



**COMPETITION COMMISSION OF INDIA**

**Case No. 35 of 2014**

**In Re:**

**M/s Thriveni Earthmovers Private Limited**

**Informant**

**And**

**M/s National Thermal Power Corporation Limited**

**Opposite Party**

**CORAM**

**Mr. Ashok Chawla**

**Chairperson**

**Mr. M. L. Tayal**

**Member**

**Mr. S. L. Bunker**

**Member**

**Mr. Augustine Peter**

**Member**

**Appearances:** Shri Parag Tripathi, Sr. Advocate, Shri Ranjan Sardana and Shri Nishit Agarwal, Advocates for the Informant.

Shri Vikas Singh, Sr. Advocate, Ms. Deepika Kalia, Advocate for the Opposite Party.



सत्यमेव जयते



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

1. The present information has been filed under section 19(1) (a) of the Competition Act, 2002 (**'the Act'**) by M/s Thriveni Earthmovers Private Limited (**'the Informant'**) against M/s National Thermal Power Corporation Limited (**'the Opposite Party'**/ **'NTPC'**) alleging *inter alia* contravention of the provisions of sections 3 and 4 of the Act.
2. Facts, as gathered from the information, may be briefly noted:
3. The Informant is a company registered under Companies Act, 1956 and is engaged in the business of mine development and operation and is stated to be a well-known Mine Developer and Operator (MDO). NTPC is a company established under the Companies Act, 1956 and has been engaged in the business of thermal power generation. Set up in 1975, it is a "Maharatna" Public Sector Enterprise/Undertaking (PSU) of the Government of India.
4. It has been averred in the information that MDO is a term used to define an agency which takes over a virgin mineral property, does everything to bring it to the stage of mine development, develops mine and service infrastructure, produces mineral in conformity with the regulatory conditions, converts into usable/ marketable product and complies the progressive mine closure plan to restore the degraded land. In other words, it is Turnkey contract in respect of mines. Due to want of expertise and specialized services with end to end solution, MDO is gaining importance now, avers the Informant.
5. The present information has been filed challenging the alleged unilateral, discriminatory and unfair acts of NTPC whereby it is, by virtue of its dominance in the relevant market, imposing unfair and discriminatory conditions in purchase or sale of service of MDO, which is thereby not only limiting and/or restricting the provision of service but also adversely affecting the competition in the relevant market in India.



6. The information has been filed in respect of the following Invitation for Bids (IFBs) issued by NTPC for development and operation of Kerendari-A Coal Block, District Hazaribagh, State of Jharkhand (“**Kerendari**”):
  - (i) CS-7012-602-9 dated 20.12.2012 (“First IFB”)
  - (ii) CS-7012-602(R)-9 dated 05.03.2014 (“Second IFB”)
  - (iii) CS-7012-602(R1)-9 dated 10.05.2014 (“Third IFB”)
7. It has been alleged that NTPC unreasonably cancelled the first IFB and Second IFB was issued after a significant delay of more than one year. Thereafter, the second IFB was also cancelled and third IFB was issued. It has been further alleged that the conditions under ‘Qualifying Requirements’ under second and third IFBs were changed at the discretion of NTPC and the new/truncated conditions are grossly unfair and discriminatory, thereby anti-competitive on the face of it.
8. As per the Informant the qualifying requirements under first IFB made those MDOs eligible to participate who have experience in developing and operating iron ore, bauxite, coal and/or lignite mines. But, under second and third IFBs qualifying requirements were unjustly and unreasonably restricted only to those who have experience in coal/lignite mine only.
9. The Informant vide two letters registered its protests before the Opposite Party after second IFB was issued. However, the Opposite Party unreasonably floated third IFB and did not respond to the representation-cum-letters of the Informant.
10. It is the case of the Informant that NTPC is abusing its dominant position by unfairly and discriminately changing the conditions in second IFB and third IFB and imposing unfair and discriminatory conditions, thereby ousting the potential competitor from the market and is risking the competition to a great



extent. The Opposite Party is alleged to have contravened the provisions of section 4 (2) (a), (b), (c) and (e) of the Act.

11. Further, the Informant has submitted that analysis of section 3(4) read with section 2(b) and section 18 of the Act along with Para 3.2 of the report of “High Level Committee on Competition Policy and Law” would show that the Opposite Party is in gross violation of section 3(4) of the Act.
12. Through additional information filed on 23.05.2014, the Informant submitted that NTPC has issued another IFB (Fourth IFB) in respect of Dulanga Coal Block, District Sundergarh, Odisha on 21.05.2014 vide IFB No. CS-7015-602-9 with the same eligibility conditions as that of second and third IFB.
13. The Commission has perused the information and the material available on record including the written submissions filed by the parties. The Commission has also heard the counsels appearing for the parties at length.
14. At the outset, the Commission observes that the Informant moved an application dated 27.06.2014 seeking withdrawal of the information. The said application was rejected by the Commission *vide* its order dated 15.07.2014 by noting that there is no provision in the Act for withdrawal of information and as such the same was dismissed as not maintainable.
15. The Informant is aggrieved by the change in qualifying requirements by NTPC under the impugned tenders whereby the eligibility for MDOs has been restricted to experience in developing and operating coal/lignite mines only in contrast to earlier position when all MDOs who have experience in developing and operating coal, lignite, iron ore and bauxite mines were allowed to submit bids.
16. To examine the allegations of abuse of dominance, it would be necessary to define the relevant market.



