



COMPETITION COMMISSION OF INDIA

Case No. 22 of 2018

In Re:

**Mr. G. P. Konar,
JC 2/8, Saltlake, Sector-3,
Kolkata-700106**

Informant

And

**Department of Agriculture and Farmers
Welfare, Government of Haryana,
represented by:**

Opposite Party

- 1. Mr. D.K. Behra, IAS, Director of
Agriculture & Farmers' Welfare
Department.**
- 2. Mr. A. K. Rana, Additional
Director Agriculture, SWM**
- 3. Mr. Abhilaksh Likhi IAS,
Principal Secretary**

CORAM:

**Mr. Sudhir Mital
Chairperson**

**Mr. Augustine Peter
Member**

**Mr. U. C. Nahta
Member**

**Mr. Justice G. P. Mittal
Member**



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

1. This information has been filed under Section 19(1) (a) of the Competition Act, 2002 (“Act”) by Mr. G. P. Konar (“Informant”) against Department of Agriculture and Farmers Welfare, Government of Haryana (“OP”) alleging contravention of the provisions of Section 4 of the Act.
2. The Informant has alleged abuse of dominant position by the OP which floated a Tender bearing No. 1/Agric./2018-19/SC-III dated 13th April, 2018 (“Tender”), for outsourcing of soil testing, data entry on portal and printing of cards under the Soil Health Card (“SHC”) scheme of the Government of India (“GoI”). The tender involves testing of eight (08) lakh soil samples and its value is stated to be Rs. 16 crores.
3. The Informant has stated that detailed guidelines were issued by the GoI under Memo No. 16-13/2017-Fert.Use dated 22nd January, 2018 (“GoI Guidelines”), setting forth the eligibility criteria for outsourcing the ‘soil testing’ of the SHC scheme. The GoI Guidelines provided that all the National Accreditation Board for Testing and Calibration Laboratories (“NABL laboratories”) would be eligible for participation in the Tender.
4. The Informant has averred that the OP is the nodal department for implementation of SHC scheme in the State of Haryana as per the GoI Guidelines and is, thus, dominant, being the sole authority to implement SHC projects in the State of Haryana.
5. The Informant has, *inter alia*, alleged that the OP has abused its dominant position by incorporating the following clauses in the impugned tender:

5.1 Clause No.: 3.1 (i) to (v) read with Clause 16(z)

Clause 3.1 (i): *Accurate and error free testing of soil samples in Haryana is to be done for 11 parameters under SHC scheme namely (1) pH, (2) Electrical conductivity (EC), (3) Organic Carbon, (4) Phosphorous, (5) Potash, (6) Sulphur, (7) Zinc (Zn), (8) Iron (Fe), (9) Copper (Cu),*



(10) Manganese (Mn) and (11) Boron (B) and maintaining sample wise record of the same.

(ii) Data entry and uploading of information pertaining to soil samples tested on Soil Health Card Portal.

(iii) Printing of Soil Health Cards (SHCs) (online/offline).

(iv) The Successful bidder shall be allowed to analyse all the soil samples at two places namely at soil Testing Laboratory at Karnal and Rohtak or any one of these two. Under no circumstances analysis of soil samples will be allowed at any place other than STL Karnal and STL Rohtak.

(v): The successful bidder will use its own equipment/ consumables for analysis of soil samples, data entry and printing of Soil Health Cards. Under no circumstances the bidder will be allowed to use the existing lab equipments owned by the Department.”

Clause 16)(z):

The service contract work given to the successful bidder shall not be sublet under any circumstances. This is a non-transferable contract.

Clubbing of the Soil testing job with the other two jobs of Data Entry and Printing of SHC reduces the scope of competition and the condition is unfair and discriminatory as the relevant product market for soil testing is highly technical and different, whereas this is not so in the case of data entry and printing. The Informant has further alleged that only those laboratories, which would be able to install printing unit at the designated laboratory at Rohtak and/or Karnal, will qualify to participate in the bidding although soil testing is a separate relevant market. Further, these conditions prevent NABL



accredited laboratories from being eligible to participate in the tender, as sub-letting and sub-contracting of the work is prohibited.

5.2 Clause No.: 4.1.4 (b) and (c)

(b) The Successful bidder must have executed at least two separate assignments of minimum 50,000 samples each as per 3.1(i) of Scope of Work.

(c) The bidder should have the experience of data entry at SHC Portal of GoI for at least 1.00 Lakh soil samples and printing of Soil Health Cards thereof.

The relevant product market of Soil Testing is largely different from Data Entry and Printing of SHC, but the OP has clubbed the same in the instant tender. In furtherance, the Informant has alleged that these clauses limit and restrict competition for all NABL laboratories who have experience in soil testing services but not in the Data Entry and Printing of SHCs. This results in denial of market access to all NABL laboratories and thus, the OP is abusing its dominant position by protecting only a few laboratories in the relevant market.

5.3 Clause No.: 4.1.6 (b) and Item No 6 (b) in Annexure-I

Must not be involved in any legal dispute with any Government in any kind of similar work assigned to it through tender.

