.

14. It is alleged by the informant that the opposite party Nos. 3, 4 and 5 have been using their dominant position as agencies/ departments/ undertakings of the opposite party No.1 to control the market which comprises of the Central Government and its departments, the State governments, PSUs, government agencies, departments etc. and to induce different states and government organisations as well as PSUs to implement the e-procurement platform offered by them on a nomination basis without inviting tender or through any other competitive bidding process.

15. The informant has also detailed various instances in support of its allegations that the opposite party Nos. 3 and 5 in connivance with the opposite party Nos. 1 and 2 are deliberately and intentionally abusing their dominant position to further influence various departments/ agencies, State Governments to enter into contracts with them for the e-procurement solutions without any open bidding. It is not necessary to reproduce such averments/allegations here.



16. Based on the above averments and allegations, the informant has alleged contravention of the provisions of section 4 of the Act by the opposite parties.

17. The Commission has perused the information/ additional information and the documents filed therewith by the counsel for the informant. The Commission has also heard the counsel appearing for the informant.

18. The informant is essentially aggrieved by the purported abuse of dominant position by the opposite parties whereby and whereunder they are providing e-procurement solutions to the Central Government/ State Governments/ Government Departments/ PSUs/ Government Agencies *etc.* on nomination basis without any open tender or otherwise going through competitive bidding process.

19. Earlier, the informant filed a similar information before the Commission *vide* Case No. 63 of 2012 which was closed by the Commission by passing an order dated 22.11.2012 under section 26(2) of the Act.

20. Against the aforesaid order of the Commission, the informant preferred an appeal before the Competition Appellate Tribunal. The Tribunal *vide* its order dated 12.11.2013 disposed of the said appeal as withdrawn with liberty to the appellant to file a fresh information before the Commission with some fresh data. For felicity of reference, the order is quoted below:

After considerable arguments, Ms. Ahmadi seeks to withdraw this appeal but with a liberty to raise all the points to file fresh information, if required, with some fresh data before the CCI. She is, however, apprehensive that the observations in the impugned order might come against her. We request the CCI to entertain the information with fresh data without being influenced by the earlier order. In short, all the questions would remain open before the CCI.



The appeal is disposed of as withdrawn.

21. On perusal of the present information and the documents filed therewith, at the outset, the Commission observes that the informant has impleaded M/s Karnataka State Electronics Development Corporation Ltd. (KEONICS) as a new opposite party in the instant matter.

22. The crux of the grievance made by the informant in the present matter appears to be that by abusing the dominant position in the relevant market, the opposite parties are entering into agreements with the Central Government and its Departments/ PSUs/ Agencies *etc.* as also with the State Governments and their Departments/ PSUs/ Agencies *etc.* to provide e-procurement solutions on nomination basis without open tender or any other competitive bidding process.

23. In the previous case filed by the informant on the similar set of facts, the Commission determined the relevant market as providing/procuring e-Tendering/e-Procurement software, solutions and services in India. The informant tried to assign a basis for considering purchase of e-government solutions by government/ departments/ PSUs as a distinct market. Further, the informant has supplied various print-outs of government websites/ documents related to competition policy, records of government communications/ circulars/ policy documents/ presentations/translations/ agreements between government entities and state governments *etc.* alongwith the present information in support of its submissions.

24. In the present case, notwithstanding the liberty granted by the Hon'ble Tribunal, the informant failed to produce any data before the Commission indicating the market share of public and private sectors in purchase of e-tendering/ e-procurement software, solutions and services in India. The informant has only stated that size of public procurement constitutes 28% of



GDP. That may be so, the issue herein is not the size of total public procurement. The issue involved in the present case is the share of public and private sectors in purchase of e-tendering/ e-procurement software, solutions and services in India.

25. As such, the Commission holds providing/procuring e-tendering/e-procurement softwares, solutions and services in India as the relevant market.

26. For the reasons stated below, it is not necessary to determine the dominance of any of the opposite parties in the relevant market adumbrated above.

