



**COMPETITION COMMISSION OF INDIA**  
**Case No. 21 of 2017**

**In Re:**

**VE Commercial Vehicles Limited,  
3<sup>rd</sup> Floor, Select City Walk, A3, District Centre,  
Saket, New Delhi- 110017**

**Informant**

**And**

**Uttar Pradesh State Road Transport Corporation,  
Parivahan Bhawan, Mahatma Gandhi Marg,  
Lucknow-226001, Uttar Pardesh**

**Opposite Party**

**CORAM**

**Mr. Devender Kumar Sikri  
Chairperson**

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

**Mr. Sudhir Mital  
Member**

**Mr. Augustine Peter  
Member**

**Mr. U.C. Nahta  
Member**

**Mr. Justice G.P. Mittal  
Member**

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

1. The present information has been filed by VE Commercial Vehicles Ltd. (hereinafter, the '**Informant**') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') against Uttar Pradesh State Road Transport Corporation



(hereinafter, ‘OP’ / ‘UPSRTC’) alleging contravention of the provisions of Sections 3 and 4 of the Act.

2. The brief facts are as under:
3. The Informant is a joint venture between Eicher Motor Ltd., India and Volvo Group, Sweden, and is, *inter alia*, engaged in the production of heavy commercial vehicles. It has been a supplier to various State Transport Units including Gujarat, Andhra Pradesh, Uttarakhand, Rajasthan, Telangana and Goa.
4. The OP is a public sector undertaking created under Section 3 of the Road Transport Act, 1959 with the objective of development of the road transport sector in the State of Uttar Pradesh. It is stated to be the largest purchaser of passenger buses in Uttar Pradesh holding almost 50% of the total passenger buses in Uttar Pradesh.
5. The Informant has submitted that the OP has been procuring bus chassis through open tenders for the last 5 years. The Informant has alleged that the conduct of the OP, while procuring the said product, is discriminatory and unfair. The details of these impugned tenders and clauses thereof are as under:

#### **Details of tenders**

Tender No. 1519 MT/12-61V/12-13 (TC) dated 22.08.2012 (hereinafter, ‘**Tender No. 1**’) for supply of 600 diesel passenger chassis BS—III

*Clause 31.1:*

*Other than Tata Motors & Ashok Leyland any chassis manufacturer has to quote his rates along with AMC (annual maintenance contract) only.*

*Clause 31.4:*

*Rates per Km for AMC for first 3 years shall be limited to Rs.2.60 per km which has been arrived upon UPSTRC’s expenditure on maintenance of its own buses and based on last year’s audited financial balance sheet.*



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Tender No. 1369 MT/13-61V/13-14 dated 20.06.2013 (hereinafter, '**Tender No. 2**') for supply of 500 BS III diesel engine chassis

*Clause 31.1:*

*Other than Tata Motors & Ashok Leyland any chassis manufacturer has to quote his rates along with AMC (annual maintenance contract) only.*

*Clause 31.4:*

*Rates per Km for AMC for first 3 years shall be limited to Rs.2.60 per km which has been arrived upon UPSTRC's expenditure on maintenance of its own buses and based on last year's audited financial balance sheet.*

Tender No. 2108 MT/14-61 V/14-15(II) dated 29.09.2014 (hereinafter, '**Tender No. 3**') for procurement of 400 passenger chassis, BS-III/BS-IV having minimum wheelbase 5334 MM and 50 passenger chassis with minimum wheelbase 5500 to 6200 MM, BS-III/BS-IV.

*Clause 13:*

*Other than Tata Motors & Ashok Leyland any chassis manufacturer has to quote his rates along with AMC (annual maintenance contract) only.*

Tender No. 1096 MT/15-61 V/15-16 dated 19.05.2015 (hereinafter, '**Tender No. 4**') for 750 bus chassis BS-III/ BS-IV having minimum wheelbase 5334 MM and fully built ordinary buses.

