

**COMPETITION COMMISSION OF INDIA****CASE NO 59/2010**

Date: 13.01.2011

**Information Against:**

1. Chief Secretary, Govt. of Haryana
2. Shri Y.S. Malik, Financial Commissioner & Principal Secretary, Industries Department, Haryana
3. Shri Mohammed Shayin, Director Supplies & Disposals, Haryana

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

The instant information has been filed against the Chief Secretary, Govt. of Haryana (Party No. 1), Shri Y.S. Malik, Financial Commissioner & Principal Secretary, Industries Department, Haryana (Party No. 2) and Shri Mohammed Shayin, Director Supplies & Disposals, Haryana (Party No. 3).

2. The Information provider, vide his written submissions dated 06.12.2010, sought to amend his earlier submission regarding violation of Section 3 of the Act. The information, as modified, withdraws the earlier allegation of violation of Section 3 of the Act and, instead, alleged abuse of dominance by the opposite parties in violation of Section 4(2)(a), 4(2)(b) and 4(2)(c) of the Act.
3. The facts, in brief, as given in the written submissions dated 06.12.2010 are as under:
  - 3.1 The Information provider is engaged in the business of trading in Diesel Generator (DG) sets and like products and is one of the authorized dealers for DG sets and also registered as an approved vendor with the Haryana Development Authority (HUDA) and Public Works Department (PWD), Haryana.

- 3.2 The Party No.3 is the Directorate of Supplies and Disposals, Government of Haryana, which is the nodal agency for various purchases required by various Government departments, public sector undertakings, boards and local bodies/corporations, in the State of Haryana and is also responsible for the disposal of unserviceable/surplus stores in the said State. It is headed by the Director Supplies & Disposals Haryana, who is assisted by three Joint Directors and one Assistant Director. The Party No.3 is an 'enterprise' within the meaning of Section 2(h) of the Act and the activities of the Party No.3 are in no way related to discharge of any of the sovereign functions of the State.
- 3.3 As per the Information, the Government of Haryana through the Joint Director, Directorate of Supplies & Disposals invited tenders for purchase of DG sets of different capacities on annual rate contract, vide Tender no. 07/HR/E-1/RC/2010-11 opened on 02.08.2010 and Tender no. 07/HR/E-1/RC/2010-11/II opened on 01.10.2010, with the specifications mentioned therein with the work, supply and commissioning at site, in which there was participation by the information provider.
- 3.4 One of the allegations is that the following condition no.2 of terms and conditions of eligibility accompanying the tender notices has been designed in unfair manner and it results in virtually ousting the Authorized Dealers from participating in bidding process:
- "The tendering firm should be a Original Equipment Manufacturer/Original Equipment Assembler (OEM/OEA) of Diesel Generating sets. OEA must submit a certificate from the engine manufacturer regarding their OEA alongwith the offer. Authorised dealers are allowed provided they submit a certificate from the OEM/OEA that they do not supply to end consumers directly."*
- 3.5 It further alleges that the impugned condition *prima facie* has the effect of "limiting or restricting the market" for supply of DG sets only to OEM/OEA (as they do not have to fulfill this condition) and "forecloses the market" for the

same for the Authorised Dealers (who cannot fulfill this condition as it would be impossible for the Authorised Dealers to obtain such certificate from OEM/OEA).

4. The Information claims that the relevant product market is the market for "Purchase of Diesel Generating Sets of various capacities on the Annual Rate Contract required for PW (B&R) Department, HUDA, PHED, Transport, Industrial Training & Vocational Education & other Departments of State of Haryana" and the relevant geographic market is the "State of Haryana".
5. It is further claimed that in the above defined relevant product and geographic markets, Party No.3, being the only authorized department of the State of Haryana is in an absolute dominant position akin to a monopolist but in the facts and circumstances of the case, the position of all the Parties is akin to that of a monopsonist wherein one buyer faces many sellers and thereby the monopsonist is in a position to dictate terms on the sellers. It is further claimed that a monopsonist is capable of affecting competition among suppliers in a similar way as a monopolist and both are subjected to the same level of scrutiny under the competition law. The Party No.3 has no competitors as an exclusive purchaser of stores including DG sets on annual rate contract for the indenting and consuming departments of the Government of Haryana. The tenders floated by the Executive Engineers of the PWD in individual districts of Haryana are not on annual rate contract basis, which is meant to facilitate bulk purchase at lowest competitive prices and is always preferred over piece meal procurements.
6. Following reliefs have been sought in the modified information:
  - a. An interim order under Section 33 of the Act staying the execution of the works awarded under Tender No. 07/HR/E-1/RC/2010-11 dated 02.08.2010 and finalization of award of Tender No. 07/HR/E-1/RC/2010-11/II dated 01.10.2010
  - b. The clause 2 of the terms and conditions of Tender No. 7/HR/E-1/RC/2010-11 dated 02.08.2010 and Tender No. 7/HR/E-1/RC/2010-

11/III dated 01.10.2010, be declared to constitute an exclusionary conduct to be regarded as abuse of dominant position by the Party No.3 and direction to the Party No.3 to cease and discontinue the said abusive practice forthwith in the purchase of DG sets through annual rate contracts.

- c. Direction to all the Parties to remove the impugned conditions imposed on the authorized dealers regarding production of certificate from the OEMs and the OEAs and permit them to participate in the tender process on equal footings with the OEMs/OEAs.
7. Additionally, the Information has also prayed for interim order against all the Parties to the effect that finalization of award of tender no. 7/HR/E-1/2010-11/II as well as the execution of work awarded under tender no. 7/HR/E-1/RC/2010-11 be stayed.
8. The Commission has perused the material available on record. It is noted that the Information has been amended/restricted vide written submission dated 06.12.2010, to the relief to Section 4 of the Act only whereas earlier violation of Section 3 of the Act was also alleged.
9. The information is centered around eligibility condition (quoted in para 3.4) which requires the authorized dealers to submit a certificate from the OEM/OEA that they do not supply to end consumers directly.
10. On the perusal of terms and conditions in the tender document, the impugned condition appears to have been specified with a view to ensure that makes of all eligible OEMs/OEAs are included in the tender process and the makes of those OEMs / OEAs who do not supply directly and supply only through authorised dealers are not excluded from the bidding process. Therefore, it is not the case of excluding authorised dealers from the tender process, altogether, as has been alleged. Furthermore, it is also evident from the assailed condition that similarly the participating OEAs have also been asked to produce a certificate from the engine manufacturers regarding their OEA

status. Under these facts and circumstances the impugned conditions does not appear to be arbitrary or discriminatory. It also does not lead to the inference that said condition has been designed purposely to oust the Authorized Dealers from participating in the bid.

11. In view of the foregoing analysis and after considering the entire material <sup>in</sup> the information has also not been able to place any credible or cogent material to show or establish the infringement of either Section 3 or 4 of the Act in this case and hence the allegations made remain unsubstantiated and uncorroborated. The Commission, therefore, is of the view that no *prima facie* case is made out for making a reference to the Director General for conducting investigation into this matter under section 26 (1) of the Act and the proceedings relating to this information are required to be closed forthwith.

12. As the Information fails to make out a prima facie case the interim relief sought cannot be granted. The application of the interim relief is disposed of accordingly.

13. In view of the above, the matter relating to this information is hereby closed under section 26(2) of the Competition Act.

14. Secretary is directed to inform the Informant accordingly.

Sd-  
Member (L)

Sd-  
Member (R)

Sd-  
Member (P)

Sd-  
Member (L)

Sd-  
Member (A)

Sd-  
Member (T)

Chairperson