

COMPETITION COMMISSION OF INDIA

Case No. 63 of 2012

Dated: 22-11-2012

M/s NexTenders (India) Private Limited

Informant

v.

Ministry of Communication and Information Technology

Opposite Party No. 1

Ministry of Commerce

Opposite Party No. 2

National Informatics Centre (NIC)

Opposite Party No. 3

National Informatics Services Incorporated (NICSI)

Opposite Party No. 4

M/s ITI Limietd (ITI)

Opposite Party No. 5

ORDER UNDER SECTION 26(2) OF THE COMPETITION ACT, 2002

The informant is a company incorporated under the Companies Act, 1956 with its registered office at Mumbai. It is stated to be in the business of providing application software solutions and services, including electronic tendering and electronic procurement software, solution and services, particularly to the agencies of Government of India at Central and State level.

2. OP No. 1 is entrusted with policy making in respect of software, information technology and e-governance including National E-governance Plan of the Government of India. OP No. 2 is tasked with the implementation of the 'Electronic Procurement Mission' project under the National E-governance Plan. OP No. 2 is also empowered with laying down the technical and security standards for e-procurement systems to be adopted by Central and State government agencies. OP No. 3 is an independent unit of OP No. 1 which provides e-Governance Solutions services. OP No. 4 is the commercial and services arm of OP No. 3 which had been formed under section 25 of the Companies Act, 1956, and is controlled by OP No. 3. OP No. 5 is a public sector undertaking marketing an e-tendering system commercially, though the e-tendering solution is owned by a private party 'M/s Antares Systems Limited'.

3. The informant is primarily aggrieved by the government to government transactions entered into between the opposite parties without giving any opportunity to the private players like the informant to have a chance in the tendering process. The facts that gave rise

to the present information pertain to the sourcing of the Government e-Tendering/e-Procurement projects. The informant claimed to be a product/service provider for this facility since 2002, when the market for this product was relatively new and involved a few private players who operated on 'No-Cost to Government Model'. However, in the last few years, some Government and public sector companies, including OP No. 3, 4 and 5, entered this market. Consequently, the informant and these opposite parties became competitors in the market for 'providing Government e-Tendering/e-Procurement software, solutions and services'. According to the informant the opposite parties were dominant in this relevant market i.e. market for 'providing Government e-Tendering/e-Procurement software, solutions and services'. The opposite parties distorted the competition in the said market by adopting nomination method of allotment of government contracts for e-Tendering/e-Procurement software, solutions and services, without an open tender or competitive bidding. Further, OP No. 3, being the agency/unit of OP No. 1, abused its dominant position by inducing all State Governments to implement the e-tendering system offered by it on a nomination basis for all their departments/agencies. This, the informant argued, resulted in ousting the informant from the relevant market. The informant also highlighted that the claim of OP No. 3 that it offered its services at a 'no-cost' model was not true. In support of this argument the informant annexed various documents e.g. minutes of the meeting between OP No. 3 and other parties, e-tendering project proposal submitted by OP No. 3 to National Highways Authority of India, letter from Mahanadi Coalfields limited confirming an MOU with OP No. 3 for its e-procurement system on a long-term basis without any open tender etc.

4. The Commission perused the information available on record and heard the Informant at length. The issue in the present case pertained to abuse of dominant position by the opposite parties under section 4 of the Act. For assessing the case under section 4 of the Act, relevant market needs to be determined first. The informant proposed the relevant market to be market for 'providing Government e-Tendering/e-Procurement software, solutions and services'. The narrow determination of the relevant market as proposed by the informant does not seem to be correct. Procurement through tendering is not solely done by the Government agencies. Government entities, public sector enterprises, autonomous bodies and private companies—all may choose this method of procurement. Therefore, the appropriate relevant market for the present case should be market for 'providing/procuring e-Tendering/e-Procurement software, solutions and services'. Since the informant and other competitors (OP No. 3, 4 & 5) are providing their services pan India without any geographical limitation

and the alleged abuse is also said to be taking place across states, the relevant geographic market in this case will be 'whole of India'. Therefore, applying the relevant provisions of the Act i.e. section 2(r), 2(s), 2(t), section 19(6) and 19(7), the relevant market in this case would be 'providing/procuring e-Tendering/e-Procurement software, solutions and services in India'.

