



COMPETITION COMMISSION OF INDIA

Case No. 113 of 2015

In Re:

**P.E.C. Usha Furniture
D. No. 37-12-45/6, P.R.R. Gardens,
Industrial Post,
Visakhapatnam**

Informant

And

**Military Engineer Services, Officials working under CE (Navy),
Visakhapatnam and concerned Higher Officials,
Station Road,
Visakhapatnam**

Opposite Party

CORAM:

**Mr. Devender Kumar Sikri
Chairperson**

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

**Mr. Sudhir Mital
Member**

**Mr. Augustine Peter
Member**

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

**Dr. M.S. Sahoo
Member**

**Justice G.P. Mittal
Member**



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

1. The present information has been filed by P.E.C. Usha Furniture (hereinafter, the “**Informant**”) under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the “**Act**”) against Military Engineer Services (MES), Officials working under Chief Engineer (Navy), Visakhapatnam and its concerned higher officials, (hereinafter, the ‘**Opposite Parties**’), alleging *inter alia* contravention of the provisions of Sections 3 and 4 of the Act.
2. The Informant is stated to be a furniture dealer based in Visakhapatnam. It also deals in the execution of civil and mechanical works. It claims to be registered as a class ‘C’ contractor under manufacturer of furniture and executions of civil works, with HQ, CE, Southern Command, Pune since December 2010.
3. As per the information, the Opposite Parties consist of various MES officials working under CE (Navy), Visakhapatnam and its other high rank officials. It has been stated that MES organisations are meant for infrastructure development and provisioning of facilities for defence establishments. For procuring various goods and services, the MES organisations float tenders from time to time.
4. The Informant has primarily highlighted two grievances in the information. The first is related to irregularities in the tender procedures adopted by the Opposite Parties, in the procurement of furniture, which have allegedly led to the contravention of the provisions of Section 3 of the Act. The second issue, raised by the Informant, pertains to abuse of dominant position by the Opposite Parties whereby the Informant has been forbidden from participating in the bidding process, despite being an authorised class ‘C’ contractor.



5. It has been contended that the Opposite Parties have executed the tender process in an illegal manner in the year 2012 for works pertaining to MES formations. The Informant has referred to about 200 'Notices Inviting Tenders' (NITs) in which deviation from procedures allegedly took place in the tender floating system. It has also been submitted that the allotment of works in such tenders (about Rs. 400 crore value of works) in the year 2012 was done in an anti-competitive manner.

6. It is alleged that about 80% of tenders issued in the year 2012 were not properly published/ uploaded/ circulated/ allotted, in complete defiance of the norms of the department. The Informant has contended that the Opposite Parties deliberately avoided effective publication of the NITs to reduce participation in the tenders. It is submitted that these NITs were mostly published in newspapers having very low circulation, just to comply with the audit requirements, and were not even displayed on the notice boards. Further, it is alleged that the Opposite Parties also used to delay or avoid uploading the NITs on the MES website and at times even created duplicate websites to upload the NITs so that interested prospective bidders could not participate. The Informant, relying on a response received to an RTI application, has submitted that the Commander Works Engineer (CWE) office has confirmed that many of the tenders in 2012 were not floated through proper procedure and that they failed to upload 90% of the tenders.

7. The Informant has further submitted that when it started participating in the tenders floated by the Opposite Parties, it realised that it is very difficult for new entrants to get tenders as the Opposite Parties tried their best to squeeze outside bidders. The Opposite Parties even restricted local or registered eligible bidders from participating in various tenders. The Informant alleged that the Opposite Parties have some sort of collusive understanding with some



of the contractors (*i.e.* bidders) who win the tenders on rotation basis and the actions of the Opposite Parties are motivated to ensure the same. Allegedly, the Opposite Parties used to return the application of tender schedules after due date of tenders or lapse of time period, so that the new applicants are restricted to challenge their decision regarding rejection.