*Clause 38:*

*Other than Tata Motors & Ashok Leyland any new Tenderer will be awarded maximum 20% of the tendered quantity subject to the minimum of 50 chassis per firm depending upon its position in price bid that is L-1. The order for remaining quantity will be placed on the lowest prices of the tender & will be distributed as per clause 38.*

Tender No. 1812 MT/15-61V /15-16 dated 25.08.2015 (hereinafter, '**Tender No. 5**') for supply of *inter-alia* 680 Passenger Chassis with minimum Wheel Base 5545MM.



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*Clause 17:*

*Other than Tata Motors & Ashok Leyland any new Tenderer (who has not supplied the chassis of min 5334 W.B.) will be awarded maximum 20% of the tendered quantity subject to the minimum of 10 Nos. per firm depending upon its position in price bid that is L-1. The order for remaining quantity will be placed on the lowest prices of the E- Tender & will be distributed as per the purchase policy of the corporation.*

*Clause 31.1*

*Any manufacturer who is participating in e-tender and has not supplied the chassis of minimum Wheel Base of 5334 MM to UPSRTC before has to quote its rates along with AMC (annual maintenance contract) only.*

*Clause 38:*

*Other than Tata Motors & Ashok Leyland any new Tenderer (who has not supplied the Chassis of minimum 5334 mm wheel base) will be awarded maximum 20% of the tendered quantity subject to the minimum of 50 Nos. per firm depending upon its position in price bid that is L-1. The order for remaining quantity will be placed on the lowest prices of the E-Tender and will be distributed as per clause 17. New tenderer has to quote his rates along with AMC.*

UPSRTC E-Tender dated 31.03.2017 (hereinafter, '**Tender No. 6**') for procurement of BS-IV Diesel Passenger Chassis and fully built ordinary buses.

*Clause 12:*

*Other than Tata Motors and Ashok Leyland any chassis manufacturer has to quote his rates along with AMC (annual maintenance contract) only.*

*Clause 17:*

*Other than Tata Motors & Ashok Leyland any new Tenderer (who has not supplied the Chassis of min 5545 W.B.) will be awarded maximum 20% of the tendered quantity subject to the minimum of 50 Nos. per firm depending upon its position in price bid that is L-1. The order for remaining quantity will be*



*placed on the lowest prices of the E- Tender and will be distributed as per the purchase policy of the corporation.*

*Clause 38:*

*Other than Tata Motors & Ashok Leyland any new Tenderer (who has not supplied the Chassis of min 5545 W.B.) will be awarded maximum 20% of the tendered quantity subject to the minimum of 50 Nos. per firm depending upon its position in price bid that is L-1. The order for remaining quantity will be placed on the lowest prices of the E-Tender and will be distributed as per clause 17. New tenderers (who has not supplied the Chassis of minimum 5545 wheel base before to UPSRTC) has to quote his rates along with AMC (annual maintenance contract).*

6. With regard to Clause 17 of Tenders no. 5 & 6, it is submitted that the Informant / any new tenderer can be awarded maximum 20 percent of the tendered quantity, if it quotes the lowest bid. For remaining quantity, the Informant /any new tenderer has to quote the bid along with AMC which will be compared with the bids (*i.e.* without AMC) quoted by Tata Motors Ltd. (TML) and Ashok Leyland Ltd. (ALL). In every eventuality, the bids of TML and ALL would be lower than the bid quoted by the Informant. Therefore, the Informant will never be able to be awarded with more than 20 percent of the tendered quantity.
7. In relation to AMC, the Informant has pointed that the OP has unilaterally set a ceiling on the rate of AMC per km which is required to be quoted by the Informant / any new tenderer.
8. The Informant has also alleged that certain clauses, such as 34.1 (arbitration clause), 16 and 37.6 (power to reject the tenders without assigning any reason) are abusive in nature and ought to be declared void under Section 4 of the Act.