5. It is alleged by the informant that the opposite parties were dominant in the relevant market and had abused their dominant position in the relevant market by entering into agreements with the Central Government and its Departments/ PSUs/ Agencies etc. as also with the State Governments and their Departments/ PSUs/ Agencies etc. to provide e-procurement solutions on nomination basis without open tender or any other competitive bidding process. As already discussed above, the relevant market would be 'providing/procuring e-Tendering/e-Procurement software, solutions and services in India'. The Government is not the sole consumer in the market of 'providing/procuring e-Tendering/e-Procurement software, solutions and services in India'. There are private companies which also procure through the tender process and use e-tender and e-procurement software, solutions and services. The informant has not provided a comprehensive overall market data regarding share of government enterprises/agencies and private enterprises (other than government players) on either sale or purchase sides of this service through which question of dominance can be determined. The informant has restricted the relevant market and the information only to few government agencies/departments. The market cannot be narrowed down only to government enterprises/agencies' procurement. Therefore, in the absence of any concrete information with regard to respective share in the e-procurement and e-tendering process of different payers in the pan India market, it is difficult to accept the plea of the informant with regard to dominance of opposite parties (agencies of the government) in the relevant market of 'providing/procuring e-Tendering/e-Procurement software, solutions and services in India'.

6. Nevertheless, assuming without accepting, that the opposite parties were dominant enterprises in the relevant market, even in such a scenario no case is made out under section 4 of the Act. The informant had alleged that the opposite parties had abused their dominant position in the relevant market by directing the Central Government and its Departments/ PSUs/ Agencies etc. as also the State Governments and their Departments/ PSUs/ Agencies etc. to provide e-procurement solutions contracts to OP No. 3, 4 & 5 on nomination basis without open tender or any other competitive bidding process. Thus conduct of engaging an in-house agency or a government enterprise created for the purpose, without

bidding process shall not fall foul of the provisions of section 4 of the Act so long as the Central Government does not impose e-procurement solutions of its entities upon other Ministries of Central/ State and other Government agencies, PSUs, etc. On a careful perusal of the information and the material filed in support thereof, it appears that the information is misconceived. The following extract from 'A Compendium of Mission Mode Projects under NEGP' placed by the informant on record at Vol. II pp.388 & 389 reads as under:

DGS&D has developed an end-to-end e-Procurement Portal for procurement of common user items through Rate Contracts. The e-Tendering modules were developed in PPP mode through a Service Provider, the contract for which has since expired in March 2010. The remaining modules were developed with the assistance of NIC. DGS&D is in the process of empanelling Application Service Providers (ASPs) to make available an e-Procurement platform which can be made use of by willing Central Ministries/State Government/PSUs. The writ petition (WP (C) No. 9342/2009) filed in this matter also stands disposed by the Hon'ble Delhi High Court vide its judgment dated 08/09/2010. While disposing the petition, the court has noted the submission made by the ASG on behalf of the Government that it will not impose its e-procurement solution to any other Ministry of Central/State and other Govt. agencies, PSUs etc. and other PSUs/Departments/Ministries, shall have the choice to devise their own e-procurement solutions.

9. The above extract is self instructing of the fact that the e-procurement platform developed by the Central Government entities need not be made use of by unwilling Central Ministries/ State Governments/ PSUs etc. It also appears that an assurance was made on behalf of the Central Government before Delhi High Court in WP(C) No. 9342 of 2009 that it will not impose its e-procurement solution on any other Ministry of Central/ State and other Government agencies, PSUs etc. and they shall have the choice to devise their own e-procurement solutions.

10. The informant has not placed on record any instance of imposition of e-procurement platform developed by the Central Government entities on unwilling Central Ministries/ State Governments/ PSUs etc. Resultantly, in view of the aforesaid policy prescription and assurance given by the Central Government before the Hon'ble Delhi High Court, the grievances raised by the informant have no substance. Moreover in an earlier case before this Commission, *Advertising Agencies Guild vs DAVP & Ors.* (Case No. 21 of 2012), it was held that department of the government has a right to have its own purchase department to save costs. Therefore, having in house service provider cannot be considered to amount to abuse of dominant position.

11. In view of the above, the Commission finds that there does not exist any *prima facie* case under section 4 of the Act to cause an investigation into the matter under section 26(1). The proceedings in the above case are hereby closed under section 26(2) of the Act.

12. The Secretary is directed to communicate the decision of the Commission to all concerned accordingly.

Sd/-
H.C. Gupta
(Member)

Sd/-
Geeta Gouri
(Member)

Sd/-
Anurag Goel
(Member)

Sd/-
M.L. Tayal
(Member)

Sd/-
Justice(Retd.) S.N. Dhingra
(Member)

Sd/-
Ashok Chawla
(Chairperson)