Item No 6 (b) in Annexure-I

Must not be involved in any legal dispute with any Government in any kind of similar work assigned to it through tender;

Item No. (i) of Annexure-III

Does not have any dispute with any organization/ Govt. sector or any court case pending of any cause.



Item No (f) of Annexure-III

Does not have any involvement in any legal dispute with any Government Department / agency in any kind of similar work assigned to it through tender.

This clause is unfair and discriminatory as it denies market access in an unconstitutional manner and the OP is using its dominant position to restrict competition, protecting only a few players and eliminating competitors. Restricting debarred or blacklisted firms from participating in a tender is a general practice, whereas the condition of not being involved in any legal dispute with any Government in any kind of similar work assigned through tender is unconstitutional.

5.4 Clause No.: 9 (iv)(a) and (b)

The payment pertaining to uploading of data of soil samples and printing of Soil Health Card will be released separately on the basis of bills submitted by the bidder subject to verification.

a) Data entry of analysed samples on GoI Portal @ Rs. 10/- per sample + GST or as fixed by GoI Guidelines from time to time.

b) Printing of Soil Health Cards of analysed samples @ Rs. 5/- per Card + GST or as fixed by GoI Guidelines from time to time.

The Informant has averred that these clauses prevent competition in data entry and printing of soil health cards because by specifying the rates for data entry and printing, the OP has prevented competition in these services. It is further claimed by the Informant that these clauses make the competition for the above two jobs irrational and thus, are against the spirit of fetching best value of money spent on public exchequer.

5.5 Clauses No.: 16 (q) and 16 (aa)

All prevailing rules, regulations, guidelines, instructions etc. pertaining to job work contract, issued by Government of Haryana



through its various resolutions/circulars/letters, shall also be applicable to this tender.

The Informant has alleged that these clauses, apart from being repetitive, also signify the abuse of dominant position on the part of the OP as they do not disclose the exact provisions under which the bidder having involvement in legal proceedings or any kind of dispute with any Government authority can be made ineligible to participate in the bid.

6. The Informant has further alleged that in response to points raised by an intending bidder via email dated 09th May, 2018, seeking clarifications on certain points, the OP responded on 14th May, 2018, *i.e.* on the last date of submission of tender, stating that the Tender document is already approved by the competent authority and in compliance with the requirement of the OP and GoI Guidelines. This behaviour by the OP is also alleged to be a display of abuse of dominant position.
7. Based on the aforesaid facts and allegations, the Informant has prayed to the Commission to commence proceedings against the OP for abuse of dominant position under Section 4 of the Act.
8. The Commission has carefully perused the information and the material available on record. The information relates to the alleged infraction of the provisions of Section 4 of the Act by the purported unfair conditions/clauses imposed by the OP in the stipulations of the Tender.
9. Before delving into the matter, the Commission would examine whether the OP, is an “enterprise” in terms of provisions of the Act. As per Section 2(h) of the Act, the Commission observes that the OP is one of the departments of the Government of Haryana, entrusted with the responsibility of agricultural activities and farmer welfare. Section 2(h) is reproduced herein below for the sake of convenience and ready reference:

“enterprise” means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the



production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any 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.

10. The Commission observes that the OP floated the Tender for procuring soil testing services, data entry and printing of SHCs in order to implement the ambitious SHC Scheme of the Central Government. It appears that the OP is procuring the said services for providing the same to the farmers in the State of Haryana. Going by the definition of enterprise under the Act, it is apparent that the OP is engaged in procurement and provision of various services to the farmers in the State of Haryana. The service in question, with regard to which allegations are made in this Information is procurement of soil testing services, which is an economic activity. A similar view was observed in *Shri Rajat Verma And Haryana Public Works (B&R) Department, through its Engineer-in-Chief and Ors.*, Appeal no. 45/2015 dated 16th February, 2016, where the Hon'ble Competition Appellate Tribunal held the Public Welfare Department of Haryana as an 'enterprise' under Section 2(h) of the Act. The relevant portion of the order is reproduced below:

"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."

11. The Commission further observes that the functions of the OP do not fall within the exceptions specified in Section 2(h) of the Act *i.e.* sovereign functions of the Government including atomic energy, currency, defence and space.
12. In view of the foregoing discussion, the Commission is of the view that the OP falls within the ambit of the term 'enterprise' as defined under the provisions of Section 2(h) of the Act.
13. For applicability of the provisions of Section 4 of the Act, the first requirement is to delineate the relevant market. As per Section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the 'relevant product market' or the 'relevant geographic market' or with reference to both the markets.



