

COMPETITION COMMISSION OF INDIA

11 April, 2013

Case No. 80/2012

HLS Asia Limited

Informant

Vs

Schlumber Asia Services Ltd.

Opposite Party No.1

Oil & Natural Gas Corporation Ltd. (ONGC)

Opposite Party No.2

ORDER

This application has been made by the informant under section 38 (2) of the Competition Act for rectification of Order dated 6th February, 2013. It is submitted in the application that the order of the Commission suffered from certain mistakes apparent on record as pointed out in the application and these mistakes need to be corrected.

2. The application mentions about the following mistakes :

a) On pages 3 and 4 of the order, the Commission has observed that no data had been given by the informant about the pricing of its own product. It is submitted that during the hearing, the Sr. Counsel for the applicant had handed over data regarding cost of the applicant's product to show the price quoted by the respondent was below the cost of the product. The applicant had also filed an application dated 4th February, 2013 (after the hearing) wherein such data was given.

b) In paragraph 3 of the Order, the Commission observed that 10 bidders had submitted their bids in response to the e-tender floated by OP2. Similar observation was made at page 3 that there were 10 bidding parties. It is stated that actually there were only 3 bidding contractors i.e. applicant, OP1 and M/s. Weather Ford Ltd. The Commission by mistake noted that there were 10 bidding parties.

c) On page 5 of the Order, the Commission observed that the informant sought contract from OP2 on the same rates as quoted by OP1, without saying that these rates were predatory or would result in loss to the informant. It is submitted that the informant, in the letter written to OP2, did state that the rates quoted by OP1 were unreasonably/extremely low, yet as a special case for interim relief, till decision was taken on the award of new contract, the informant reluctantly may agree to work as per the rates quoted by OP1. The informant had also stated that OP1 had created unfair/discriminatory situation for its competitors by quoting the predatory prices. It is submitted that the observation of the Commission on page 5 of the Order were thus incorrect.

d) On page 3 of the order, the Commission observed that the data chart filed by OP1 shows that the prices for standard services had been falling since 2008. It is submitted that this observation of the Commission was not correct since the data placed by OP1 on record did not relate to wire line logging and perforation service that is the subject matter of the information. The applicant stated that it had placed on record Annexure A5 giving comparison of rates quoted by OP1 in India for all major long term contracts from year 2005 to 2011 and year 2012 showing that the prices quoted for standard services by OP1 had actually been rising from 2005 to 2011 and only in 2012 the rates quoted were substantially below the earlier prices. It is prayed that this observation be corrected by the Commission.

e) The Commission on page 2 of the Order observed that by grabbing the contract in question, share of OP1 would increase from 70.8% of the work to 100% of the work in respect of ONGC and 67.9% of the work in respect of other customers. The observation of the Commission was incorrect since the applicant/informant had stated that the share of OP1 would increase to 96.3% of the total work of ONGC and to 70.1% of the total work from other companies and to 92% of the total work in India for wireline logging and perforation service. It is submitted that the percentage mentioned by the Commission needs to be corrected.

f) The Commission on page 2 observed that the standard services formed a major part of the contract (about 70%), while Hitech service formed only a minor part of the contract. It is stated the figures of 70% has been wrongly mentioned. In the additional affidavit of the applicant, it was stated that the value of the standard services work as per ONGC initial internal estimate was 82% of the total contract.

3. Section 38 under which the application has been made reads as under :-

”Rectification of orders

38. (1) With a view to rectifying any mistake apparent from the record, the Commission may amend any order passed by it under the provisions of this Act.
(2) Subject to the other provisions of this Act, the Commission may make—
(a) an amendment under sub-section (1) of its own motion;
(b) an amendment for rectifying any such mistake which has been brought to its notice by any party to the order.

Explanation.— For the removal of doubts, it is hereby declared that the Commission shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.”

4. It is apparent from reading of section 38 that the power of the Commission is limited to rectifying the mistakes apparent on record. The Commission cannot amend substantive part of its order passed under the Act. It is also clear that only clerical or arithmetical mistakes can be corrected under section 38 and in the garb of correcting mistakes, the Commission cannot change any substantive portion of the order.

5. Coming to the prayer for rectification of mistakes as mentioned in paragraph 2 above, the first mistake pointed out is about observation of non providing of data by the informant to the Commission in respect of pricing of its own product. The plea of the informant is that this data was provided by the informant to the Commission at the time of arguments. During arguments, the counsel for the informant handed over one sheet of paper to the Commission stating that data given therein was confidential since it contained pricing data of the informant. This piece of paper was taken back by the informant. Producing some data during arguments and not placing the same on record cannot be considered giving information to the Commission. The information to the

Commission is only that information which forms part of the record of the Commission and which can be used by the commission. There is a procedure prescribed under law for seeking confidentiality of the data submitted to the Commission. If any party submits data to the Commission and seeks that the data should be kept confidential, it has to make an application and the Commission, after considering the application, decides whether the data has to be given confidentiality as per the norms laid down by the act or not. Similarly, filing an affidavit containing data, after the order is reserved has no significance and the Commission could not have considered such affidavit or application as it would have violated the Principles of Natural Justice. The Opposite Party would have got no opportunity to respond to the application or to the data furnished in the application. The data given in the application dated 4th February, 2013, therefore, could not have formed part of the Order of the Commission.

6. The other mistake (as at 2(b)) pointed out by the informant is regarding number of bidders. It seems that in paragraph 2 and 3, the number of bidders/bidding parties has been wrongly stated as 10. In fact 10 parties had participated in the pre bidding discussions but only 4 parties submitted their bids. One bid was found invalid because of its having been submitted beyond time. Only three bids were found valid. Thus in paragraph 2, the following correction be made :

In line 2 of paragraph 2, instead of ' 9 other parties' to '2 other parties' be substituted.

On page 3 last line of paragraph 2 instead of '10 bidding parties', '3 bidding parties' be substituted.

7. No arithmetical error or clerical error is pointed out in respect of alleged mistake as stated in paragraph 2(c) above as the Commission only stated factual position culled out from the material on record. The Commission is not supposed to reproduce the language of the information application in its orders.

8. As regards alleged mistake in paragraph 2(d), no clerical or arithmetical mistake is pointed out. The Commission has made observation based on the facts placed before it by OP1. The Commission was not supposed to specify the kind of standard

services mentioned in the chart. The chart forms part of the record and the Commission only mentioned the arguments of OP1 as adduced before it.

9. Concerning the mistake regarding market share as pointed out by the applicant in paragraph 2(e) above, it appears that an error has crept in in the order inadvertently and figures of Oil India have been stated instead of stating the figures of ONGC. The correction is required to be made and on page 2, 4th line from bottom of the order, and 100% be replaced by 96.3% and 67.9% be replaced by 70.1%.

10. Regarding percentage of standard serviced forming a major part of the contract, there is no clerical mistake. The Commission has observed actual percentage of standard services based on the contract and not based on estimates of standard services as given in the tender document.

11. As a result of the above discussion, the only clerical mistakes to be rectified in the order are as given in paragraphs 6 and 9 above. The Order dated 6th February, 2013 shall stand corrected as stated above and the corrections be carried out in the original order on the basis this order.

18. Secretary is directed to inform all concerned accordingly.

Sd/-
(H.C. Gupta)
Member.

Sd/-
(Geeta Gouri)
Member.

Sd/-
(Anurag Goel)
Member.

Sd/-
(M.L. Tayal)
Member.

Sd/-
(Justice S.N. Dhingra [Retd.]
Member.

Sd/-
(S.L. Bunker)
Member.

Sd/-
(Ashok Chawla)
Chairperson.