8. It has been contended that many contractors cooperate with the Opposite Parties as the Opposite Parties are capable of influencing the tender procedures owing to their dominant position. It is alleged that because of the various anti-competitive practices in most of tendered works, the price quoted in such tenders are higher than the competitive price. The Informant also alleged that the new contractors, who wish to execute any work, are necessarily required to go through routine bid rigging or rotation system conducted illegally by the Opposite Parties.
9. Thus, the Informant has highlighted various practices adopted by the Opposite Parties to allegedly prevent competition, such as – avoiding issuance of receipt of letters; applications for tender schedules; manipulations in the registers where tenders were recorded; agreement to squeeze out outside bidders; agreement designating bid winners in advance on a rotational basis *etc.*
10. The Informant claims to have made a complaint with the Central Bureau of Investigation (CBI) in 2013 regarding the irregularities in the tender procedures but the matter was said to be transferred to Engineer-in-Chief (E in C) for necessary action. The Informant has submitted that despite several complaints with the concerned higher authorities, including the E in C of MES, no proper action has been taken to deal with the matter.



11. It is alleged that when the Informant tried to uncover the Opposite Parties' illegal conduct, all the transactions which the Opposite Parties had with the Informant were immediately suspended for about three and a half years without any of his fault. Thereafter, the Opposite Parties allegedly took series of illegal actions to stop the Informant from participating in the bidding process or to get the information about the tenders. It is alleged that by January 2013, the Opposite Parties stopped issuing tenders for Informant firm from all their departments and recovered all penalties, compensation and other amounts illegally from the amounts due to the Informant by the end of 2013. In December 2013, HQ, CE, Southern Command Pune, lifted the ban on issue of tenders to the Informant firm. However, this command of superior authority has also been allegedly ignored by the Opposite Parties. This, as per the Informant, amounts to abuse of dominant position by the Opposite Parties, which adversely affected the Informant's reputation.
12. In view of the aforementioned facts, the Informant has, *inter-alia*, prayed that the Commission look into the alleged anti-competitive activities of the Opposite Parties working under the CE (Navy) under Sections 3 and 4 of the Act.
13. The Commission considered the information, along with the documents, filed by the Informant in its ordinary meeting dated 28th January 2016 and decided to seek further information from the Informant with regard to the alleged collusion amongst the contractors as highlighted at annexure 'J' placed at pages 128 to 130 of the information. Accordingly, *vide* order dated 28th January 2016, the Informant was directed to furnish additional information, including, the details of the contractors who have allegedly indulged in bid-rigging, the outcome of the tenders *etc.*



14. In response, the Informant submitted additional information *vide* its letter dated 19th February, 2016 which was captioned by the Informant as 'confidential'. The Commission considered the letter of the Informant in its ordinary meeting dated 17th March 2016 and granted confidentiality on the information submitted *vide* the said letter. The information, including the additional information, is analysed hereunder.
15. It is noted that the Informant has highlighted various irregularities on the part of the MES officials in the tendering process for procurement of furniture for defence establishments. Such irregularities include inadequate publication of tenders, misappropriation of funds, pre-determination of contractors for award of works *etc.* These allegations need to be analyzed within the scope of Section 3 and 4 of the Act. The Commission has, thus, analyzed the facts in light of these provisions of the Act.
16. With regard to Section 3 of the Act, the Informant has alleged that the procurement process of the Opposite Parties was tainted with irregularities, which has distorted the competition amongst various bidders (contractors). Section 3 of the Act deals with anti-competitive agreements which are either horizontal or vertical or otherwise causing appreciable adverse effect on competition. The Commission observes that the Informant has alleged collusive understanding between the Opposite Parties (*i.e.* MES officials) on one hand and the contractors (*i.e.* Bidders) on the other. It is alleged that their conduct amounts to bid-rigging.
17. In this regard, the Commission notes that collusive bidding is specifically recognized to be a violation of the Act under Section 3(3)(d) read with Section 3(1) of the Act. Explanation to Section 3(3) of the Act describes 'bid-rigging' as any agreement, between enterprises or persons referred to in sub-section (3)



engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. Considering the definition of bid-rigging as provided under Explanation to Section 3(3) of the Act, the Commission is of the view that the allegation pertaining to collusive understanding between the MES officials (the Opposite Parties) and the contractors does not fall within the provisions of Section 3(3)(d) read with Section 3(1) of the Act. Moreover, there is nothing on record to show that the Opposite Parties were awarding the tenders on the basis of collusive understanding with the contractors/bidders.