9. The Informant has submitted that it could not find any reason behind the preferential treatment extended by the OP towards TML and ALL. Therefore, it is alleged by the Informant that there exists a tacit anti-competitive agreement amongst TML, ALL and the OP. Hence, such conduct of the OP is in violation of the provisions of Sections 3(1), 3(3) and 3(4) of the Act.
10. With regard to abuse of dominant position under Section 4 of the Act, the Informant has submitted that 50 percent of the total buses in the State of UP are owned by the OP. Hence, the OP is in dominant position in Heavy Duty Bus Category (15 Tonne and above Gross vehicle weight). Due to favourable terms and conditions for TML and ALL in the aforesaid tenders, the Informant has alleged that the OP has abused its dominant position and hence, violated the provisions of Section 4 of the Act.
11. The Informant has, *inter alia*, prayed before the Commission for issuance of directions to the OP to refrain from indulging in the aforesaid discriminatory conduct.
12. The Informant has also stated that appeals before the Hon'ble High Court of Lucknow, the Competition Commission of India and the Competition Appellate Tribunal in relation to aforesaid tenders have been filed by it. However, these litigations have either been dismissed by the concerned forum or withdrawn by the Informant.
13. The Commission has carefully analysed the information filed by the Informant and the material available on record.
14. It is noted that the Commission has already considered similar issues in Case No. 80 of 2015, namely, *M/s V. E. Commercial Vehicles Limited vs. Uttar Pradesh State Road Transport Corporation*, wherein the same Informant had filed a case against the same OP. In Case No. 80 of 2015, the Commission has already considered the four tenders floated by the OP, namely, Tenders No 1-4; however, in the present



case, the Informant has made allegations in relation to the aforesaid four tenders along with two more tenders (Tenders No 1-6). After considering all the six tenders in totality, the Commission is of the view that the Informant is primarily aggrieved by the alleged discrimination of the OP in favour of TML and ALL with respect to procurement of bus chassis in the State of Uttar Pradesh. It is noted that the allegations levelled by the Informant in the present case are substantially similar to the allegations raised in Case No. 80 of 2015 filed by the same Informant. Additionally, the Informant has also alleged anti-competitive arrangement amongst the OP, TML and ALL in this case.

15. To examine the allegations under Section 4 of the Act, it is necessary to delineate the relevant market which comprises of the relevant product market and the relevant geographic market. In this regard, it is noted that in Case No. 80 of 2015, the Commission, *vide* its order dated 7<sup>th</sup> January, 2016 passed under Section 26(2) of the Act, had delineated the relevant market as *'the market for procurement of bus chassis in India'*. The relevant paragraphs of the said order is reproduced below:

*"14.....the allegations pertain to unfair and discriminatory treatment in tender conditions in the bids floated by the Opposite Party for procurement of 'bus chassis'. The Opposite Party is the procurer of bus chassis and the Informant is the manufacturer/supplier. Thus, the relevant product market may be defined as the 'market for procurement of bus chassis.*

*15. The 'bus chassis' manufactured by the Informant and other players (like M/s Tata Motors and M/s Ashok Leyland) are used by public (state transport units) as well as private entities. Further, state transport undertakings established/ operating in different States procure 'bus chassis' to provide passenger road transportation services in their respective states. As a matter of fact, the Informant itself has stated that it has supplied such 'bus chassis' to State Transport Corporations in the states of Gujarat, Andhra Pradesh, Rajasthan, Maharashtra etc. It is not a case where a particular state transport authority issues a license or permits a manufacturer to manufacture 'bus chassis' which can be used only within a particular/ restricted geographic boundary to qualify for a separate geographic market. The case at hand*



*involves the procurement of 'bus chassis' which, irrespective of the location of the procurer (State Transport Corporation/ Undertaking or private transport operator), would be of similar make/ nature and the manufacturers supplying such 'bus chassis' would usually face similar competitive constraints. Hence, the relevant geographic market can be defined as the territory of India. Accordingly, the relevant market in the present case may be considered as the 'market for procurement of bus chassis in India'.*"

16. Since the issues involved in this case are exactly the same as discussed in Case No. 80 of 2015, the Commission deems it appropriate to define the relevant market in the present case also as the *"market for procurement of bus chassis in India"*.
  