14. In the instant case, the Commission observes that soil testing refers to a wide variety of soil analysis conducted for various purposes which include estimation of plant nutrients to determine fertilizer recommendations in agriculture, engineering (geotechnical), geochemical/ ecological investigations etc. Therefore, apart from the agricultural sector, soil testing services are used in a number of other sectors, such as geological surveys, oil exploration, construction and infrastructure projects *etc.* Information available in public domain suggests that soil testing services required for all these sectors are of similar nature. Therefore, the relevant product market may be delineated as “*Market for provision of soil testing services*”.
15. With regard to the relevant geographic market, the Commission notes that the instant case is of alleged abuse of buyers’/procurers’ power and not that of seller’s power. Thus, it is observed that in the present case the concept of substitutability would be applicable from the perspective of suppliers and availability of alternate buyers to them. Similar observation was made by the Commission in its order *Adcept Technologies Pvt. Ltd. And Bharat Coking Coal Limited*, Case No. 16 of 2013, dated 08th May, 2013. The relevant portion of the order is reproduced herein below:

“...Generally, as per the scheme laid down by the Act, the dominant player (or enterprise) is the seller of goods/services who/which adversely affects the buying side i.e. the consumer. In this case, the buyer has been contended to be dominant and affecting the competition on selling side of the market (by excluding some of the players, informant in this case). Such cases of “buyer power” or buyer being dominant and abusing its dominant position to suppress competition in the downstream market have been assessed by competition regulators in other jurisdictions like UK (Office of Fair Trading) and EU (European Commission). In the case of buyer power, it is the procurement markets, not the supply markets, which have to be defined. The demand-side oriented market concept is applied inversely in this context. From the suppliers point of view



the market definition is thus based on their ability to switch to alternative sales opportunities. The definition focuses on the products the supplier is offering or would be able to offer without any significant problems. Therefore, what needs to be seen in this case is that whether the OP, if at all it is found to be dominant in the relevant market defined by the Commission, had been able to adversely affect the competition in the supply side of the market.”

16. In view of the above, the Commission observes that in the instant case the suppliers of soil testing services can participate in the tenders from all across India and can provide their services without getting constrained by regional geographical barriers. Therefore, the Commission is of the view that relevant geographic market is “*the Territory of India*”. Accordingly, the relevant market in the instant case is “*Market for provision of soil testing services in the Territory of India*”.
17. After delineating the relevant market, the next step is to assess the dominance of the OP in the relevant market. It has been alleged by the Informant that the OP assumes a position of dominance because as per GoI Guidelines, the implementation of SHC Scheme is the sole responsibility of the State Government where it is to be implemented. In order to assess the dominance, position of the OP is to be seen *qua* other procurers/ users of relevant product. The Commission notes that the aforesaid ‘sole responsibility’ of the OP is only with regard to implementation of the SHC scheme. This, however, does not imply that the OP is the only entity which procures the relevant product. It is relevant to note that within the agriculture sector apart from the Government, farmers also get the soil testing done directly from the private agencies offering relevant services. Further, as discussed earlier, in addition to the agricultural sector, soil testing services are used in a number of other sectors, such as geological surveys, oil exploration, construction and infrastructure projects *etc.* Therefore, from the suppliers’ perspective, the entities providing soil testing services for agricultural purposes have an option to provide such services to other entities and sectors, as stated above. Furthermore, it is also feasible for the sellers to switch from one procurer in a particular region to another procurer in a different region as they are free to offer their services to procurers, public or private, in



any State. The dominance of a procurer such as the OP would have no meaning from the perspective of a seller, in such cases where the sellers can easily switch to other procurers. Hence, given the present facts and circumstances, the Commission holds that the OP is not dominant in the relevant market.

18. The Commission has held in several previous cases that it is the prerogative of the procurer to decide the tender conditions/technical specifications/ conditions/ clauses in the tender document as per its requirements. The Commission, in *Suntec Energy Systems And National Dairy Development Board and Amul Dairy*, Case No. 69 of 2016 decided on 10th November, 2016, while dealing with the allegation that a tender condition resulted into making only one manufacturer a preferred supplier, observed as under:

“a procurer, as a consumer, can stipulate certain technical specifications/ conditions/ clauses in the tender document as per its requirements which by themselves cannot be deemed anti-competitive. It may be noted that the party floating the tender is a consumer and it has the right to decide on the appropriate eligibility conditions based on its requirements.” The Commission also stated that, “in a market economy, consumers’ choice is considered as sacrosanct and in such an economy, a consumer must be allowed to exercise its choice freely while purchasing goods and services in the market. It is expected that a consumer can decide what is the best for it and will exercise its choice in a manner which would maximise its utility that is derived from the consumption of a good/ service.”

19. As the Opposite Party does not have a dominant position in the relevant market, the instant case does not fall within the ambit of the provisions of Section 4 of the Act. Accordingly, the Commission holds that no case is made out against the OP for making a reference to the Director General for conducting investigation into the matter. The Commission, therefore, deems it fit to close the proceedings of the case under the provisions of section 26 (2) of the Act.



20. The Secretary is directed to communicate the decision of the Commission to the parties, accordingly.

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

**Sd/-
(Augustine Peter)
Member**

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

**Sd/-
(Justice G. P. Mittal)
Member**

New Delhi

Date: 30.08.2018