



**COMPETITION COMMISSION OF INDIA**

**Case No. 70 of 2014**

**In Re:**

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

**Informant**

**And**

**1. Public Works (B&R) Department,  
Government of Haryana  
Sector 33A, Chandigarh.**

**Opposite Party No. 1**

**2. Secretary, PWD (B&R),  
Government of Haryana  
Sector 33A, Chandigarh.**

**Opposite Party No. 2**

**3. Superintending Engineer,  
PWD B&R Br., Karnal, Haryana.**

**Opposite Party No. 3**

**CORAM**

**Mr. Ashok Chawla  
Chairperson**

**Mr. S. L. Bunker  
Member**

**Mr. Sudhir Mital  
Member**



**Mr. Augustine Peter**

**Member**

**Mr. U. C. Nahta**

**Member**

**Present:** Mr. Satyabrata Panda on behalf of the Informant.

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

1. The present information has been filed by Shri Rajat Verma (hereinafter, '**the Informant**') under section 19(1) (a) of the Competition Act, 2002 ('**the Act**') against Haryana Public Works (B&R) Department (hereinafter, '**the Opposite Party No. 1**') and its two officials alleging, *inter alia*, contravention of the provisions of section 4 of the Act. The allegations of the Informant are primarily against the abusive conduct of the Opposite Party No. 1 however, its officials have been made proforma party to the case.
2. The Informant is a director of a company M/s Dwarika Projects Ltd. and the Opposite Party No. 1 is stated to be a department of the Government of Haryana responsible for construction of roads, buildings, bridges, *etc.* in the State of Haryana.
3. As per the information the Government of Haryana through the Opposite Party No. 1 had invited online bids for "Construction of Approaches to 2 Lane ROB at Level X-ing No. 78-AB in Km 139 on Delhi Ambala Railway line crossing Nilokheri-Karsa-Dhand road in Karnal District" on 29.08.2012. It is the case of the Informant that being in a dominant position in execution of works of roads, buildings, bridges and other civil construction works in the state of Haryana, the Opposite Party No. 1 has abused its dominant position by



incorporating unfair clauses in the bid document of the said tender which is in contravention of the provisions of section 4 of the Act.

4. Following are some of the clauses of the bid document for the said tender which are allegedly unfair, discriminatory and therefore, abusive in nature in terms of section 4 of the Act:

(i) **Clause 30(a) of Instruction to Bidders:** *“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 HSR+CP/analytical rates/NS item rates, worked out in financial statement. Financial statement will be made a part of agreement”*

(ii) It is alleged that the said clause is vague, arbitrary, and unfair because the running as well as final payment is to be made as per the lowest amount worked out from 30(a)-a, 30(a)-b, 30(a)-c.

(iii) **Clause 24 and Clause 25 (conditions of contract regarding dispute redressal system and arbitration):** As per the Informant these clauses are unconscionable, exculpatory, unfair and bias and devised in such a way so as to harass the contractor. The Informant submits that the redressal system allows a period 45 days to the competent authority and a period of 90 days to the standing empowered committee for adjudication of disputes from the date of request by the contractor in writing. It is alleged that the dispute redressal mechanism is designed in such a way that the contractor is forbidden to approach any unbiased forum for adjudication before exhausting the above mechanism which takes at least 135



days. Therefore, in case of any dispute or any mala fide, arbitrary or unjust acts on part of the Opposite Party No. 1, the contractor is left with no option but to wait for more than five months for redressal of such dispute/grievance.

- (iv) Clause 24.1 provides that the contractor cannot stop the works pending the decision of the expert/empowered committee of any dispute without any exception whatsoever which is unfair and biased. It is submitted that in many situations, where the dispute is major and the breach is fundamental such as stoppage of payment against work executed by the contractor, the work cannot be carried on by the contractor diligently and the work may have to be stopped /slowed down due to such breach of the agreement.
- (v) Clause 24.1 read with clause 59.2(a) of the Condition of Contract says that the stoppage of works for 28 days by the contractor, without authorization of the Engineer, is a fundamental breach and thereby opens the contract to be terminated which has very adverse consequences for the contractor including encashment of 5.0% of its Bank Guarantee to the tune of Rs. 1.2 Crores in such contracts, recovery of 20.00% of amount of balance work to be executed, and confiscation of all material, plant, equipment, works *etc.*
- (vi) Clause 25 is also unfair and unjustified because the amount of 2.00% has to be deposited with the Opposite Party No. 1 without any interest payable thereon, even if the judgement is in favour of the contractor.
- (vii) **Item No. 1.4 of Bill of Quantity:** It is stated that in order to carry out reinforcement works, overlaps of steel bars have to be made in order to join steel bar and make the reinforcement complete as per drawings. Further, some steel bars also get wasted as scrap on account of left over pieces which cannot be used in the reinforcement works. It is submitted



that Opposite Party No. 1 does not make any payment for steel bars consumed in overlaps and wastage.