17. With regard to assessment of dominance, the Commission notes that as per "Review of the Performance of State Road Transport Undertakings (Passenger Services) for April, 2014–March, 2015", forty six State Road Transport Undertakings (SRTUs) reported their physical and financial parameters to the Transport Research Wing of Ministry of Road Transport and Highways, Government of India for the financial year 2014-15. These SRTUs owned a total of 1,40,497 buses during the period April, 2014-March, 2015. The largest fleet size during the said period was held by Maharashtra SRTC (17,957), followed by Andhra Pradesh SRTC (12,079) and Telangana SRTC (10,329). These three SRTUs accounted for 12.8%, 8.6% and 7.3% respectively of the total fleet strength of SRTUs. These SRTU's were followed by Uttar Pradesh SRTC (9,415), Karnataka SRTC (8,321) and Gujarat SRTC (7,765) with market shares of 6.7%, 5.9% and 5.5%, respectively. The market share of the OP would further decline if procurement of 'bus chassis' by the private transport entities and other SRTUs (which have not reported to Transport Research Wing of Ministry of Road Transport and Highways) are taken into consideration. Hence, the OP, having market share of less than 6.7 percent as a buyer, does not seem to enjoy a position of strength in the relevant market.





18. Further, in Case No. 80 of 2015 also, the Commission has held that the OP was not dominant in the relevant market. The relevant paragraphs of the order dated 7<sup>th</sup> January, 2016 passed in the said case are reproduced herein below:

*“16... As per the data available on the website of Association of State Road Transport Undertakings and the websites of the various State Road Transport Undertakings, it is observed that the Opposite Party has a fleet size of approximately 9500 buses out of the total number of 124630 buses held by the different public transport authorities across India. Accordingly, the market share of the Opposite Party estimated as 7.62%, which is meagre. Furthermore, as per the review conducted by the Ministry of Road Transport and Highways, it is observed that the Opposite Party had a fleet size (in March 2013) of approximately 8893 buses out of the total number of 133823 buses held by the different public transport authorities across India indicating that the market share of the Opposite Party is merely 6.64%. These market share figures will further reduce if procurement of ‘bus chassis’ by the private transport entities are taken into consideration.*

*17. Considering the low market share as estimated above, prima facie, it may be considered that the Opposite Party is not dominant in the relevant market”.*

19. As noted in the above case, the Commission is of the view that though market share figure is not the sole/ conclusive factor for deciding dominance of an enterprise, a very low market share may be considered as an indicator of low market power of the enterprise. Evidently, the OP is one of the many state transport undertakings which is procuring ‘bus chassis’ in varying volumes for its operation. Further, there are many private passenger bus transport operators who are buying ‘bus chassis’ from the TML and ALL and other manufacturers. In the relevant market determined above, the OP is therefore, not found to be dominant.

20. In the absence of dominance in the relevant market, assessment of abuse of dominant position is not required under the provisions of Section 4 of the Act.



21. It may also be noted that the Informant had filed an Appeal bearing No. 20 of 2016 against the order dated 7<sup>th</sup> January, 2016 passed by the Commission under Section 26(2) of the Act in Case No. 80 of 2015 before the erstwhile Competition Appellate Tribunal (COMPAT). However, the same was dismissed by the erstwhile COMPAT on account of withdrawal of the appeal by the Informant on 19<sup>th</sup> July, 2016. The relevant paragraph of the said order of the erstwhile COMPAT is reproduced as under:

*“At the Commencement of the hearing, learned counsel for the appellant made a statement that his client may be permitted to withdraw the appeal because it has already filed Special Leave Petition against the order passed by the Division Bench of Allahabad High Court*

*The Request made by the learned counsel is accepted and appeal is dismissed as withdrawn.”*

22. It is pertinent to mention that the Informant had also filed two Writ Petition bearing Nos. 8543 (M/B) of 2015 and 5345 (M/B) of 2016 in the Hon'ble High Court of Allahabad; however, both were rejected.

