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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 42 of 2014

In Re:

K. N. Choudhary

Informant

And

- | | |
|---|----------------------------|
| 1. M/s Delhi Metro Rail Corporation Ltd. | Opposite Party No 1 |
| 2. M/s Kochi Metro Rail Limited | Opposite Party No 2 |
| 3. Ministry of Urban Development | Opposite Party No 3 |

CORAM

Mr. Ashok Chawla
Chairperson

Mr. Anurag Goel - (Demitted office)
Member

Mr. M. L. Tayal
Member

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Appearances: Shri O.P Dua, Senior Advocate and Shri Rahul Singh,
Advocate alongwith the informant.



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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 Shri K. N. Choudhary ('the informant') against M/s Delhi Metro Rail Corporation Ltd. ('the opposite party No. 1'/ DMRC), M/s Kochi Metro Rail Limited ('the opposite party No. 2'/ KMRL) and Ministry of Urban Development ('the opposite party No. 3') alleging *inter alia* contravention of the provisions of section 4 of the Act.
2. Facts, as gathered from the information, may be briefly noted:
3. The informant has described himself as a citizen who is concerned with the welfare of the country and has filed the present information upon coming to know about the alleged discrepancies in the tendering process of the opposite parties.
4. The opposite party No. 1 *i.e.* DMRC is a public limited company. Its primary business is stated to be the operation of Delhi Metro in the NCR region. Besides, it is averred that DMRC is also engaged in planning and implementation of metro rail, mono rail and high-speed rail project in India and abroad.
5. The opposite party No. 2 *i.e.* KMRL is also a public limited company by way of a joint venture company between Government of India and Government of Kerala. The primary business of KMRL is stated to be the operation of Kochi Metro which is further stated to be under-construction for the city of Kochi in Kerala, India.
6. It is further averred that the opposite party Nos. 1 and 2 operate under the aegis of the opposite party No. 3 Ministry which controls the operations of the opposite party Nos. 1 & 2.



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7. It is the case of the informant that on 08.01.2013, opposite party No. 1 and opposite party No. 2 signed an agreement for execution of the first phase of the Kochi Metro Rail Project. As per the agreement, opposite party No. 2 will be the project owner and opposite party No. 1 shall be the executing agency and will be responsible for executing the works of the Kochi Metro rail project. As per the agreement, opposite party No. 1 shall invite tenders on behalf of opposite party No. 2.
8. The informant avers that in July, 2013 the opposite parties floated a tender (No. RS12) for design, manufacture, supply, testing, commissioning and training of 75 Nos. standard gauge cars for Kochi Metro rail project. However, the said tender could not fetch more than two bidders and was later on scrapped.
9. It is further averred that the opposite parties later invited fresh bids by re-tendering the same in the month of March, 2014 for design, manufacture, supply, testing, commissioning and training of 75 Nos. standard gauge cars with an option to procure additional cars (upto 75 Nos.) for Kochi Metro rail project being Tender KRS1.
10. It is alleged that while few bidders had purchased the tender documents being eligible as per the qualification criteria after making the payment of Rs. 2,62,500/-, the opposite parties came out with an addendum dated 17.04.2014 *i.e.* after one month wherein the opposite parties modified the terms of entire clauses 12 A, B & C by adding the words “or in India” as well as added reference to Initial Filter Question No. 17 (a), which changed the very character and nature of the pre-qualification criteria and many bidders across the world got excluded and disqualified.
11. Based on the above, the informant has alleged that the opposite parties are abusing their dominant position by incorporating unfair and discriminatory conditions of purchase in the “initial filter evaluation criteria” for the said



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tender. As the date of opening the tenders is stated to be 18.06.2014, the informant has sought urgent hearing alongwith the interim relief.

12. The Commission has perused the material available on record besides hearing the senior counsel Shri Dua appearing on behalf of the informant.
13. The informant is essentially aggrieved of the changes effected by KMRL in its tender document for procurement of standard gauge cars *vide* an addendum dated 17.04.2014 to the tender.
14. At the outset, it may be mentioned that the informant has directed its grievance against DMRC and has also, accordingly, alleged dominance and its abuse by DMRC in the relevant market. In this connection, it may be pointed out that as per the averments made by the informant itself the opposite party No. 2 is the project owner whereas the opposite party No. 1 is just the executing agency. In these circumstances, the entire edifice of the challenge of the informant in laying its grievance against DMRC is misconceived.
15. Even otherwise, no abusive conduct can be ascribed to KMRL as well through changes brought-in in the tender documents *vide* the impugned addendum.
16. It is the case of the informant that by adding the term 'or in India' through the addendum, the opposite parties have prejudicially discriminated against foreign manufacturers who have not previously supplied to India. It is alleged that these manufacturers have to comply with the three country export rule as compared to all other manufacturers who are for all intents and purposes exempt from the three country export requirement, as long as they have supplied to India previously. These foreign manufacturers while fulfilling all technical and financial requirements are discriminated against merely because they have not exported 100 nos. of