27. From the allegations, it appears that NIC, NICS, ITI are able to provide e-procurement solutions on nomination basis without open tenders to governments/ PSUs *etc.* due to the alleged insistence exerted by the Central Government. Thus, it is evident that NIC, NICS, ITI are benefitting due to the actions of the Central Government in making such requirements. The act of the Central Government in so prescribing such course would not make the government as enterprise. In fact, the informant itself has only claimed the opposite party Nos. 3 to 6 as 'enterprise' within the meaning of the term as defined under section 2(h) of the Act. The alleged impugned act emanates out of the prescriptions of the government, which act, in itself, would not clothe it with the trappings of an 'enterprise' in the absence of any economic activity undertaken by it.

28. At any event, the Commission observes that the aforesaid conduct *i.e.* engaging vendors without bidding process *per se* may not fall foul of the provisions of section 4 of the Act so long as the Central Government does not impose e-procurement solutions of its entities upon any other Ministry of Central/ State and other Government agencies, PSUs, *etc.* and so long as they are left free to obtain e-procurement solutions through other vendors



(including private vendors) or if they are given choice to devise their own e-procurement solutions.

29. On a careful perusal of the information and the material filed in support thereof, it appears that the information is misconceived. The following extract from 'A Compendium of Mission Mode Projects under NeGP' and placed by the informant on record at Vol. II pp.388 & 389 is quite pertinent in this regard:

DGS&D has developed an end-to-end e-Procurement Portal for procurement of common user items through Rate Contracts. The e-Tendering modules were developed in PPP mode through a Service Provider, the contract for which has since expired in March 2010. The remaining modules were developed with the assistance of NIC. DGS&D is in the process of empanelling Application Service Providers (ASPs) to make available an e-Procurement platform which can be made use of by willing Central Ministries/State Government/PSUs. The writ petition (WP (C) No. 9342/2009) filed in this matter also stands disposed by the Hon'ble Delhi High Court vide its judgment dated 08/09/2010. While disposing the petition, the court has noted the submission made by the ASG on behalf of the Government that it will not impose its e-procurement solution to any other Ministry of Central/State and other Govt. agencies, PSUs etc. and other PSUs/Departments/Ministries, shall have the choice to devise their own e-procurement solutions.

30. Thus, it is evident that e-procurement platform developed by the Central Government entities need not be made use of by unwilling Central Ministries/ State Governments/ PSUs etc. It also appears that an assurance was made on behalf of the Central Government before the Hon'ble Delhi High Court in WP(C) No. 9342 of 2009 that it will not impose its e-procurement



solution to any other Ministry of Central/ State and other Government agencies, PSUs *etc.* and they shall have the choice to devise their own e-procurement solutions.

31. Resultantly, in view of the aforesaid policy prescription and solemn assurance given by the Central Government before the Hon'ble Delhi High Court, the grievances raised by the informant herein stand squarely covered and addressed. However, if the policy prescription is not followed by the Government or the solemn assurance given before the Hon'ble High Court is not adhered to, the remedies therefor shall lie elsewhere.

32. Moreover, it is pertinent to note that a criterion other than tendering/ bidding cannot be *per se* construed as anti-competitive so long as the same is not unfair or discriminatory or otherwise results in denial of market access to other market participants *etc.* in contravention of the provisions of the Act.

33. The Commission is also not oblivious of the concern of the Government of India which led to assigning the task of providing e-tendering/ e-procurement solutions to NIC. It was observed by the government that market for e-procurement solutions was mostly dominated by few Application Service Providers (ASPs) and they used to dictate terms to the clients. They usually licensed their solutions and there were hidden costs in extending to new users. Assigning this task to NIC, it was felt, would eliminate such problems. Besides, national security considerations are also to be kept in mind.

34. In view of the above discussion, the Commission is of opinion that no case of contravention of the provisions of the Act is made out against the opposite parties and the information is ordered to be closed forthwith in terms of the provisions contained in section 26(2) of the Act.

35. The Secretary is directed to inform the parties accordingly.



**Sd/-
(Ashok Chawla)
Chairperson**

**Sd/-
(Anurag Goel)
Member**

**Sd/-
(M. L. Tayal)
Member**

**Sd/-
(S. L. Bunker)
Member**

New Delhi

Date: 29/04/2014