23. With regard to allegation made under Section 3 of the Act, the Informant has alleged that due to an understanding amongst the OP, TML and ALL, the OP has been favouring TML and ALL in the aforesaid tenders which is in contravention of Section 3(1), 3(3) and 3(4) of the Act. In this regard, the Commission notes that Section 3(3) and 3(4) read with Section 3(1) of the Act deal with anti-competitive horizontal and vertical agreements respectively. Facts of the case indicate that the OP, TML and ALL are not engaged in identical or similar trade of goods or provision of services, which is an essential condition for applicability of Section 3(3) of the Act. Therefore, the allegation of contravention of Section 3(3) read with Section 3(1) does not hold ground in the present matter. Further, the OP, TML and ALL are also not placed at different stages of the production chain in different



markets. Applicability of Section 3(4) read with Section 3(1) of the Act requires the parties to be placed vertically at different stages of the production chain, which is lacking in the present matter. Hence, violation of Section 3(4) read with Section 3(1) is also ruled out.

24. In light of the above discussion, the Commission is of the opinion that no *prima facie* case of contravention of the provisions of the Act is made out against the OP in the present matter. Thus, the case is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

25. The Secretary is directed to communicate to the Informant accordingly.

**Sd/-**  
**(Devender Kumar Sikri)**  
**Chairperson**

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

**Sd/-**  
**(Sudhir Mital)**  
**Member**

**Sd/-**  
**(U.C. Nahta)**  
**Member**

**Sd/-**  
**(Justice G.P. Mittal)**  
**Member**

**New Delhi**  
**Date: 07/09/2017**



## **Supplementary Order**

**Per:**

**Augustine Peter, Member**

1. I agree with the conclusion arrived at and the reasoning set out in the order under section 26(2). However, I wish to supplement the same with reasoning of my own. As the facts and other details relating to the case have already been set out in the final order, I shall elaborate only on those which I deem necessary for the purpose of my writing a supplementary order.
2. The present information has been filed by VE Commercial Vehicles Ltd. (hereinafter called as the 'Informant') under section 19(1)(a) of the Competition Act, 2002 (hereinafter called as the 'Act') on 02/05/2017 against Uttar Pradesh State Road Transport Corporation (hereinafter called as the 'OP') alleging contravention of the provisions of Section 3 and 4 of the Act.
3. The Informant is stated to be engaged in the production of heavy commercial vehicles and has been a supplier to various State Transport Units. The OP is stated to be a public sector undertaking created under section 3 of the Road Transport Act, 1959 having the objective of development of the road transport sector in the State of Uttar Pradesh.
4. The informant alleges violation of Section 3 and 4 of the Act. It is stated that the tenders floated by the OP seek to exclude the informant and other similarly situated manufacturers from the tender in some way or the other and that even if the informant is the lowest bidder it would only be awarded 20% of the tendered quantity and for the balance 80% of the tendered quantity, the informant would have to quote its rate list with the Annual Maintenance Contract (AMC) while Tata Motors Limited (hereinafter called as the 'TML') and Ashok Leyland Limited (hereinafter called as the 'ALL') could bid for the entire tender without an AMC. It



is further submitted that if the informant quotes with AMC for the balance 80% of the tendered quantity and TML and ALL do not quote with AMC, in every eventuality, TML and ALL would be the lowest bidder for the balance 80% of the tendered quantity as the added cost of the AMC with respect to TML and ALL would never be considered at the stage of opening the bid. These conditions in AMC, as per the informant, are complicated and loaded in favour of the OP. Thus, the informant has alleged that the conduct of the OP in procuring the said product is discriminatory and unfair and that there exists a tacit agreement amongst TML and ALL in violation of section 3(1), 3(3) and 3(4) of the Act. As far as Section 4 of concerned, the informant states the OP to be a dominant entity in Heavy Duty Bus Category (15 Tonne and above Gross Vehicle Weight) in the State of Uttar Pradesh. The OP, as per the informant, has abused its position by granting favourable terms and conditions for TML and ALL in the tenders floated.

