



Case No.17 of 2013

**In Re:**

**a'XYKno Capital Services Ltd.**

**Informant**

**And**

**Chhattisgarh Mineral Development Corporation Ltd.**

**Opposite Party**

CORAM:

Mr. Ashok Chawla  
Chairperson

Mr. H C Gupta  
Member

Dr. Geeta Gouri  
Member

Mr. Anurag Goel  
Member

Mr. M. L. Tayal  
Member

Mr. Justice (retd.) S. N. Dhingra  
Member

Mr. S.L.Bunker  
Member

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

The Opposite Party issued a tender for selection of a consultant who would help it in selection of mine developer-cum- operator for Gare-Pelma



Sector-1, Coal Block. The tender contained certain technical and financial qualification criteria. The financial qualifying criteria read as under:-

“The average annual turnover of the bidder from consultancy/advisory services should be minimum Rs.50 crore in the last 03 (three) audited financial years (i.e. 2009-10, 2010-11 & 2011-12).

The bidder should fulfill the above technical and financial qualifications on its own and not in association or consortium with any other person”.

2. Aggrieved by the above financial condition in the tender document, the informant filed this information alleging abuse of dominant position by Opposite Party. It pleaded that the condition of tender was unfair and discriminatory as it limited and restricted the competition in the bidding process. The informant contended that prior to the present tender, the financial condition was not so stringent and instead of requirement of Rs.50 crore annual turnover, it was Rs.10 crore to Rs.20 crore. The informant had successfully given bid for earlier contract and alleged that the above unfair condition in tender was introduced in order to benefit CRISIL and other similar firms and to limit the competition.

3. The informant pleaded that Department of Economic Affairs, Govt. of India had advised to PSUs in respect of PPP infrastructure projects that empanelled advisers should be engaged for appropriate advisory support in PPP projects. The relevant paras read as under:-

“Paragraph-2

Further recognizing that implementation of this policy would require that the agencies concerned with PPPs at central state and government level have access to appropriate advisory support for the implementation of PPP transactions, the Government had notified a Panel of Transaction Advisor, vide O.M. No. 2/4/2007-Infra dated August 22, 2007, that had been assessed as suitable for providing quality transaction advisory services. The Panel is available to all Central, State and governments who are undertaking PPP transaction.



Paragraph-4

Individual firms or consortia (including those on the extant Panel of Transaction Adviser notified by this Department) who consider that they are capable of providing high quality transaction management services, and meeting the evaluation criteria set out in this RFQ, are encouraged to submit a response”.

4. It is submitted that the Opposite Party by introducing unfair and discriminatory conditions in the tender document while procuring advisory services have limited and restricted the competition in the bidding process and therefore contravened the provisions of the Act, which needs to be enquired into by the Commission. A prayer is made that an enquiry under section 26 of the Competition Act be initiated and the Commission should pass an order under section 27 directing the Opposite Party to modify and cancel the tender document and the Commission should impose penalty on the Opposite Party and pass such appropriate order as it may deem necessary.

5. Certain other facts mentioned by the informant are not relevant for the purpose of considering the matter and therefore are not being discussed.

6. It is undisputed that the Opposite Party wanted to select a contractor for mine development and operation for at least one coal mine by open bidding process and issued an advertisement seeking appointment of a consultant so that it could select a reputed mine developer cum operator. The scope of work is mentioned in terms and conditions of the tender document (Annexure B) and it is confined to providing consultancy services to Opposite Party in the selection of MDO (Mine Developer and Operator) for development and operation of CMDC’s Gare Pelma Sector-1, Coal Block. The work of consultant included preparation of bid document, finalization of bid criteria, development of different documents required at different stages in the bid, process management, developing parameters for selection of mine developer cum operator, managing bidding process to select MDO, to do bid evaluation, to develop contractor management process. It is obvious that the Opposite Party was a consumer of the services of consultant and it had issued tender notices inviting bids from consultants who were having relevant



experience and financial standing in providing consultancy. It is also undisputed that the applicant is one of the service providers in this market. The applicant has claimed that it acted as advisor for more than 30 Coal blocks and had been a pioneer in successful implementation of PPP model in coal sector. It also stated that it was even appointed as adviser by Opposite Party for the same coal block for the period starting from 15<sup>th</sup> January, 2010.

