COMPETITION COMMISSION OF INDIA

Case No. 70 of 2014

***In re*:**

Shri Rajat Verma
A-30, Sector 49
Noida, U. P. **Informant**

And

Public Works (B&R) Department
Government of Haryana
Sector 33A, Chandigarh. **Opposite Party No. 1**

The Secretary, Public Works (B&R) Department
Government of Haryana
Sector 33A, Chandigarh. **Opposite Party No. 2**

The Superintending Engineer
Public Works (B&R) Department
Karnal Circle, Haryana **Opposite Party No. 3**

CORAM

Mr. S. L. Bunker
Member

Mr. SudhirMital
Member

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Justice G. P. Mittal
Member

Appearances:	*For the Informant*	Shri Rajat Verma, Informant in-person Shri Raj Kishore Verma, Associate of the Informant
	For OPs	Shri A. P. Singh, Advocate Shri Kartik Bhardwaj, Advocate Shri S. C. Bishnoi, Chief Engineer, PWD (B&R), Chandigarh Shri R. C. Satija, Sub-Divisional Engineer, PWD (B&R), Karnal Shri Ramesh Kumar, Superintending Engineer, PWD (B&R), Karnal

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

1. The information in this case was filed by Shri Rajat Verma ('Informant') under Section 19(1)(a) of the Competition Act, 2002 (the 'Act') against Public Works (Building and Road) Department, Government of Haryana ('OP-1/ Haryana PWD (B&R)'), Secretary, Haryana PWD (B&R) ('OP-2') and Superintending Engineer, Haryana PWD (B&R), Karnal Circle, Haryana ('OP-3') (hereinafter, OP-1, OP-2 and OP-3 are together referred to as 'OPs') alleging contravention of the provisions of Section 4 of the Act. The allegations of the Informant are primarily against the abusive conduct of Haryana PWD (B&R), however, its officials have also been made pro forma party in the present case.

2. The Informant is a director of a company M/s Dwarika Projects Ltd. and OP-1 is a department of the Government of Haryana responsible for the construction of roads, buildings, bridges and other civil construction works in the State of Haryana. OP-2 and OP-3 are the officials of OP-1.

3. As per the information, on 29.08.2012 the Government of Haryana through OP-1 invited online bids for "*Construction of Approaches to 2 Lane Rail Over Bridge (ROB) at Level X-ing No. 78-AB in Km 139 on Delhi Ambala Railway line crossing Nilokheri-Karsa-Dhand road in Karnal District*". The Informant alleged that OP-1 enjoys a dominant position in execution of works of roads, buildings, bridges and other civil construction works in the State of Haryana and it abused its dominant position by incorporating unfair clauses in the bid document of the said tender. The clauses alleged to be unfair included:

a) Clause 30(a) of 'Instruction to Bidders' being adopted and applied by OP-1 in making payment against work done to the contractors;
b) Clause 24 and Clause 25 of 'Conditions of Contract' regarding settlement of disputes between parties including through alternate dispute resolution;
c) Clause 30 of 'General Conditions' mentioned in the 'Technical Specifications of the Contract' regarding 'Study of Drawings and Local Conditions';
d) Item No. 1.4 of 'Bill of Quantity' relating to reinforcement work;
e) Clause 9 of the 'Conditions of Contract' regarding employment of requisite number of technical and engineering staff by the contractor;
f) Clause 59 and Clause 60 of 'Conditions of Contract' regarding termination and payment upon termination, respectively;
g) Clause 61 of 'Conditions of Contract' regarding all materials on site, plant, equipment, *etc*. becoming deemed property of the employer in case of default by the contractor;
h) Clause 23.1 of 'Conditions of the Contract', a general clause providing that the contractor shall carry out all instructions of engineers; and
i) Deletion of Clause 44 of the 'Conditions of the Contract', which defined compensation event for contractors.

4. The Informant requested the Commission to direct OP-1 to refrain from invoking the aforementioned unfair clauses; declare Clause 30 regarding "Study of Drawings and Local conditions" to be void; direct OP-1 to refund the bank guarantee to Informant's company forfeited after termination of the contract and pass such further orders as the Commission may consider just and appropriate.