5. I agree with the conclusion arrived at by the Commission in its Order under Section 26(2). The Commission in, para 24, has come to the conclusion:

*“...the Commission is of the opinion that no prima facie case of contravention of the provisions of the Act is made out against the OP in the present matter. Thus, the case is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.”*

6. I also agree with the reasoning set out by the Commission while passing order under Section 26(2). The Commission, in para 23, observes:

*“With regard to allegations made under Section 3 of the Act, the Informant has alleged that due to an understanding amongst the OP, TML and ALL, the OP has been favouring TML and ALL in the aforesaid tenders which is in contravention of Section 3(1), 3(3) and 3(4) of the Act. In this regard, the Commission notes that Section 3(3) and 3(4) read with Section 3(1) of the*



*Act deal with anti-competitive horizontal and vertical agreements respectively. Facts of the case indicate that the OP, TML and ALL are not engaged in identical or similar trade of goods or provision of services, which is an essential condition for applicability of Section 3(3) of the Act. Therefore, the allegation of contravention of Section 3(3) read with Section 3(1) does not hold ground in the present matter. Further, the OP, TML and ALL are also not placed at different stages of the production chain in different markets. Applicability of Section 3(4) read with Section 3(1) of the Act requires the parties to be placed vertically at different stages of the production chain, which is lacking in the present matter. Hence, violation of Section 3(4) read with Section 3(1) is also ruled out.”*

7. As regards Section 4, I am in consonance with what is observed in Para 19:

*“...the Commission is of the view that though market shares figure is not the sole/conclusive factor for deciding dominance of an enterprise, a very low market share may be considered as an indicator of low market power of the enterprise. Evidently, the OP is one of the many state transport undertakings which is procuring ‘bus chassis’ in varying volumes for its operation. Further, there are many private passenger bus transport operators who are buying ‘bus chassis’ from the TML and ALL and other manufacturers. In the relevant market determined above, the OP is therefore, not found to be dominant.”*

8. Coming to the reason of my writing this supplementary note, I find the presence of a few vital and cogent reasons which need to be advanced for the purpose of closing the case under Section 26(2), more so when the Commission has, on an earlier occasion, dealt with the same issue in another case bearing number 80/2015 namely, *M/s V.E. Commercial Vehicles Limited v Uttar Pradesh State Road Transport Corporation*. The erstwhile case was closed by the Commission vide its order dated 7/01/2016 passed under Section 26(2). A dissent Note by two Hon’ble Members



constituted the minority view wherein it was stated that there is a good *prima facie* case requiring investigation under Section 26(1) of the Act.

9. The present case, as also Case No 80/2015 involves the procurement of ‘bus chassis’ by Uttar Pradesh State Transport Corporation and the same takes the form of public procurement which literally means and comprises of the government purchasing goods and services required for state activities with the objective of promotion of efficiency, i.e. the selection of the most efficient supplier in value and quality terms. It is seen that government entities are typically more constrained and face limited options and flexibility in procurement than private entities due to the highly regulated nature of public procurement, accompanied by transparency requirements and other administrative regulations and procedures which make them vulnerable to collusive bidding and bid rigging. This is worsened by the fact that high value procurement projects often follow a predictable process creating opportunities for collusion. Further, sectors historically prone to anticompetitive conduct aggravate the resultant harm.
  
10. While collusion can occur only among bidders participating in the tender process and submitting bids, corruption involves relationship between the public officials concerned, acting on behalf of the procuring government entity in the transaction, and one or more bidders, in the capacity of sellers of goods or services. What Section 3(3) examines is horizontal collusion and it is amply clear that there can be no case of collusion between the bidders and the procurement agency. Similarly, it is also clear that there can be no corruption among the bidders, *inter se*, participating in the tender. While the mandate of the Commission is to prohibit anticompetitive conduct and abuse of dominant position, corruption as such falls within the ambit of the Central Vigilance Commission (hereinafter called as ‘the CVC’) or the Vigilance Authority of the State concerned.