7. To examine the alleged abuse of dominant position by the opposite party, the relevant market has to be determined and delineated, *albeit* in a tentative manner. As per section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. Further, the term 'relevant product market' has been defined in section 2(t) of the Act as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. And, the term 'relevant geographic market' has been defined in section 2(s) of the Act to mean a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

8. For determining whether a market constitutes a 'relevant market' for the purposes of the Act, the Commission is required to have due regard to the 'relevant geographic market' and 'relevant product market' by virtue of the provisions contained on section 19(5) of the Act. To determine the 'relevant geographic market', the Commission is to have due regard to all or any of the following factors viz., regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services. Further, to determine the 'relevant product market', the Commission is to have due regard to all or any of the following factors viz., physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products.



9. In the factual setting of the present case, the relevant product market appears to be the market for procurement of consultancy services for the development, exploration and mining of minerals. Further, the relevant geographic market in this case appears to be whole of India. Resultantly, the relevant market appears to be the market for 'procurement of consultancy services for the development, exploration and mining of minerals in India'.

10. Once the relevant market is defined, the next step is to examine whether the opposite party is in dominant position in the said relevant market. By virtue of explanation (a) to section 4 of the Act, 'dominant position' means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or to affect its competitors or consumers or the relevant market in its favour.

11. Further, the Commission, while inquiring whether an enterprise enjoys a dominant position or not under section 4 of the Act, is required to have due regard to all or any of the following factors viz. market share of the enterprise; size and resources of the enterprise; size and importance of the competitors; economic power of the enterprise including commercial advantages over competitors; vertical integration of the enterprises or sale or service network of such enterprises; dependence of consumers on the enterprise; monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of market; social obligations and social costs; relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; and any other factor which the Commission may consider relevant for the inquiry.

12. On a plain reading of the information, it is evident that the informant has not placed any material on record in the light of the factors enumerated



above which could have persuaded the Commission to hold the opposite party to be dominant in the relevant market. It is trite to note that dominance of an enterprise in the relevant market has to be *prima facie* established before pressing into service the provisions of the Act relating to abuse of dominant position. Needless to add, dominance cannot be presumed in the absence of relevant materials in this regard.

13. In the present case, it does not appear that the opposite party was a dominant procurer in the relevant market, as delineated above. The informant has also not disclosed the fact regarding the number of consultants which were appointed by the opposite party in last few years. Furthermore, the informant has based the present information on the basis of one particular project only. There would be large number of such projects all over the country where such consultants are hired. Hence, opposite party cannot be stated to be dominant in the relevant market.

14. As the dominance of the opposite party could not be established in the relevant market, it is unnecessary for the Commission to examine any alleged abuse of dominance by the opposite party.

15. Even otherwise, on merits, no interference is warranted with the terms and conditions of the tender document unless the same are demonstrably unfair or discriminatory in contravention of the provisions of section 4 of the Act. The Commission cannot declare the terms of the tender prescribed by the enterprises as anti-competitive merely because it feels that some other terms in the tender would have been fair, wiser or logical.

16. In view of the above discussion, there does not exist a *prima facie* case for causing an investigation to be made by the Director General under section 26(1) of the Act. It is thus a fit case for closure under section 26(2) of the Act and the same is hereby closed.

17. It is ordered accordingly.

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



New Delhi  
Dated: 21/03/2013

Sd/-  
(Ashok Chawla)  
Chairperson

Sd/-  
(H C Gupta)  
Member

Sd/-  
(Dr. Geeta Gouri)  
Member

Sd/-  
(Anurag Goel)  
Member

Sd/-  
(M. L. Tayal)  
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