

**COMPETITION COMMISSION OF INDIA**

22<sup>nd</sup> November, 2011

**Case No. 58/2011**

**Filed by**

Technology Products,  
114, Udyog Vihar, Phase IV,  
P.O. Maruti, Gurgaon-122015

Informant

**Against**

A. Bangalore Electricity Supply Co. Ltd.,  
Corporate Office, IV Floor, K.R. Circle,  
Bangalore-560001.

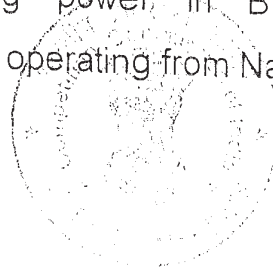
B. The Motwande Manufacturing Co. Pvt. Ltd.,  
Gyan Baug, Motwane Road, Nasik Road,  
Nasik - 422101.

Respondent

**Order Section 26(1) of the Act**

**As per R. Prasad (Dissenting)**

This an information filed by Technology Products (I.P.) against Bangalore Electric Supply Ltd. (O.P.1) and Motwane Manufacturing Co. Ltd. (O.P.2). I.P. is a company based in Gurgaon where as O.P.1 is a monopoly supplying and distributing power in Bangalore and surrounding areas. O.P.2 is a company operating from Nasik.



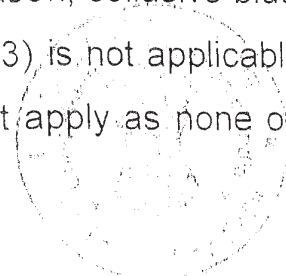
2. O.P. one in this case came out with tender through e-tendering on 18.07.2011 for the supply of 1600 members of high voltage detector instruments. 11 days were given for submitting the tender and the period was tendering was over in the evening of 28.07.2011. Some of the conditions in the tender documents were (i) at least 25% of the tendered quantity of high voltage detectors must have been supplied to any other public utility or any other government institution, (ii) Earnest money deposit of Rs. 2,62,560/- was to be deposited along with a sealed sample of the equipment required to be supplied. The I.P. deposited the earnest money and the sample which was required to be opened before the I.P or its representative. The bids were valid for 120 days from the opening of the bid. The bids were required to be opened before the representatives of the bidders on 30.07.2011 after giving a notice of the bidders.
3. But no notice was given to the I.P. and the bid of the I.P. was probably opened in its absence. It is not known as to whether the sealed sample was opened and tested. On 08.09.2011 the I.P. got information that its bid has been rejected and that orders for purchase has been given by O.P.1 to O.P.2.
4. As a consequence the I.P. has alleged contravention of Sections 3 and 4 of the Competition Act. It has been alleged that the period of 11 days for the submission of the bid was with the intention of reducing competition. Further no intimation was given to the I.P. about the opening of the bid and the rejection of its bid. It has been stated that as the rejection was done in such a clandestine manner that the I.P. could

not approach any court. It has been argued that the entire process violates Articles 38 and 39 of the Constitution of India. It has been alleged that O.P. 2 has submitted forged and fabricated documents to get the purchase order but this allegation has not been substantiated. The I.P. made enquiries and he found that the award of contract was made to O.P.2 on 23.08.2011. The I.P. has stated that it had supplied similar equipments to a large number of public utilities and that the equipments supplied were working satisfactorily. It has been alleged that the entire process was adopted to favor of OP2 and defeat the process of competition. In fact there are allegations of collusion between O.P.1 and O.P.2. It was, therefore, argued that the whole tendering process should be treated as null and void.