11. Contravention of the provisions of Section 3 and 4 of the Act may take place in several ways during the process of public procurement. Enterprises, association of enterprises, person or association of persons may collude *inter se* with the objective of determining purchase or sale price in violation of Section 3(3)(a), or limiting or controlling production, supply, markets, technical developments, investments or provisions of services in violation of Section 3(3)(b) of the Act, or sharing the market or sources of production in contravention of Section 3(3)(c) of the Act, or engaging in bid rigging or collusive bidding in contravention of Section 3(3)(d) of the Act. Similarly contravention of section 4 may take place when the procurement agency is in a dominant position and abuses the same in a manner laid down under section 4(2) (a) to 4(2) (e) of the Act. The Act not being mandated to address issues related to corruption, I shall not delve into it.
12. Coming to the allegation of the informant that due to an understanding amongst the OP, TML and ALL the informant is being discriminated against, I have already stated that I am in consonance with reasoning set out in the order. What I wish to elaborate on, here, is that all forms of discrimination are not hit by the rigours of the Act. What gets caught in the net of the Act are those exercised by a dominant player in the relevant market, without any justification or bearing no reasonable nexus with the objective sought to be achieved. The conditions of discrimination in the instant case being based on a reasonable justification, that too when the OP is held by the Commission as a non-dominant player, does not change on account of an entity being a public entity as public entities have the same freedom of contract as the private entities do. Solely being public entities does not make such entities forgo their freedom to contract with the parties of their choice subject to the procurement rules laid down by the government. The position that procurement is the prerogative of the procurer has been clarified by the Apex Court time and again in several cases.





13. In *Tata Cellular v Union of India*, (1994) 6 SCC 651, the Apex Court observed that:

*“The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi- administrative sphere.”*

(Emphasis added)

14. The above case was cited by the Supreme Court while deciding *M/s Michigan Rubber (I) Ltd v State of Karnataka & Ors*, Civil Appeal No. 5898 of 2012.

15. It has also been clarified by the Apex Court that discriminating amongst bidders based on reasoning is consistent with sound legal norms. In *G.S. and Company v Union of India*, MANU/RH/0035/2016, the High Court of Rajasthan (Jaipur Bench) accepting the contention of the respondent, Union of India that various defense organizations including the Army Service Corporations, Military Engineering Services etc. select the bidders by incorporating the specific qualifying condition in their bidding document and that such task is the prerogative of the Procurement Committee held that:

*“The Court also finds substance in the submission made by the learned counsel for the respondents that the insertion of the condition i.e. possessing work experience with Central Government/Army, Navy or Air Force was necessary for restricting the bidders considering the nature of work and the place of work where the prospective bidders were expected to supply their services.”*

(Emphasis added)

16. In *Veera Vahana Udyog Pvt. Ltd. Rep. by Managing Director, K. Srinivas Reddy v the Karnataka State Road Transport Corporation Rep. by the Managing Director, KSRTC, Bangalore (Central) Division*, ILR2009KAR3370 the Karnataka High Court held that:



*“It is the prerogative and franchise of the tender inviting authority to see that they get best among the best in order to give best and effective service to the public. The terms and conditions are normally fixed by the persons having rich experience in the respective field and petitioner cannot claim as a matter of right that its commercial bid has to be opened since the technical bid is deemed to have been accepted. **Petitioner cannot dictate terms to the Tender Inviting Authority but on the other hand the tenderers have to adhere to the requirements of the tender issuing authority which are made to suit their requirements and in larger public interest.** The terms and conditions cannot be directed to be tailor-made to suit one's requirements.”* (Emphasis added)

17. In a case decided in 2017 by **Jammu and Kashmir High Court, Prakash Cotton v State and Ors, MANU/JK/0015/2017** it was held that:

*“I have considered the submissions made by the learned counsel for the parties and am of the view that once a decision has been taken by JKMSCL in the meeting of its Board of Directors held in December, 2016 to require registration of intending bidders in response to NIT, which, inter alia, ensures satisfaction of JKMSCL of the fitness of the intending bidders to supply the products in question as also the standing and capability of the manufacturer to be able to supply quality products in a time bound manner, no fault can be found with the same. **Even otherwise, it is the sole prerogative of the Procuring Agency to lay down the conditions on which to issue the tender unless, of course, it can be shown that the conditions stipulated are arbitrary, perverse or have no nexus with the object sought to be achieved.** Such is not the case here.”* (Emphasis added)