**(viii) Clause 9:** It is alleged that the Opposite Party No. 1 has abused its dominant position, by making Clause 9 of conditions of contract a fundamental breach. That the condition to deploy some number of technical staff is based on the value of work to be executed and not on the basis, nature or specific technicalities or specifications of the work in hand. Even if a key personnel becomes unavailable at project for some unavoidable circumstances, it leaves the contract open for termination by the Opposite Party No. 1 and the contractor has to bear all the penal consequences as a result of such termination.

**(ix) Clause 59, Clause 60 and Clause 61:** It is alleged that clause 59.2(d) which provides that failure of the Opposite Party No. 1 to make payment to contractor within 56 days of the date of the Engineer's certificate is a fundamental breach to be unjust and biased. It is further stated that the Opposite Party No. 1 commands extreme power on account of having unconditional bank guarantee from the contractor, which can be invoked anytime. Similarly, clauses 60.1 and 61.1 of the contract are alleged to be highly biased and one sided in favour of the Opposite Party No. 1 as it levies a severe penalty of 20.0% of amount of value of unfinished work under the contract.

4. Based on the above averments, the Informant requested the Commission to:

(i) Direct the Opposite Party No. 1 to restrain from invocation of said unfair clauses;



- (ii) Restrain the Opposite Party No. 1 from seeking 2.0% of claim amount as fees from the contractors as pre-requisite for commencement of arbitration;
  - (iii) Declare Clause 30 regarding “Study of Drawings and Local conditions” to be void and illegal.
  - (iv) Direct the Opposite Party No. 1 to refund the bank guarantee forfeited after termination of the contract, provided the bank guarantees are kept alive pending the decision of the arbitrator.
  - (v) Pass such further orders as the Commission may consider just and appropriate.
5. The Commission heard the advocate appeared on behalf of the Informant in length and perused all the materials available on the record.
6. From the materials submitted and the arguments put forth by the Informant, it emerges that the Informant is primarily aggrieved by the alleged unfair conditions/clauses imposed by the Opposite Party No. 1 in the bid documents in response to the tender for “Construction of Approaches to 2 Lane ROB at Level X-ing No. 78-AB in Km 139 on Delhi Ambala Railway line crossing Nilokheri-Karsa-Dhand road in Karnal District”.
7. The facts of the case reveal that the matter relates to the alleged infraction of the provisions of section 4 of the Act *i.e.*, abuse of dominant position by the Opposite Party No. 1. For applicability of the provisions of section 4 of the Act, the first requirement is that the alleged contravening entity must qualify to be an ‘enterprise’ in terms of section 2 (h) of the Act.
8. The Commission observes that the Opposite Party No. 1 is one of the departments of the Government of Haryana, entrusted with the responsibility



of construction and maintenance of roads, bridges and government buildings in the state. It has state wide set up of offices and bodies such as Haryana State Roads and Bridges Development Corporation Ltd., Haryana Rural Roads and Infrastructure Development Agency (HRRIDA), Haryana State Buildings & Roads Academy of Research and Training to accomplish the said task. The activities being performed by the Opposite Party No. 1 cannot be covered in the definition of 'enterprise' because it is not directly engaged in any economic and commercial activities. The role of the Opposite Party No. 1 is limited to provide infrastructural facilities to the people without any commercial consideration.

9. Since, the Opposite Party No. 1 cannot be considered as an enterprise in terms of the provisions of section 2(h) of the Act, provisions of section 4 of the Act cannot be attracted in the matter. Accordingly, the Commission holds that no, *prima facie*, case is made out against the Opposite Parties for making a reference to the Director General for conducting investigation into the matter.
10. Accordingly, the Commission deems it fit to close the proceedings of the case under the provisions of section 26 (2) of the Act.
11. The Secretary is directed to communicate the decision of the Commission to the parties accordingly.

**Sd/-**

**(Ashok Chawla)**

**Chairperson**

**Sd/-**

**(S. L. Bunker)**

**Member**



**Sd/-**  
**(Sudhir Mital)**  
**Member**

**Sd/-**  
**(U. C. Nahta)**  
**Member**

**New Delhi**

**Date: 12-01-2015**