

COMPETITION COMMISSION OF INDIA

Case No. 16 of 2013

08/05/2013

AdCept Technologies Pvt. Ltd.

Informant

Regd. Office: 14, Mandeville Gardens, Kolkata-19

v.

Bharat Coking Coal Limited (BCCL)

Opposite Parties

Regd. Office: Koyla Bhawan, Koyla Nagar,

Post B.C.C.L, Township, Dhanbad-826005 (Jharkhand)

ORDER UNDER SECTION 26(2) OF THE COMPETITION ACT, 2002

The informant has filed this information under Section 19 (1) (a) of the Competition Act, 2002 ('the Act') against the Opposite Party ('the OP') for the alleged violation of the provisions of Section 3 and 4 of the Act.

2. Informant is a company carrying on business of providing solution for opencast mining including slope stability monitoring. OP, a subsidiary of Coal India Ltd., is a company carrying on business, inter alia, of mining from its various mines all over its jurisdiction. For the purpose of monitoring the slope stability of the said mines, OP floated a global tender dated 28.11.2012 inviting bids from proven manufacturer(s) for supply of Mine Slope Stability Monitoring Radar (MSSM RADAR).

3. The informant submitted that there were two leading Radar Technologies available worldwide for monitoring the slope stability of open pit mines in real time namely—Real Aperture Radar (RAR) and Synthetic Aperture Radar (SAR). All the industrial users of such monitoring radars send their enquiries and invite tenders from the manufacturers of both the technologies so as to ascertain the comparative suitability, cost etc. However the specification given in the tender documents as floated by OP was biased and specifically intended to favour RAR dish antenna based system. It is alleged that by defining a large parameter value for "scan angle" required only by RAR system, OP eliminated the participation of SAR technology manufacturers in this global tender. It is explained by the informant that the RAR system uses a Dish Antenna that has to be rotated on a pivot across large "scan angle" to cover the slope to be monitored at some low resolution from a closer distance from mine

slope (typically the scan angle is 170 deg. horizontal and 80 deg. vertical). In comparison, SAR system with a linear scanner with smaller horn antennas (with beam width/scan angle of 80 deg. Horizontal and 60 deg. Vertical) over a 2m long rail does not require a “large” scan angle to get the very high resolution, wide coverage and accuracy even from long distances. Therefore, manufactures using the SAR system would not, under any circumstances, need to fulfil the requirements as set out in the tender document dated 28.11.2012. Owing to the difference between the basic methodology of the two technologies, the requirements are fundamentally different.

4. The Informant pleaded that it, in association with Ingegneria Dei Sistemi, Italy (IDS), was utilizing the SAR technology worldwide for monitoring the slope stability and stood ousted out from applying for the global tender floated by the OP because of discriminatory eligibility conditions imposed. Therefore, being aggrieved by the specifications set by OP in the global tender, the Informant wrote a letter dated 15 December 2012 to the Chairman cum Managing Director of the OP asking him to intervene in the matter to consider changing one of the technical specifications i.e. changing of the Scan Angle to minimum 80 deg horizontal and 60 deg vertical so that it may include all MSSM-RADAR systems available globally to attain higher spatial resolution and greater accuracy.

5. In response to the said letter, OP wrote a letter intimating the informant that Justice Ashok Kumar Chakraborty (Retd.), Independent External Monitor had directed the matter for hearing on 26.12.2012. Informant appeared before the said External Monitor and presented its case with all relevant documents and also requested the said external monitor to get the technical specifications of the technology offered by Informant reviewed by another independent body like Mining Electronic Department of CMPDIL (CIL R &D Organization) or any other reputed institute like IIT to ascertain its efficacy. However, when no decision was communicated to the Informant till 30.12.2012, the Informant, having regard to the fact that the date of the opening of the tender was slated for 07.12.2013, wrote a letter to the Independent External Monitor praying for communication of his judgment to the Informant. The said request of the informant remained unsatisfied as per the information.

6. Upon consideration of the objections made by the Informant, OP cancelled the earlier global tender and issued a fresh tender, which again contained the same flaw (excluding the radar technology marketed by informant). This discriminatory condition in the tender document, as per the informant, amounted to abuse of dominant position by OP in the Indian

market within the meaning of the Explanation (a) of Section 4 of the Act. Informant further alleged that OP proposes to enter into an agreement with the manufacturers/firms in respect of production and supply of Mine Slope Stability Monitoring Radar which may cause an appreciable adverse effect on competition within India. Condition of the tender dated 18.01.2012 which has been framed with the specific objective of eliminating participation by manufacturers using the SAR technology limits or controls production, supply, markets and technical development, thereby contravening of Section 3(3) of the Act.

