



COMPETITION COMMISSION OF INDIA

Case No. 44 of 2020

In Re:

**Shri Yogesh
House No. 82, Kherki Daula
Gurgaon, Haryana**

Informant

And

- 1. Municipal Corporation of Greater Mumbai
(MCGM) Through Chairman
Mahapalika Marg, Fort
Mumbai, Maharashtra – 400001** **Opposite Party No. 1**
- 2. Chief Engineer
Municipal Corporation of Greater Mumbai
(MCGM), Storm Water Drains
Eastern Suburbs (E.S.), Pant Nagar
Ghatkoper (East)
Mumbai, Maharashtra – 400075** **Opposite Party No. 2**
- 3. State of Maharashtra, Through Secretary
Ministry of Housing and Urban Affairs
Mantralaya, 3rd Floor
Mumbai, Maharashtra – 400032** **Opposite Party No. 3**
- 4. Petroleum & Explosive Safety Organisation
India (PESO), “A” Block, 5th floor
CGO complex, Seminary Hills
Nagpur, Maharashtra – 440006** **Opposite Party No. 4**
- 5. Dattatreya Inc.
Authorised Dealer of M/s Korea Accelerator &
Plasma Reaseach Association (KAPRA)
A-4, Aakhandeep, Shardul House
Near Atma Jyoti Ashram, Ellora Park
Vadodora, Gujarat – 390007** **Opposite Party No. 5**
- 6. Amanky Infrastructure Pvt. Ltd.
151-B-1, Sindhi society, Chembur
Mumbai, Maharashtra – 400071** **Opposite Party No. 6**



7. **I. S. Engineers**
D-211, Udhana Sangh Commercial Complex
Beside Divya Bhaskar Press Udhana
Surat, Gujarat – 394210 **Opposite Party No. 7**
8. **Bucon-Gypsum-Bitcon JV**
108-A, Shyam Kamal Building
Agarwal Market, Tejpal Road
Vile Parle (East)
Mumbai, Maharashtra – 400057 **Opposite Party No. 8**

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

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

1. The present Information has been filed by Shri Yogesh (**‘Informant’**) under Section 19(1)(a) of the Competition Act, 2002 (**‘Act’**) against Municipal Corporation of Greater Mumbai (MCGM) (**‘OP-1’**), Chief Engineer, Municipal Corporation of Greater Mumbai (MCGM) (**‘OP-2’**), State of Maharashtra, Through Secretary (**‘OP-3’**), Petroleum & Explosive Safety Organisation, India (PESO) (**‘OP-4’**), Dattatreya Inc. (**‘OP-5’**), Amanky Infrastructure Pvt. Ltd. (**‘OP-6’**), I. S. Engineers (**‘OP-7’**) and Bucon-Gypsum-Bitcon JV (**‘OP-8’**) (collectively referred to as the **OPs**) alleging violation of the provisions of the Act.
2. It is stated in the Information that the Informant is an employee dealing with tender related matters for OP-8, i.e. Bucon-Gypsum-Bitcon JV, which is *inter alia* engaged in the construction of project activities in India in the field