5. After considering the information, the Commission passed a majority order dated 12.01.2015 under Section 26(2) of the Act wherein it was observed that OP-1 was not covered under the definition of 'enterprise' within the meaning of Section 2(h) of the Act because it is not directly engaged in any economic and commercial activities. It was held that the role of OP-1 was limited to providing infrastructural facilities to the public without any commercial consideration. Accordingly, the case was closed.

6. A dissent note dated 12.01.2015 was also passed in the case by Member Augustine Peter wherein it was observed that OP-1 is an enterprise under Section 2(h) of the Act and was dominant in the '*market for procurement of construction services through bidding for roads and bridges in the State of Haryana*'. It was also observed that a close look at the allegations showed that the conditions prescribed in the tender dated 29.08.2012 were *prima facie* unfair and that there was a contravention of Section 4(2)(a)(i) of the Act by OP-1. Accordingly, the Director General should be directed to cause an investigation into the matter under Section 26 (1) of the Act.

7. Against the order of the Commission passed under Section 26(2) of the Act, Appeal no. 45/2015 (Shri Rajat Verma v. Haryana Public Works (B&R) Department, through its Engineer-in-Chief and Ors.) was filed by the Informant before the Hon'ble Competition Appellate Tribunal (the 'Tribunal'). The Hon'ble Tribunal *vide* its order dated 16.02.2016 allowed the appeal.

8. While considering the issue whether OP-1 is an 'enterprise' under the Act, the Hon'ble Tribunal in its order referred to the observations made in the dissent note of Member Augustine Peter at length. Further, the Hon'ble Tribunal observed as follows:

> "*17. If the term 'enterprise' as defined in Section 2(h) is read in conjunction with the definition of the term 'person' and 'service' it becomes clear that the legislature has designedly included Government departments in relation to any activity relating to storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind. The width of the definition of 'enterprise' becomes clear by the definition of the term 'service'. The inclusive part of the definition of 'service' takes within its fold service relating to construction and repair. These two words are not confined to construction and repair of buildings only. The same would include all types of construction and repair activities including construction of roads, highways, subways, culverts and other projects etc. It is thus evident that if a department of the Government is engaged in any activity relating to construction or repair, then it will fall within the definition of the term 'enterprise'. We may add that there is nothing in Section 2(h) and (u) from which it can be inferred that the definitions of 'enterprise' and 'service' are confined to any particular economic or commercial activity. The only exception to the definition of the term 'enterprise' relates to those activities which are relatable to sovereign functions of the Government and activities carried by the four departments of the Central Government, i.e., atomic energy, defence, currency and space.*"

Also, it was observed that:

> "*19. In the execution of work relating to construction of roads, bridges etc., the contractor may be a service provider qua the department but*

the beneficiary of these activities is undoubtedly the general public qua whom the department acts as a service provider. The roads and bridges etc. constructed by the Haryana Public Works Department or HSRDC either by themselves or through private agencies are used by the general public in more than one ways including travelling and carriage of goods. In other words, the Public Works Department is a provider of service to the public and from that perspective it clearly falls within the ambit of term 'enterprise' …..

20. Whether the activity of procuring construction services is with a view to make profit is not the concern of the Act. What is important is that the Public Works Department by inviting tenders for award of contract for construction of roads, bridges etc. is interfacing with the wide market of road and bridge construction services in the State. Therefore, there is no escape from the conclusion that it is an enterprise within the meaning of Section 2(h) of the Act…."

"22. It is neither the pleaded case of the respondents nor Shri A.P. Singh has argued and in our opinion rightly so that the activities of the Public Works Department, Government of Haryana are relatable to sovereign functions of the Government. Any such argument would have been rejected in view of the law laid down by the Supreme Court in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa (supra) and N. Nagendra Rao and Co. Vs. State of A.P. (supra) and other decisions referred to in the dissenting note."

9. In view of the above observations, the Hon'ble Tribunal held that the Public Works Department, Government of Haryana fell within the definition of the term 'enterprise' under Section 2(h) of the Act and that the same would be the position *qua* Public Works Departments of the other States as also the Central Public Works Department.