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cars to three countries outside the country of origin or in India out of which 50 nos. should be in successful revenue operation for the last 3 years outside the country of origin or in India. By way of example, it is stated that a manufacturer in Germany, who meets all the technical and financial specifications provided in the tender invitation, but supplies his product domestically in Germany will not be eligible to bid. On the other hand, a manufacturer in Korea, who supplies domestically to Korea and has previously supplied to India will be eligible to tender a bid. In such a situation, equally placed suppliers are being treated differently, alleges the informant.

17. The Commission is of opinion that the entire allegation is misplaced.
18. As observed by the Commission in *M/s Pandrol Rahee Technologies Pvt. Ltd v. Delhi Metro Rail Corporation Ltd.*, Case No. 03 of 2010 competition concerns arise only in a particular market and for any market to exist, there has to be at least one producer / seller and one consumer / buyer who exchange a product or service for a price. Further, the market exists because the product or service has certain embedded utility and hence value. Competition laws are meant to ensure that competing producers / sellers do not destroy free and fair competition that should exist amongst them or do not exploit their consumers or competitors due to market power. This principle applies to all entities within any production chain. For any given product or service, the production chain can be said to end where the last transaction takes place and after which point the utility of the product or service is consumed by the person who buys it. The buyer may itself be producing some other product or service which is not part of the specific production chain of the first product, which is a consumable for the buyer. But here, the buyer would have the status of a consumer.



19. Further, 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 prices 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. 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.
20. The Commission, however, notes that 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 procurer, in fact, appears to have widened the conditions of procurement *vide* the impugned addendum. As such, instead of creating entry barriers, it appears that the barriers are diluted/ relaxed for having a wider zone of consideration. In these circumstances, the very basis of the challenge made by the informant is completely negated.
21. As the allegations have been examined on merits, it is not necessary to define or delineate the relevant market in any great detail or to examine the issue of dominance. Suffice to note that, as pointed out earlier, KMRL is the project owner whereas DMRC is just the executing agency. As such, the averments of dominance laid by the informant against DMRC are of no



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consequence as KMRL is admittedly the project owner. There is nothing on record to suggest that KMRL is in a dominant position in the relevant market of procurement of standard gauge cars for metro rail services in India.

22. In this connection, it may be pointed out that in *CSR Nanjing Puzhen Co. Ltd. v. Kolkata Metro Rail Corporation Limited & Ors.*, Case No. 54 of 2010 also almost on a similar set of allegations, the Commission closed the matter against Kolkata Metro Rail Corporation Limited (KMRCL) by observing as under:

It is evident from the facts and circumstances of the case that the allegation of abuse of dominance against the opposite parties cannot be sustained. The informant has not furnished any material to show that the KMRCL is in a dominant position in the relevant market of metro rail coaches in India. Furthermore, the impugned condition that the bidders should have experience of manufacturing minimum 200 stainless steel coaches in the preceding 10 years and that 50% of them should have been supplied and proven to be in service for a period of 5 years or more in India or a country other than the country of manufacturer also cannot be termed as discriminatory or unfair just because the informant company is unable to meet that requirement. It has also not been shown that it is incumbent on all the metro rail corporations to have identical terms and conditions for supply of rail coaches. The conditions can vary according to specific requirements of a particular metro rail corporation having regard to local conditions obtaining therein. Thus, the impugned conditions not being unfair or discriminatory cannot be said to be abusive.

23. In view of the above discussion, no case of contravention of the provisions of section 4 of the Act is made out against the opposite parties and the information is ordered to be closed forthwith in terms of the provisions



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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.

24. It is ordered accordingly.

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

Sd/-
(Ashok Chawla)
Chairperson

(Anurag Goel) – (Demitted office)
Member

Sd/-
(M. L. Tayal)
Member

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

New Delhi
Date: 03/09/2014