

# COMPETITION COMMISSION OF INDIA

Case No. 63/2012

22<sup>nd</sup> November, 2012

Filed by: M/s. NexTenders (India) Private Limited.

Informant

Against: Ministry of Communication and Information and  
Information Technology & others

Respondent

## **Order under Section 26 (1) of Competition Act, 2002**

### **As per R.Prasad (Minority)**

#### **Facts of the Case**

1. The Complainant is a Company incorporated under the Companies Act with its registered office at Mumbai. The complainant is in the business of providing application software solutions and services, particularly to the agencies of the Government of India, State Governments, Union Territories, PSUs, semi-government agencies etc. One of the major areas of the Complainant's business is electronic tendering and electronic procurement software, solutions and services which is a major thrust area for e-governance, particularly to increase transparency and reduce corruption in Government procurement.

#### **2. Allegations**

The Informant has alleged that Respondent Nos. 3, 4 and 5 are Government Agencies who have been abusing their dominant position to enter into contracts for providing e-tendering solutions to various Government Agencies and PSUs on a nomination basis and without an open tender or any competitive bidding process. This transaction is masked as a government to government transaction

to justify the lack of tendering or bidding. As a result there is no competition and absurd prices are recovered from vendors bidding on that particular portal which are then built into the cost of the product the result of which is felt directly by the exchequer.

## **Findings**

1. The main grievance of the informant is that the OPs have created entry barrier for the Informant as OPs being the Government departments, are in a dominant position and as such they have abused their dominance by controlling the e-procurement market, strangle competition and drive out competing business enterprise like the Informant. It is the majority's view that the Informant has failed to define the relevant market and to prove that the OPs are holding dominant position in that market. In this regard my view is that the onus is not on the Informant to prove that the OPs are holding dominant position. It is the job of the Commission to find out whether the OPs are holding dominant position in the relevant market. Informant is merely an information provider. He is not supposed to be expert on the Competition Law. His job is to bring it to the notice of the Commission that some anti competitive act is being committed and then it is for the Commission to find out whether that act is prima facie anti competitive.
2. The Competition Act regulates, inter alia, activities that cause or are likely to cause an appreciable adverse effect on competition within India as well as with abuse of dominance by an enterprise in a relevant market. With the enactment of the Competition Act, 2002 and the creation of the Competition Commission of India, decisions, whether in the nature of policy or administrative decisions, that would have adverse effect on competition or interests of consumers would fall under the scope of duty and the powers and functions of the Competition Commission of India.
3. Thus, awarding of a contract without following a competitive bidding process in a

transparent manner very much fall within the jurisdiction of the Competition Commission of India pursuant to section 18 of the Competition Act, which imposes a duty on the Competition Commission to, inter alia, eliminate practices having adverse effect on competition, promote and sustain competition and protect the interests of the consumers. On reading the definitions of “practice”, “trade” and “enterprise” as provided under the Competition Act, it becomes clear that the practices of a government department relating to the production, supply, distribution, storage or control of goods and provision of any services will fall within the ambit of the duty of the Competition Commission.

4. Under the principles enshrined in the Competition Act, 2002, the Commission seek to prevent: (i) unfair or discriminatory conditions on which services are provided or (ii) unfair or discriminatory determination or revision of price, or (iii) limiting or restricting or denying, directly or indirectly, access or (iv) using the dominant position obtained under a contract agreement to enter into or protect its or a related entity's position in another relevant market or (v) entering into anti competitive agreements.
5. There is no uniform policy in the government to award a contract though, the courts in India have stated that contracts should be awarded through a bidding process except in cases of natural disaster etc. In the absence of such policy the contracts are awarded on nomination basis citing socio-economic reasons. However, this justification always raises doubt on the entire process of awarding a contract e.g. there is no transparency; large scale corruption, not getting the true value for money, not providing a level playing field and fair competitive platform for vendors and lack of accountability in the entire process. Consequently, the competitive bidding route is the most preferred route for grant of concession agreements under Indian law. In relation to competition laws, competitive bidding process has been viewed as a device that can be used to create competition for the market, when competition in the market is not operating. Further, if there is no bidding, then any agreement

entered thereto would be in violation of section 3(1) of the Competition Act.