5. Hearing was given to informant to explain its case. The IP stated that in nearly all the Discoms of Karnataka where similar tenders were floated, the tender documents were so designed that O.P. 2 got the contract. And in the tenders where the I.P. was L1, tenders were called again at the instance of O.P. 2. This happened even in the case of tenders called by the discoms of Haryana and U.P. It was further argued that the action of OP 1 and O.P. 2 violates section 3 and 4 of the Competition Act.
6. But before proceeding we have to examine the legal framework. The Supreme Court in the case of Nagar Nigam Vs. Al Faheem Meat Exports Pvt. Ltd. Ors SLP (Civil) No. 10174 of 2006 has held that all government procurement should be by a tender process. It has also been held in that case that public procurement cannot be equated with

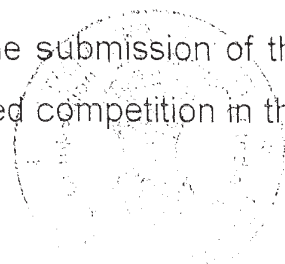
private procurement. Further, public procurement being large leads to employment and industrial development and competition in public procurement leads to lesser cost to government and its agencies and gives equal opportunity to persons as envisaged under Article 14 of the Constitution. Further when a tender process is adopted, it ultimately leads to an arrangement or an understanding between the parties, which under Section 2(b) is an agreement. This agreement leads to the issue of a purchase order. In every tender document only one person gets an order and the others do not get it. This amounts to a foreclosure of competition by hindering entry into the market [Section 19(3) of the Act]. But when the whole process is transparent and fair, it cannot foreclose the market. If the tender document is so designed to create a barrier to new entrants in the market, then in view of section 19(3) (a) of the Act it could be anti-competitive.

7. We have to consider whether Section 3 is attracted in this case. If appreciable adverse effect to competition in India had been created by the acts of O.P.1 and O.P.2 as laid down read with the provisions of section 19(3) of the Act, then the provisions of section 3(1) of the Act would have been attracted. But there is no material to hold that there was any creation of barriers or foreclosure of competition. Therefore, section 3(1) is not attracted. As far as section 3(3) is concerned it would apply only when the parties O.P.1 and O.P.2 were in a similar trade which is not the case here. For this reason, collusive bidding and bid rigging would not apply. Thus section 3(3) is not applicable on the facts mentioned. Section 3(4) would also not apply as none of the fire



factors mentioned are appreciable. Thus, section 3 of the Act would not apply in this case.

8. Before considering the appreciability of section 4 of the Competition Act, it is necessary to define the relevant market. Relevant market means the market to be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. In this particular case the relevant market would be the procurement market for high voltage detectors. The geographical market would be the area for which the O.P.1 is the licensee for the supply of electricity.
9. After defining the relevant market, it is necessary to examine as to whether O.P.1 is a position of dominance in the geographical area as defined above and the market for the procurement of high voltage directors. Dominant position is defined in the explanation to Section 4 of the Act. As O.P.1 is the only licensee in this area as far as the supply of electricity is concerned, it can operate independently of competitive forces prevailing in the relevant market. Further in the said relevant market it can affect its consumers i.e., the purchasers of its product and the supplier in its favour. In terms of the provisions of Section 19(4)(g) of the Act it has acquired the dominance by statute as well as by being a government company.
10. The next case is as to whether there has been an abuse of dominance. There is no doubt that the time given for the submission of the tender papers was too short. It could have impacted competition in the market



because by the time the other competitors would have become aware time for submitting the tender papers would have been over. Further according to the norms fixed for tendering the tender papers should have been opened on 30.07.2011 in front of the I.P. or its representatives. This was not done. In fact no intimation was given to the I.P. This procurement process followed by O.P.1 appears to unfair and discriminatory in accordance with the provisions of section 4(2)(a)(i) of the Act or may be a practice resulting in denial of market access as envisaged in section 4(2)(c) of the Act. These aspects needs to be looked into by investigation.

11. Therefore, under the provisions of section 26(1) of the Competition Act, the DG is directed to investigate the case and submit a report within sixty days of the receipt of this order. The Secretary is directed to send a copy of the order to the Director General.

Sd/-  
Member (P)