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- of tunnelling and chilling, rock excavation and allied works of similar nature. OP-8 is a joint venture of Bucon Engineers and Infrastructure Pvt Ltd., Gypsum Structural (India) Pvt. Ltd. and Bitcon India Infrastructure Developers Pvt. Ltd.
3. As per the Information, OP-1 and OP-2 are MCGM and Chief Engineer MCGM (Storm Water Drains - SWD), respectively. MCGM is responsible for providing the basic services and civic amenities to the citizens of Mumbai city and suburbs and performing activities like sewer project, sewerage network and operations and maintenance, sewerage disposal and management, *etc.* OP- 3 is the State of Maharashtra. OP-4 is the Petroleum & Explosive Safety Organisation (PESO). OP-5 is Dattatreya Inc., which is the only agency/authorised dealer of B & B Engineering Co. on behalf of Korea Accelerator & Plasma Research association (KAPRA) in India since 2007. OP- 6 and OP-7 are companies that are stated to be working in the sector of “Pulse Plasma Technology”.
 4. The Informant has stated that on 13.09.2019, MGCM, through its Dy. Chief Engineer, (SWD), E.S, issued E-tender Notice for bidding of four works at Serial no. 1 to 4 (ES 343, ES 344, ES 345 and ES 346) at Mithi River at four different locations. The works included providing and laying of sewer line, diversion of dry weather flow by constructing interceptors and training of Mithi River (Widening, deepening, Construction of retaining Wall & Service Road). The estimated cost of ES-343, ES-344, ES-345 and ES-346 were Rs. 97,60,04,198/-, Rs. 113,18,23,685/-, Rs. 71,17,00,474/- and Rs. 63,43,35,466/-, respectively, totalling Rs. 345.35 crore.
 5. As per the Information, the grievance of the Informant relates to E-tender for award of public work to contractors of the contract relating to “Providing and laying of Sewer Line, diversion of dry weather flow by constructing interceptor and training of Mithi River (Widening, Deepening, Construction



of retaining wall and service Road) between MTNL Bridge, BKC and Airport Taxiway Bridge, Kurla in Group No. 1 In 'L & H/E' ward (**ES-344 Tender**), which required submission of an MOU for "Pulse Plasma Technology" by the bidders as pre-qualification criteria.

6. The Informant has submitted that amongst other bidders for ES – 344 Tender, OP-8 was one of the bidders; however, its bid was rejected as 'non responsive' *vide* communication dated 23.12.2019, for not fulfilling qualifying technical criteria, on account of non-submission of MOU for Pulse Plasma Technology. It is alleged that the said pre-qualification criteria is itself arbitrary, discriminatory and anti-competitive and also in violation of CVC Guidelines, for the reasons stated in ensuing paras.
7. The Informant has stated that KAPRA is the only agency to provide Pulse Plasma Technology used for rock breaking. With respect to the said technology, it is stated that when high power pulse electric energy generated by an EPI (Electro Power Impactor) is supplied to the cells filled with powders of aluminum and copper oxide in a milli-second the cells (electrolyte) change to plasma state and generate high heat and impact wave (pulse), which makes the rock break with weak noise and vibration.
8. The Informant has submitted that before the rejection of bid and upon receiving the communication, OP-8 had approached KAPRA. The Technical Director of KAPRA had confirmed to the Informant that KAPRA has authorised B&B Engineering Co. (401 Doo Ta, 245, Hanguel Bisuk Ro , Nowon Gu Seoul, Korea) to undertake project of rock excavation using Pulse Plasma Technology developed by KAPRA and that B&B Engineering Co. representative was Mr. Wansik Pak. It is stated that the Informant contacted Mr. Pak *vide* emails dated 31.01.2020 and 01.02.2020 to seek the details of its approved agencies for "Pulse Plasma Technology" in India. In response, Mr. Pak, *vide* emails dated 01.02.2020 and 02.02.2020 confirmed that



Dattatreya Inc. was their only agency in India from the year 2007 and Mr. Samuel Patel of Dattatreya Inc. had experience as to KAPRA Plasma Rock Fragmentation Technology. Upon a specific query of OP-8 with regard to the other two agencies, namely Amanky Infrastructure Pvt. Ltd. and I S. Engineers, Mr. Pak replied *vide* e-mail dated 02.02.2020 that Amanky Infrastructure Pvt. Ltd. and L.S. Engineers are also authorised agencies; however, they are not so active. Hence, generally Dattatreya is introduced by them to everyone and it is recommended that OP-8 should also get in touch with it 'to perform projects more perfectly'.