18. Coming to the case in hand, it is clear from the decisions of the Apex Court that the procuring agency has the freedom to procure goods and services at its terms and conditions unless the condition stipulated are arbitrary, perverse or have no nexus



with the objective sought to be achieved. No doubt government, as the procuring agency, is subject to transparency and other administrative regulations, but akin to a private procurer it is free to engage in procurement in the manner it wishes and has the freedom to introduce terms and conditions suiting its requirements. It is not open to a person to challenge the terms and conditions of a bid called for by the procuring agency solely on the ground that it is sought to be eliminated as per the stated terms and conditions, when the same are invoked having regard to some reasonable justification/ ground. Various Courts in India have time and again maintained that the courts cannot question the wisdom of the procuring agency in introducing the terms and conditions when it comes to engaging in procurement with a predetermined objective of defence, public security etc.

19. Distinction can also be sought between cases where procurement has to be necessarily based on standards and where it is not. The former takes the shape of cases, for example, where procurement standards are set by standard setting agencies like the Research and Development Standard Organization (hereinafter the 'RDSO') in the case of railways. The procurement agency possesses limited freedom of deciding the terms and conditions of procurement and has to mandatorily abide by the standards set by the standard setting organization. These organizations may find place in core strategic areas such as defence, railways etc. where security of state and public interest is accorded the top most priority. The standards set and the recommendations made by such organization become binding on the procurement agency which cannot find themselves in a position of denying the same by virtue of sensitive reasons of security of state etc. Often in these areas, established players meeting the set standards alone qualify to participate in the tender. However, when the parties participating in the tender are generally few and enjoy an upper hand in the process, procurement authorities tend to evolve process of development of vendors, often referred to as the 'Vendor Development Programme'. This being a good practice is followed by many procurement agencies like railways, defence etc. Here the procurer, in order to promote competition, may



allow new players with lower reputation to bid, albeit keeping their share in the final allotment limited, even if they happen to be the lowest bidder. The procurement agency could also reserves to itself the freedom to introduce any additional conditions on such bidders suiting its requirement in the tender documents as regards such tenderers.

20. In the instant case if discrimination is made by the OP in setting the terms and conditions of its bid, it may be the outcome of the wisdom exercised by the OP in allotting the bids to established players like ALL and TML while implementing its procompetitive Vendor Development Programme by allowing new players to take part in the bidding process, something which the Commission cannot go into unless the same appears to be unfair and arbitrary. If the OP had the intention to favour TML and ALL, it could have couched the conditions in such a manner as to exclude all the new players from the bid. However, that is not the case. As part of the Vendor Development Programme, new and less experienced players are allowed to participate though some additional conditions have been imposed on them based on business justification.

21. It is reiterated that here the procurement agency like a natural person and a private procurement agency has all the freedom to choose whom to contract with subject to transparency rules and other administrative proceedings and any favouritism shown in such a case comes within the ambit of Vigilance Authorities. In case the discrimination made by the procuring agency is to the detriment of the organization, it is for the owner, i.e. State of UP, to invoke efficiency grounds or initiate corruption proceedings against the concerned officials. The mandate of the Commission is limited to monitoring and prohibition of anticompetitive activities especially where the bidders collude *inter se* to fix the price or to share the markets or to limit the output etc.



22. Dominant procurers though covered by the principle '*procurement is the prerogative of the procurer*', have the obligation to ensure that they act in a responsible manner not allowing their conduct to perpetrate contravention of the Act by imposing unfair conditions. However, imposition of differential conditions on bidders backed with sound reasoning, keeping in view its business interests, by a dominant player cannot be hit by the provision of the Act merely by the reasons of it being public entity. In the instant case, the OP has not been found to be dominant in the relevant market.
23. As regards the merits of the case, it is reiterated that I concur with the order passed under section 26(2).
24. The Secretary is directed to inform the parties accordingly.

Sd/-  
**(Augustine Peter)**  
**Member**

**New Delhi**  
**Date: 07/09/2017**