17. NTPC being primarily a thermal power generator with no expertise in coal mining had invited a bid for development of its Kerendarai captive coal mine project located at Hazaribagh district in Jharkhand from mine developers through MDO route. MDO is a new concept in the mining sector wherein the ownership of the mine resides with the entity to which mine is allocated and the owner of the mine contracts the mine development to a third party contractor. The contracted MDO take care of all activities associated with mine development such as mine design & planning, coal handling plant design & construction, mine infrastructure design & construction, overburden removal, coal mining, processing, delivery, ongoing mine operation & maintenance throughout the entire life of the mine and delivers the stipulated quantum of coal against a fee as agreed in the MDO contract. MDO contract is awarded mostly on the basis of quoted mining cost per tone, to the lowest bidder.
18. As NTPC, through the impugned tenders, was procuring the services of Mine Developer cum Operator (MDO), the relevant product market appears to be 'the market for services of a Mine Developer cum Operator'. In this connection, it may be pointed out that the market is not restricted to coal mines only as based on various technical parameters, the Informant itself has admitted in the information that the techniques used in opencast mining of coal are substantially and materially the same as those in iron ore/bauxite. As such, the market has not been confined to coal mines only.
19. Further, as the tender was open for all bidders throughout India the relevant geographic market has to be India.
20. Based on the relevant product and relevant geographic market, the relevant market considered as 'the market of services of Mine Developer cum Operator in India'.



21. The next issue is whether NTPC is a dominant procurer of the services of Mine Developer cum Operator in India. In this regard, it is observed that as per section 3(3) (a) (iii) of the amendment Coal Mines (Nationalisation) Act, 1973 the companies engaged in production of iron & steel, generation of power, production of cement, production of syn-gas obtained through coal gasification (underground and surface) can do coal mining in India for captive consumption. Based on the above provision, captive coal mines have been allocated to the above said sectors.
22. The present status of coal blocks allocation as per the Annual Report (2012-13), Ministry of Coal is as follows:

Sector	Sector wise Allocation			
	To Govt. Companies	To Pvt. Companies	To UMPPs/ Tariff based bidding	Total blocks
Power	55	28	12	95
Commercial Mining	41	--	--	41
Iron & Steel	4	65	--	69
Cement	--	8	--	8
Small & Isolated	--	3	--	3
CTL	--	2	--	2
Total	100	106	12	218

*Source: Annual Report (2012-13), Ministry of Coal*

23. From the distribution of captive coal mines allocated to different sectors viz. power, commercial mining, iron & steel, cement, small & isolated and coal to liquid, it is evident that out of a total of 218 blocks, 95 blocks (43%) were allocated to power. Further, within the power sector, government power generators have got 55 blocks (58%), private power generators have got 28



blocks (29%) and ultra-mega power projects have got 12 blocks (13%). As per the Annual Report 2012-13 of NTPC, it was allocated only 6 captive coal mines such as Pakri-Barwadih in Jharkhand, Chatti-Bariatu in Jharkhand, Kerandari in Jharkhand, Talaipalli in Chhattisgarh and Dulanga in Odisha.

24. Thus, it is evident that NTPC neither has the largest number of coal mines allocated nor is a large player in terms of reserves. In this scenario, when NTPC does not have the dominant presence in having coal mines, the issue of NTPC being a dominant procurer of Mine Developer cum Operator services in India in respect of coal mines, does not arise. NTPC also cannot be a dominant procurer in the relevant market of Mine Developer cum Operator services in India in respect of coal, lignite, iron ore and bauxite mines *etc.* together because no iron ore, bauxite mines, *etc.* are allotted to NTPC as it does not deal with iron ore, bauxite, *etc.* for its operations. In the absence of dominance of NTPC in the relevant market, its conduct is not liable to be examined under the provisions of Section 4 of the Act.
25. Even otherwise, the Informant has not been able to establish abuse in terms of the provisions of section 4 of the Act. The gravamen of the information is directed at change in qualifying requirements by NTPC under the impugned tenders whereby the eligibility for MDOs has been restricted to experience in developing and operating coal/lignite mines only which earlier allowed all MDOs who had experience in developing and operating coal, lignite, iron ore and bauxite mines. The Commission is of considered opinion that such change in the stipulated conditions whereby a procurer is restricting the zone of consideration to MDOs who have experience in developing and operating coal/lignite mines only cannot be termed as unfair or discriminatory.
26. The Informant has also alluded to the provisions of section 3(4) of the Act. In this regard, suffice to note that no agreement as such has been entered into by NTPC with any of the potential MDOs. Hence, it is premature to allege contravention of the provisions of section 3 of the Act at this stage.



27. Lastly, it may be pointed out that previously in the case of *M/s Pandrol Rahee Technologies Pvt. Ltd. v. DMRC & Ors.*, Case No. 03 of 2010, the Commission while upholding brand specific requirement in the matter of procurement of rail fastening system for ballastless tracks in metro rails observed as follows:

*“...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 consumers choice is based on personal assessment of competing products or services, their relative prices or personal preferences. For any other type of consumer, this process of decision making in exercise of consumers 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 consumers’ choice on behalf of the public. Of course, there could be competition concerns in rare cases where a monopoly buyer exercises the option in an anti-competitive manner but the present case is not in that category. Here the exercise of the option by various Metro projects has been done in the interest of reliability and safety...”*





28. In view of the above discussion, no case of contravention of the provisions of either sections 3 and 4 of the Act is made out against NTPC and the information is ordered to be closed forthwith in terms of the provisions contained in section 26(2) of the Act. Resultantly, the application seeking interim relief under section 33 of the Act does not survive and also stands dismissed.

29. It is ordered accordingly.

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

**Sd/-**

**(Ashok Chawla)**  
**Chairperson**

**Sd/-**

**(M. L. Tayal)**  
**Member**

**Sd/-**

**(S. L. Bunker)**  
**Member**

**Sd/-**

**(Augustine Peter)**  
**Member**

**New Delhi**

**Date: 01-08-2014**