10. Accordingly, the majority order of the Commission was set aside and the matter was remitted to the Commission for considering whether the allegations contained in the information filed by the Appellant made out a *prima facie* case of abuse of dominant position warranting an order of investigation under Section 26(1) of the Act or not.

11. Pursuant to remand of the matter to the Commission, the Commission heard the Informant and OP-1 to determine whether a case for contravention of the provisions of Section 4 of the Act was made out in this case.

12. It is pertinent to mention here that in order to ascertain abuse of dominance by OP-1 in terms of Section 4 of the Act, a pre-requisite under the Act is to determine in which relevant market OP-1 operates and whether or not it is dominant in that relevant market.

13. At this stage the Commission would like to refer to the observations of Member Augustine Peter in his dissent note with respect to the relevant market and dominance of OP-1 therein. It was observed:

> *"42. The relevant market in this case is the "market for procurement of construction services through bidding for roads and bridges in the state of Haryana". In this market, the Public Works Department (B&R) of Haryana is the dominant player in the geographical market of State of Haryana in the sense that they are responsible for construction of State Highways, Major District Roads and some of the other District Roads, Railway Over-Bridges (ROBs), Railway Under Bridges (RUBs), Bridges, rehabilitation of public bridges, and construction of National Highways in the State of Haryana. Major construction activities relating to public roads and bridges are through tendering and are under the charge of OP1.*
>
> *43. As far as procurement of the construction services for roads and bridges by tender is concerned OP1 has near monopoly in the state of*

Haryana. And I am of the prima facie view that OP1 is a dominant player in the relevant market thus defined."

14. Thus, the relevant market in the instant case may be defined as "*the market for procurement for construction and repair of roads and bridges through tendering in the State of Haryana*". The Commission notes that PWD is the only procurer of such services in the State of Haryana. It is obvious that it is dominant in this relevant market. Even OP-1 in its submissions does not outrightly deny this position by citing market shares or its competitors in the market, but only argues that the alleged dominant position of a Government department as a recipient of services in the matrices of welfare state is not by choice but by matter of compulsion due to socio-economic reasons and because there is no private contractor who would compete to provide free road connectivity to all end users.

15. Coming to the examination of the alleged abusive conduct of OP-1, the Commission notes that the allegations by the Informant relate to imposition of unfair conditions in the bid document/ agreement as mentioned above. In this regard, OPs have submitted that the Informant has filed the information with an oblique purpose to get some of the clauses declared as unfair or anti-competitive in order to find some justification for its claims in the three pending arbitrations with OP-1.

16. Giving a brief background of the facts of the case, OPs have stated that the Informant's company is a contractor based in the State of Uttar Pradesh. In the year 2012, the Informant's company submitted its bid for three ROB works of Rs. 2341.91 Lakhs, Rs. 2282.85 Lakhs and Rs. 2452.37 Lakhs respectively. The terms and conditions of the said agreement were provided well in advance alongwith the tender and the Informant had prepared and submitted the bid after going through all the clauses. No question or query was raised against the said clauses at that stage much less any challenge raised in the pre-bid meetings. Also, no protest was raised by the Informant against the clauses even during the execution of the work. However, when the Informant's company failed to execute the work and OP-1 imposed liquidated damages and subsequently terminated its contract; the

Informant not only raised disputes but also invoked arbitration which is now at an advanced stage. Accordingly, OPs have contended that the Informant is challenging the terms of the contract not only after entering into it with open eyes but also after part performance of work under it to gain an unfair advantage with regard to his claims pending in the arbitration.

17. OP-1 has denied that it is abusing its dominant position in any manner or that the terms and conditions of the agreement are in contravention of Section 4(2)(a) of the Act. It is submitted that the contract clauses are *inter alia* to respond to the dynamic challenges being faced by OP-1 from time to time.

18. The contentions of the Informant and the OPs with respect to some of the clauses alleged to be abusive by the Informant are discussed below.

19. One of the clauses alleged to be abusive by the Informant is Clause 30(a) of the 'Information to Bidders' which provides that "*The agency/ bidder to whom the work is allotted, rates shall be paid lowest of the following in the running/final bills:*

    (a) Amount calculated with the accepted rates of lowest agency.

    (b) Amount worked out with the rates L-2/L-3/L-4 and so on.

