COMPETITION COMMISSION OF INDIA

Case No. 38/2012

Date:18.10.2012

All India Genset Manufacturer Association — Informant

Vs.

Chief Secretary, Govt. of Haryana — OP-1
Chief Sectt. Chandigarh, Haryana

Financial Commissioner & Principal Secretary, — OP-2
Industries Department
Civil Sectt., Chandigarh, Haryana

Director Supplies and Disposals, Haryana — OP-3
SCO No. 1032-33, Sector -22 B, Chandigarh, Haryana

As per R.Prasad (Minority)

I have a different view on this subject and am therefore giving a separate order. In the majority decision, it has been held that OP3 was a dominant enterprise in the relevant market as far as the purchase of gensets was concerned. In the majority order the relevant market has been defined as the sale and purchase of gensets. In the majority order it has been held that the relevant market has to be the entire market for the product in the relevant geographic area. In the majority order the relevant market has been taken as the purchase of gensets by all the enterprises within the state of Haryana. The majority has held that the total turnover of the market of gensets in the state of Haryana has not been given by the Opposite Party. The purchase of gensets is different from government procurement. It has been held that OP3 was only one of the enterprises which was purchasing gensets and that there would be

hundreds of other enterprises who also were purchasing gensets and that the Commission has to keep in mind the entire relevant market. It was held that Government purchase and private purchase of gensets are substitutable and interchangeable and the two cannot be considered as two separate markets. It was also held by the majority that as there was a total lack of information especially with reference to dominance of OP3 in the market. The dominance of OP3 was stated to be not established in the relevant market. For this reason the case was closed by the majority order

2. Under Competition Law, a relevant market has to be defined with reference to either the relevant geographic market or the relevant market or with reference to both. Thus, the relevant market can be defined either with reference to the relevant product market or the relevant geographic market. The relevant product market means comprising all those products which are regarded as interchangeable or, substitutable by a consumer, by reasons of the characteristics of the products, their prices or intended use. The government can be a consumer under Section 2(f) of the Act. The product which the government proposes to purchase is the same as would be purchased by a private person. But the prices in a government purchase would be different. Further, the intended use of the product in the case of government purchase is different as the government does not use it for personal purpose whereas a private person would use it for his own use. Thus, the relevant market for government purchase is different from a private use of the same products. It is also a fact that a state Government is always in a position of strength.

3. Further, the purchase of gensets by any enterprise and by the government cannot be equated. The rules governing government procurement are totally different because rules for procurement cannot be unfair or anti-competitive or result in a denial of market access to any person. There has to be equality of law as far as government procurement is concerned for all the suppliers. If certain elements in the

government procurement restricts the market or forecloses the market for certain suppliers due to restrictive clauses then such a clause is not proper. This is a view which has been laid down by the Supreme Court in various cases, one of them being Hindustan Development Corporation 1994 AIR 988 1993 SCR (3) 128. Therefore government procurement is different from a purchase by any private individual as the rules for government procurement are totally different. The relevant market would therefore be the market for the procurement of gensets in the geographical area of Haryana. Incidentally OP3 is the only agency of the government which procures gensets for different departments of Haryana. In the procurement for the Government of Haryana, OP3 is the main agency. It has to be treated as a dominant enterprise in respect of procurement of diesel gensets in the state of Haryana.

4. In view of these facts it appears to be case of abuse of dominance by OP1, OP2 and OP3 in respect of gensets purchased by the Government of Haryana. The case may be investigated by the Director General.

S/d-
(R. Prasad)
Member, CCI