7. The Commission has examined the information and heard the informant at length. Dealing first with allegations made under section 4 of the Act, it is to be seen if OP was a dominant player with respect to a particular relevant market. The informant has not defined the relevant market in this case. The OP is the procurer while the informant is the supplier of slope stability monitoring services, a common technique to determine slope stability so as to monitor the small precursory movements, which occur prior to collapse. A 'slope stability radar' system has been developed to remotely scan a rock slope to continuously monitor the spatial deformation of the face. As stated in the information, the Imaging radars can be divided in two main categories, depending on the imaging technique used—RAR and SAR. The Slope Stability Radar system is currently in use across the global mining and civil industries. Since OP is the procurer of slope stability monitoring services, the relevant product market in the instant case ostensibly would be a market of 'procurement of slope stability radar services'. Although, the tender invited by OP in the present case is a global tender, the Commission has to look at the competition effects only within the geographic market of India. Therefore, the relevant geographical market to be taken is India. As a result, the relevant market is the market for 'procuring slope stability radar services in India'.

8. This case is peculiar in its own way. Generally, as per the scheme laid down by the Act, the dominant player (or enterprise) is the seller of goods/services who/which adversely affects the buying side i.e. the consumer. In this case, the buyer has been contended to be dominant and affecting the competition on selling side of the market (by excluding some of the players, informant in this case). Such cases of 'buyer power' or buyer being dominant and abusing its dominant position to suppress competition in the downstream market have been assessed by competition regulators in other jurisdictions like UK (Office of Fair Trading) and EU (European Commission). In the case of buyer power it is the procurement markets, not the supply markets, which have to be defined. The demand-side oriented market concept is applied inversely in this context. From the suppliers' point of view the market definition is

thus based on their ability to switch to alternative sales opportunities. The definition focuses on the products the supplier is offering or would be able to offer without any significant problems. Therefore, what needs to be seen in this case is that whether the OP, if at all it is found to be dominant in the relevant market defined by the Commission, had been able to adversely affect the competition in the supply side of the market.

9. Before assessing the conduct of OP, its dominance needs to be established. It may be noted that the slope stability radar services are used by all open cast mines. OP is engaged in the business of only coal mining and allied activities. Therefore, it is only one of the procurers of the service in the relevant market offered by the informant. The OP does not seem to be a dominant player in the said market as there are ample number of players purchasing the Slope Stability Radar services in India to determine slope stability of the mines.

10. Since OP is not dominant in the relevant market, the question of abuse does not arise. However, assuming that OP was dominant in the relevant market, let us see whether the conduct of OP results in abuse of its dominant position. The instant case relates to the procurement of a technology by an enterprise which happens to be a public sector undertaking. Since, services were being procured for measuring slope stability of the mines, it is for the procurer of technology to decide which technology it wants to use. The Commission has no reason to interfere with its free choice. The Commission, on the issue of consumer choice, has observed in case no. 03/2010 (Pandrol Rahee Vs. DMRC) that *“A consumer must be allowed to exercise its consumer choice and freely select between competing products or services. This right of consumer’s choice must be sacrosanct in a market economy because it is expected that a consumer would decide what is best for it and free exercise of consumer choice would maximize the utility of the product or service for the consumer. For an individual, that consumer’s choice is based on personal assessment of competing products or services, their relative price or personal preferences. For any other type of consumer, this process of decision making in exercise of consumer’s choice is more structured and reflected in procurement procedures. Such a consumer may use experts or consultants to advise, do its own technical assessment, take advice of others it may trust or even purchase from known and reliable sources. The process of such decision making may result in purchase by nomination or limited tender or open tender. Normally, open tenders without a brand bias are desirable as it may give the best value for money. However, each of the purchase process is acceptable and valid as a process of decision making. The consumer*

is the best judge. In case of public entities, the entity is a representative consumer on behalf of the public. There are administrative mechanisms in place for carrying on the due process of exercising consumer's choice on behalf of the public."

11. In view of the above discussion, no *prima facie case of* abuse of dominant position against OP seems to be made out. There is no anti-competitive conduct apparent on part of the OP by insisting upon a particular type of technology for its use. There is no agreement existing at present which can be tested on the touchstone of section 3. Mere floating of the tender does not amount to entering into an agreement.

12. On the basis of aforesaid, the Commission is of the view that there does not exist a *prima facie case* for directing DG to investigate the matter. There is no case either under section 3 or under section 4 of the Act. The case deserves to be closed under section 26 (2) of the Act and is accordingly hereby closed.

13. The Secretary is directed to communicate the decision of the Commission to all concerned accordingly.

Sd/-
H.C. Gupta
(Member)

Sd/-
Geeta Gouri
(Member)

Sd/-
Anurag Goel
(Member)

Sd/-
M.L. Tayal
(Member)

Sd/-
Justice (Retd.) S.N. Dhingra
(Member)

Sd/-
S.L.Bunker
(Member)

Sd/-
Ashok Chawla
(Chairperson)