6. In the cases where government departments have been made opposite parties, it is important to go into the philosophy of Competition Law. The Parliament has enacted a law to ensure that a level playing field is created to all market players irrespective of their size, resources, market position, economic strength etc. The intention of the statute is very clear that there should not be any discrimination between a private player and a government player and all players should be treated equally and there should be complete neutrality so that they can operate independently and freely in a given market. This is the reason why section 2(h) has included even the government enterprise. A perusal of the definition would show that any government department which is engaged in any activity relating to carrying a business would be an enterprise under the Competition Act 2002. "This interpretation is supported by the following observations made by Ld. Single Judge of the Hon'ble High Court of Delhi in the order passed in W.P. (C) 5770 of 2011 on 04.11.2011:

*"Respondent no. 2, prima facie, would also fall within the expression 'enterprise' as used in the Act which is very widely worded to even include a person or a department of the government rendering services 'of any kind' and excludes only those activities of the government which are relatable to sovereign functions of the government and all activities carried out by the departments of the Central Government dealing with the atomic energy, currency, defence and space. Respondent no. 2 does not fall in any of the said exceptions."*

The Delhi high court has also held in the case of Railway that the Indian Railways was carrying out commercial functions and was therefore an enterprise.

7. There is, therefore, no reason to hold that the OPs are not an enterprise. The Competition Act, 2002 ("The Competition Act") is not limited only to the regulation of

commercial agreements between private entities, the scope of the provisions of the Competition Act brings within its ambit actions of any department of the government (both Central Government and State Governments) which is engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles of goods or the provision of services of any kind either directly or through one or more of its units or divisions or subsidiaries and only excludes such activity of the Government relating to the sovereign functions of the Government (including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space). Thus, awarding a contract on nomination basis will not be covered by the exception of sovereign function as it is a commercial function of the government and therefore, it will be subjected to the scrutiny under the Competition Act.

8. There is a plethora of decisions of the Supreme Court of India in relation to the manner in which a Government can enter into contracts. Some of the landmark judgments are the cases of Lucknow Development Authority vs. M.K. Gupta 1994 AIR 787 1994 SCC (1) 243 and Union of India & Ors. vs. Hindustan Development Corporation 1994 AIR 988 1993 SCR (3) 128, wherein it has been held that there are different manifestations of economic power in different fields of economic activity. On such manifestation is the achievement by one or more units in an industry of such a dominant position that they are able to control the market by regulating prices or output or eliminating competition. Therefore, the avowed policy of the Government particularly from the point of view of public interest is to prohibit concentration of economic power and to control monopolies so that the ownership and control of the material resources of the Community are so distributed as best to subserve the common good and to ensure that while promoting industrial growth there is reduction in concentration of wealth and that the economic power is brought about to secure social and economic justice.
9. Now coming to the provisions of the Act, the explanation to section 4 states “dominant position means a position of strength enjoyed by an enterprise in the

relevant market in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.” In the present case, all the OPs are holding a dominant position because they are government departments and as such they are operating independently of competitive forces prevailing in the relevant market and affecting their competitors, the relevant market and ultimately the consumers.

10. The paper/documents submitted by the Informant show that the informant is in the business of providing application software solutions and services, particularly to the agencies of the Government of India, State Governments, Union Territories, PSUs, semi-government agencies etc. One of the major areas of the Complainant's business is electronic tendering and electronic procurement software, solutions and services which is a major thrust area for e-governance, particularly to increase transparency and reduce corruption in Government procurement. So, if the Informant is otherwise qualified and competent to provide this service, his entry into the government department cannot be denied on the ground that the government department has decided to procure such services through its own agency, i.e. NIC on nomination basis and not on open tendering basis, the same is clearly a denial of market access as per the provisions of section 4(2) (c) of the Competition Act.

11. From the above discussion, I am of the opinion that there exists a prima facie case and the DG shall be directed to cause an investigation into the matter.

12. Secretary is directed to inform all concerned accordingly.

Sd/-  
(R.Prasad)  
Member