    (c) Amount worked out with the accepted percentage above Haryana Schedule of Rates ('HSR') + calculated percentage (CP)/analytical rates/NS item rates, worked out in financial statement. Financial statement will be made a part of agreement".

20. With respect to this clause, the Informant has alleged that the stipulation in the clause that the running as well as final payments were to be made as per the lowest amount worked out from the conditions mentioned in (a), (b) and (c) of Clause 30(a) is vague and arbitrary and, hence, abusive. However, OPs have averred that this clause is not abusive as it is aimed at avoiding any excessive payment to the contractors at the interim stage to neutralise any incentive for the contractors to indulge in front loading or abandon the work after obtaining payment from the early execution items, generally quoted at exaggerated rates. It is submitted that OP-1

makes the payment at L-2, L-3, L-4 rate or by ascertaining percentage of HSR applicable to the period of execution of the work on whichever is lower basis and the complete payment gets paid progressively till the stage of the final bill. There was no loss to the contractors as they ultimately get paid as per their quoted rates.

21. As regards Clauses 24 and 25 of the 'Conditions of Contract' dealing with dispute redressal system and arbitration, the Informant had alleged that, in case of a dispute between the contractor and the department, the dispute redressal mechanism under Clause 24 requires the contractor to approach the OP's officials and then the standing empowered committee of the department for settlement of the dispute. Hence, a contractor could not expect fair and unbiased trial. Another unfair component that the Informant pointed out in this clause was that the contractor could not stop work pending the decision upon the dispute, even if the dispute was the reason for stoppage of work. This was so because if the work was stopped for 28 days or more, it would become a fundamental breach under the 'Conditions of Contract' and OP-1 could encash 5 percent of the contractor's bank guarantee and also confiscate all its material, plant, equipment, *etc.* on site. Further, in case an appeal had to be made to the standing empowered committee there was no time-limit within which such committee was to be constituted. Thus, the Informant has alleged that this clause was devised in such a manner that it caused harassment to the contractors and deprived them of fair and timely justice. Further, Clause 25 dealing with arbitration was alleged to be unfair as it required that, in case the arbitration clause was invoked by the contractor, he was required to deposit 2 percent of the claim amount with the OPs without any interest payable thereon. It was alleged that this clause was onerous upon a contractor who may already be under financial distress on account of wrongful termination of its contract.

22. In this regard, OPs have contended that since most disputes raised at site were due to technical difficulties, the clause was intended to get dispute resolution at site by the engineer, to avoid litigation and to ensure timely execution of work. It was denied that OPs had any personal interest or bias and that delay, if any, in appointing the standing empowered committee would be intentional. Further, it was denied that

the condition requiring deposit of 2 percent of the amount for purposes of arbitration was arbitrary. It was submitted that such clauses are to check exaggerated claims and to make sure that only serious claims are filed by a contractor. It was stated that such clauses had been upheld even by the Hon'ble Supreme Court.

23. Further, the Informant has alleged that Clause 30 *i.e.,* 'Study of Drawings and Local Conditions' mentioned in 'Technical Specifications' of the contract under the heading 'General Conditions' in the bid-document/ agreement was unfair and unjust as it enabled OP-1 to circumvent all liability and deny the contractors right to claim compensation arising out of breach by OP-1. This clause *inter alia* provided that the drawings shown to the tenderers could be suitably modified during the execution of the work according to the circumstances without making OP-1 liable for any claims on account of such changes. Further, the rates quoted by the contractors and accepted by OP-1 were to hold good irrespective of modifications and, in case of non-finalisation of drawings, no compensation was payable by OP-1 and no claim would be entertained by OP-1 on account of any delay or hold up of work arising out of a delay in approval of drawings, changes, modifications, *etc*. OPs have submitted that this clause is designed to meet the possibilities of minor modification in drawings based on site condition, which happens in any contract. Delay in this regard is usually only nominal and the allegation of the Informant is misconceived.

24. Apart from the above, the Informant has cited around five to six other clauses in the bid-document/ agreement as well which are alleged to be one-sided and biased in favour of the OPs and hence, anti-competitive in nature. In respect of these clauses also, OPs have provided similar justifications and averments and denied that any of the conditions imposed are unfair or prejudicial.