9. The Informant has averred that from the above response, it is clear that as on date of issuance of the tender and even thereafter, Dattatreya Inc. in effect, was the only agency providing collaboration/ MOU with regard to pulse plasma technology and had a monopoly in the sector. It is further submitted that in the area of pulse plasma technology, admittedly, as per the PESO, there is no certified agency for using pulse plasma technology in India. Thus, only one agency, i.e. Dattatreya Inc., which is the authorised agency of KAPRA, enjoys a monopoly position in the market. Hence, every participant is left with no option but to approach the said vendor for execution of MOU. Thus, the action of OP-1 and OP-2 in introducing 'Pulse Plasma Technology' in tender condition as eligibility criteria, has created monopoly situation, which is likely to encourage practices having an appreciable adverse effect on competition.
10. Further, the Informant has stated that the condition for submission of MOU for Pulse Plasma Technology, has no nexus with the contractual work in question, as the average vibration velocity achieved by pulse plasma technology is 1.1mm/sec, which is more than the minimum specified vibration velocity of 1 mm/sec specified in the tender. As such, the stipulation of pulse plasma technology does not meet the purported purpose sought to be achieved by introducing the pulse plasma technology, as an



essential requirement. Also, the tender requirement published by MCGM which contemplates that ‘the technology shall be certified by PESO, as non-explosive process’ is also vague, arbitrary, malafide and motivated, as PESO has not certified any agency for blasting using pulse plasma technology. Moreover, apart from Pulse Plasma Technology there are other alternate methodologies for rock breaking also and several non-explosive methods have been approved by PESO and MCGM including using rock breaker, jack hammer and splitter. However, the said condition has been arbitrarily introduced to restrict the control of the market in hands of few persons/ bidder engaged in the trade.

11. The Informant has alleged that the action of MCGM frustrates and negates the very purpose and spirit of the Act which was enacted to promote and sustain competition and eliminate practices having adverse effect on competition and to promote and sustain competition in market.
12. In addition, the tender conditions of MCGM also violate the CVC guidelines, particularly, the Office Memorandum No. 12-02-1- CTE-6 dated 17.12.2002 of the CVC which lays down guidelines that prohibit framing of tender pre-qualification criteria which are too stringent, so as to restrict entry of genuine experienced bidders. It is alleged that by requiring the bidders/participants to obtain a MOU, which in effect and purpose has to be taken from one entity, i.e. Dattatreya Inc., the only local franchise of B&B Engineering Co., which itself enjoys monopoly at global level with regard to this technology, every participant has no option but to approach the said vendor for execution of MOU. Thus, the condition for MOU for Pulse Plasma Technology as prequalification criterion falls foul of the aforesaid guidelines and as such is required to be struck down.



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13. The Informant has, therefore, *inter alia* requested the Commission to (i) pass an appropriate order declaring the inclusion of Pulse Plasma Technology as qualifying criteria in tender condition, as anti-competitive and likely to have an appreciable adverse effect on competition in the field; (ii) pass an appropriate order prohibiting inclusion of “Pulse Plasma Technology” in the tender condition and directing the respondent to modify the same suitably in all Notice Inviting Tenders; (iii) call for the records and information from the OPs and after going through the legality and validity of the same, conduct an enquiry and /or call upon expert in the field, as deem necessary to assist the Commission and /or direct the Director General to cause an investigation in to the matter and submit an investigation report to the Commission; (iv) pass an *ex parte* interim order under Section 33, restraining OP-1 and OP-2 from proceeding further in the award of tender in question (ES-344), pending disposal of Information; (v) award cost/compensation in favour of the Informant; and (vi) pass such other further order or direction as the Commission may deem fit and proper in the facts and circumstances of the case and in the interest of justice.
14. The Commission has perused the Information and the material available on record. It is noted that the Informant in the instant case is an employee of Bucon-Gypsum-Bitcon JV, i.e. OP-8, who is stated to be aggrieved on account of rejection of bid of Bucon-Gypsum-Bitcon JV for ES-344 Tender by MCGM on ground of non-fulfilment of tender condition requiring submission of MOU for Pulse Plasma Technology. The Informant has alleged that this tender condition, inserted as a pre-qualification criterion by MCGM is unfair, discriminatory and anti-competitive and that by inserting such a condition in the ES-344 Tender, MCGM has contravened the provisions of the Act. However, the Informant has not specified contravention of any specific provision of the Act.