18. The Commission, in order to examine the acts of bidders/contractors amongst themselves, directed the Informant, *vide* its order dated 28th January 2016, to furnish additional information, to examine the matter from that perspective. The Informant, *vide* letter dated 26th February 2016, has provided information regarding list of contractors who were allegedly involved in bid rigging, collection of illegal amounts, unauthorised finalisation of contractors, distributing illegally collected amounts to unsuccessful bidders, department officers *etc.* The Commission has perused the said information. However, it is noted that the information provided is very general in nature as the Informant has provided the names of the contractors/bidders *simpliciter*, without any reference to the respective tenders where their conduct or the outcomes of the tenders was anti-competitive. In the absence of such details, *prima facie*, there is no case for the Commission to direct an investigation into the matter for contravention of Section 3 of the Act.
19. The Informant has also alleged abuse of dominant position by the Opposite Parties in the procurement of furniture for defence establishments. In this regard, the Commission is of the view that the allegation of the Informant is



misplaced. The Informant has mainly alleged that the Informant was forbidden from participating in the bidding process, despite being authorised as a class 'C' contractor. It is the grievance of the Informant that the Opposite Parties have excluded the Informant from the bidding process while procuring the furniture for defence establishments.

20. The information is silent on the delineation of relevant market or the overall market size of the furniture purchase/procurement. It is observed that the demand for furniture is not only for defence establishments. The procurement of furniture by MES would constitute a miniscule share of the overall market for which furniture is being supplied by various competing furniture manufacturers. In such a market, it is highly unlikely that the Opposite Parties will hold a dominant position. In the absence of dominance, the question of abuse of dominant position for procurement in such a market by the Opposite Parties does not arise.
21. Before parting with this order, the Commission observes that in essence, the Informant has challenged the acts of the Opposite Parties in choosing few contractors over others. In this regard, it is imperative to note that the Commission, generally, does not interfere into exercise of free choice by a consumer/buyer, unless that choice is resulting into anti-competitive effects. The exercise of free choice by the buyer/consumer, where few sellers/suppliers are chosen over others, cannot be held as anti-competitive. The Commission, on the issue of consumer choice, has observed as follows in *Case No. 03 of 2010 (Pandrol Rahee Technologies Pvt. Ltd. v. Delhi Metro Rail Corporation)*:

“A consumer must be allowed to exercise its consumer choice and freely select between competing products or services. This right of consumer’s choice must be sacrosanct in a market economy because



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it is expected that a consumer would decide what is best for it and free exercise of consumer choice would maximize the utility of the product or service for the consumer. For an individual, that consumer's choice is based on personal assessment of competing products or services, their relative price or personal preferences. For any other type of consumer, this process of decision making in exercise of consumer's choice is more structured and reflected in procurement procedures. Such a consumer may use experts or consultants to advise, do its own technical assessment, take advice of others it may trust or even purchase from known and reliable sources. The process of such decision making may result in purchase by nomination or limited tender or open tender. Normally, open tenders without a brand bias are desirable as it may give the best value for money. However, each of the purchase process is acceptable and valid as a process of decision making. The consumer is the best judge. In case of public entities, the entity is a representative consumer on behalf of the public. There are administrative mechanisms in place for carrying on the due process of exercising consumer's choice on behalf of the public.”

22. In view of the foregoing, the Commission finds that, from the competition law perspective, any intervention would be inappropriate as it would tantamount to interfering with the free choice of the buyer/consumer.
23. In result thereof, no case of contravention of the provisions of the Act is made out in the instant matter under any of the provisions of the Act. The case is accordingly closed under Section 26(2) of the Act herewith.



24. The Secretary is directed to inform all concerned accordingly.

**Sd/-
(Devender Kumar Sikri)
Chairperson**

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

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

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

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

**Sd/-
(Dr. M.S. Sahoo)
Member**

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

**New Delhi
Date: 28/06/2016**