25. The Commission heard the parties at length on 10.11.2016 on various clauses alleged by the Informant to be anticompetitive including Clause 30 (a) of the 'Information to Bidders' which appears to be the primary cause of grievance of the Informant. This clause provides that payment is to be made to the contractor as per the lowest amount worked out from three criteria prescribed therein. Having

considered this clause, it seems that *prima facie* the possibility of the contractor being paid less than the agreed amount in an arbitrary manner by OP-1 by virtue of this clause cannot be ruled out. Though OPs have explained that the payment being made as per HSR+CP rates or on the basis of L-2, L-3 rates would only be in case of interim bills, but a plain reading of the clause indicates that the clause is applicable to final bills also. Another argument that OPs have made is that the clause is not unfair as the Informant had knowledge of this condition at the time of submitting the bid. In this regard, it is pertinent to note that both Informant as well as OP-1 have submitted that often HSR+CP rates turned out to be the lowest thereby becoming the criterion for payment to the contractor. In such a scenario, if the applicable HSR+CP rates were not known to bidders at the time of submitting the bid, then the bidders would not be in position to calculate the amount payable to them as per this condition. Accordingly, during hearing OPs were specifically asked whether the HSR+CP rates applicable to the bidders such as Informant were known to them by virtue of same having been communicated or displayed on the website, but this was neither clarified during hearing nor any reply was received subsequently. Further, it is noted that L-2, L-3 rates can in any case not be known prior to submission of the bid. Accordingly, it appears that even though the Informant may have been aware of the clause but the implications of the clause could not have been ascertained by the Informant at the time of submission of the bid. All the more when the design and drawings in respect of the project can be changed mid-way, how the successful bidder can be paid on the basis of L-2, L-3 or HSR rates against his quoted rates. Thus, the Commission is of the view that *prima facie* this clause provides scope for arbitrariness and the actual conduct of OP-1 with respect to this clause requires investigation.

26. Another clause that the Commission *prima facie* finds unfair and one-sided is Clause 30 of the 'Technical Specifications' of the contract under the heading 'General Conditions' regarding Drawings and Local Specifications. It is noted that this clause does not prescribe a time limit on the OPs for modification/ finalisation of the drawings nor does it make them liable for delay. Similarly, Clause 24 and Clause 25 of the 'Conditions of Contract' regarding the Dispute Redressal System

and Arbitration, Item No. 1.4 of 'Bill of Quantity' whereby payments for wastage and overlaps of steel bars in excess of 5% are denied even when actual wastage is 20-30% and Clauses 59, 60 and 61 dealing with fundamental breach and consequences thereof appear to be one-sided and onerous on the contractors.

27. Based on the above discussion, the Commission is of the *prima facie* view that the allegation of the Informant that certain clauses of the agreement are unfair, discriminatory and therefore, violative of Section 4 of the Act does have some merit. Many of the clauses pointed out by the Informant *prima facie* appear to tilt in favour of the OPs and prejudicial to the contractors. The OPs have tried to justify the clauses relying on efficiency and other arguments; however, the defence taken by OPs that the actual implementation of these clauses is not unfair cannot be ascertained unless the matter is investigated.

28. In view of the aforesaid, the Commission is of the opinion that some of the clauses of the bid document/ agreement which is the subject matter of the case *prima facie* appear to be in contravention of the provisions of Section 4 of the Act and that the same alongwith the conduct of the OPs in consequence thereof need to be investigated.

29. Accordingly, the Commission hereby directs the Director General (DG) under Section 26(1) of the Act to cause an investigation to be made into the matter and to complete the investigation within a period of 60 days from the receipt of this order.

30. It is also made clear that if during the course of investigation, the DG comes across any other clauses or conduct of OPs in addition to those mentioned in the information, to be in contravention of the provisions of the Act, the DG shall also investigate the same.

31. Nothing stated in this order shall tantamount to final expression of opinion on the merits of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.

32. The Secretary is directed to send a copy of this order to the DG, along with the information and other submissions filed by the Informant and the Opposite Parties.

Sd/-

(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-

(U. C. Nahta)
Member

Sd/-

(Justice G. P. Mittal)
Member

New Delhi

Date: 27.02.2017