15. Based on the averments and allegations made in the Information, it appears that the allegations relate to the contravention of the provisions of Section 4 of the Act which proscribes abuse of dominant position. However, the Informant has neither alleged dominance of MCGM nor delineated any relevant market for the purpose. The Informant has merely alleged that the tender condition that requires contractor to have an MOU for Pulse Plasma Technology, which purportedly can be obtained only from one entity in India, i.e. Dattatreya Inc., since it is the only approved agency of 'B&B Engineering Co.', which, in turn, is the only agency authorised by KAPRA for use of Pulse Plasma Technology to undertake project of rock excavation, is unfair, discriminatory and anti-competitive as it has made the technical eligibility of bidders' dependent on one agency, i.e. Dattatreya Inc. and limited the ability of bidders to participate in the tender.
16. In this regard, it is observed that in the instant case, the procurer required the contractor to use a specific technology which was apparently available for use by contractors only upon signing an MOU with the agency of KAPRA. Normally, from a competition law perspective, a procurer, who is essentially a consumer of services, has the choice to procure goods or services as per its needs and requirements. For an individual consumer, its choice is based on personal assessment of competing products or services, their relative prices or personal preferences. In case of public procurers such as MCGM, such process of decision making in exercise of its choice as a consumer, is more structured and reflected in procurement procedures. However, there could be competition concerns, which may require examination under the framework of the Act, in cases where a monopoly buyer exercises the option in an anti-competitive manner by putting in terms and conditions in the tender documents which are demonstrably unfair or discriminatory.



17. In this backdrop, the Commission notes that it is not the case of the Informant that MCGM is a dominant procurer or has otherwise abused its dominant position in any relevant market. Coming specifically to the assertion of the Informant that inclusion of the impugned condition has limited the ability of bidders to participate in the tender, the Commission notes that a letter dated 18.12.2019 of IVL India Environmental R & D Pvt. Ltd., a firm which scrutinised the bids for ES-344 Tender received by MCGM is annexed along with the Information. This letter shows that at least four bidders had participated in the bid process, namely, Bucon-Gypsum-Bitcon (JV), i.e. OP-8, MEPL-MB JV(JV), N.A. Construction and S. S. Associates (JV), of which all, except Bucon-Gypsum-Bitcon JV, were found responsive. This indicates that three out of four bidders were able to meet the criteria of the procurer. Thus, it is not evident from the Information as to why and for what reasons, the employer of the Informant, i.e. Bucon-Gypsum-Bitcon JV could not obtain the MOU. Be that as it may, the Commission notes that, in the present case, since the tender condition has been met by more than one bidder, the allegation of the Informant that criteria laid down by the procurer has limited the ability of the bidders to participate, is not borne out from the facts of the present case.
18. It is also interesting to note that the instant Information has not been filed by Bucon-Gypsum-Bitcon (JV) itself but by its employee who has rather made it an opposite party in the matter, i.e. OP-8. It is also not understood as to how the Informant can allege any perceived difficulty in participating the tender due to the impugned condition, by its employer, i.e. OP-8 when such entity itself has not approached the Commission making any grievance in this regard. It is further noted that apart from MCGM and OP-8, the Informant has impleaded other parties as opposite parties in the matter, i.e. OP-3 to OP-7; however, he has neither alleged contravention of provisions of the Act by them nor provided any rationale for including them as such parties in the matter.



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19. Furthermore, the Commission notes that the Informant has alleged that the tender condition is in violation of the CVC Guidelines. In this regard, suffice to note that mere contravention of the CVC Guidelines, in the absence of any material showing contravention of the provisions of the Act, does not *ipso facto* imply violation of the provisions of the Act.
20. Thus, in view of the foregoing, the Commission is of the opinion that in the instant matter there exists no *prima facie* case and the matter is ordered to be closed forthwith in terms of the provisions of Section 26(2) of the Act.
21. The Secretary is directed to communicate to the Informant, accordingly.

Sd/-

**(Ashok Kumar Gupta)
Chairperson**

Sd/-

**(Sangeeta Verma)
Member**

Sd/-

**(Bhagwant Singh Bishnoi)
Member**

New Delhi

Date: 29/12/2020