



सत्यमेव जयते



## COMPETITION COMMISSION OF INDIA

Case No. 02 of 2020

### In Re:

**Mr. Ambalal V. Patel**  
**Mahipat bunglow, Opp. 1 Amar Park Society**  
**Nizampura, Baroda-390002**  
**Gujarat**

**Informant**

### And

- 1. Central Medical Service Society**  
**Vishwa Yuva Kendra, 2<sup>nd</sup> Floor, 6**  
**Tinmurti Marg, Chanakya Puri**  
**New Delhi** **Opposite Party No. 1**
- 2. Anti TB Department**  
**Mr. K. S. Sachdeva, DDG, Room No. 243-A/523**  
**'C' Wing, Nirman Bhawan**  
**New Delhi** **Opposite Party No. 2**
- 3. RITES India Ltd.**  
**MSM Division, RITES Bhawan-II, 4<sup>th</sup> Floor,**  
**Plot No. 144, Sector-44, Gurgaon-122003**  
**Haryana** **Opposite Party No. 3**

### CORAM

**Mr. Ashok Kumar Gupta**  
**Chairperson**

**Ms. Sangeeta Verma**  
**Member**

**Mr. Bhagwant Singh Bishnoi**  
**Member**



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

1. The Information in the present case has been filed by Mr. Ambalal V. Patel (hereinafter, the '**Informant**') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the "**Act**") against Central Medical Service Society (hereinafter, the '**CMSS/ Opposite Party No. 1 / OP-1**'), Anti TB Department (hereinafter, the '**Opposite Party No. 2 / OP-2**') and RITES India Ltd (hereinafter, the '**Opposite Party No. 3 / OP-3**'), alleging contravention of the provisions of Section 4 of the Act. Hereinafter, OP-1, OP-2 and OP-3 are collectively referred to as '**Opposite Parties / OPs**'.
2. The Informant has alleged insertion of illegal tender conditions, by OP-1, in the purchase of Anti-TB drugs and by OP-3 in the purchase of HIV drugs to create monopoly of few companies. As per the Informant, OP-1 published a tender to procure Anti-TB drugs for local treatment supply to various government dispensaries. The Informant has alleged that OP-1 asked for suppliers to have Geneva WHO-Prequalified certificate (mentioned in labelling only) which has created monopoly of two companies having the said certificate. The Informant has further stated that there are other companies with WHO certifications which are better than WHO-Prequalified certification but OP-1 required WHO-Prequalified certificate in order to give monopoly to two companies. It has also been submitted that in the same tender, there is no such requirement for other drugs being procured.
3. It is further averred by the Informant that as per WHO-prequalified certificate, medicines have to be labelled as per foreign pharmacopoeia standards but as per Drugs and Cosmetics Act, 1940, if any drug or its contents are mentioned in the Indian Pharmacopoeia (IP), it has to be



labelled as per IP, otherwise, it is called 'Misbranded drug'. Accordingly, the Informant has alleged that it is illegal to ask for such WHO-prequalified certificate which is for foreign pharmacopoeia labelling standards.

4. The Informant has also submitted that the Department of Pharmaceuticals *vide* its Order No. 31026/4/2018 Policy dated 01.01.2019 has notified Public Procurement (Preference to Make in India), Order, 2017, for encouraging 'Make in India' and to promote manufacturing and production of pharmaceutical formulations in India.
5. Based on the aforesaid averments and allegations, the Informant has prayed the Commission to issue a direction to OPs to stop finalizing of above tender and remove this condition in future tenders.
6. The Commission considered the matter in its ordinary meeting held on 28.01.2020 and decided to pass an appropriate order in due course.
7. Based on the information provided by the Informant and as available in public domain, it is noted that the Informant has alleged contravention of provisions of Section 4 by OPs by incorporating the aforementioned conditions in the tender for procurement of Anti-TB and HIV medicines.
8. As regards OP-1, the Commission noted that CMSS has been established as a Central Procurement Agency to streamline drug procurement and distribution system of Department of Health & Family Welfare, Ministry of Health and Family Welfare, Government of India. It is also noted that OP-3 is a Government of India enterprise and is a multi-disciplinary consultancy organization in the fields of transport, infrastructure and related technologies. It also offers consultancy services for comprehensive



procurement & logistics management and auditing covering all phases of procurement cycle. It is noted that the Informant has not alleged any specific allegation against OP-2.

9. Having observed as above, the Commission considered whether OP-1 and OP-3 fall within the purview of the Act *i.e.* whether they are enterprises within the meaning of Section 2(h) of the Act. Going by the definition of 'enterprise' under Section 2(h) of the Act, it is clear that OP-1 and OP-3 are engaged in procurement of health sector goods and offering consultancy services respectively, which are economic activities. These entities are not performing any sovereign functions and therefore, the Commission finds OP-1 and OP-3 to be covered within the definition of 'enterprise' in terms of Section 2(h) of the Act. Similar observation was made by the Commission in case no. 45 of 2018 (*Cupid Limited v. Ministry of Health & Family Welfare and Central Medical Services Society*) in relation to OP-1.
10. For the purpose of analysing present case under 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. The Commission noted that the Informant has not delineated the relevant market in which the OPs are alleged to be dominant and abusing their position of dominance. The Commission has previously decided cases involving allegations of abuse of buyer's power<sup>1</sup>, wherein, the Commission delineated the relevant market by applying the concept of 'demand side substitutability' inversely *i.e.* by assessing the availability of substitutes for suppliers and their ability to switch to alternative sales

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<sup>1</sup> Case No. 70 of 2014 (Shri Rajat Verma v. Public Works (B&R) Department Government of Haryana & others); Case No. 16 of 2013 (Adcept Technologies Pvt. Ltd. v Bharat Coking Coal Limited); Case no. 45 of 2018 (Cupid Limited vs. Ministry of Health & Family Welfare and Central Medical Services Society); Case No. 80 of 2015 (V.E. Commercial Vehicles Limited v UPSRTC); *etc.*



opportunities both in terms of products as well as geographies. Hence, the relevant product market may be delineated as “*Market for procurement of Anti-TB drugs*” in case of OP-1 and “*Market for procurement of HIV drugs*” in case of OP-3. With regard to the relevant geographic market, the Commission observes that in the instant case the suppliers of health sector goods/drugs can participate in the tenders from all across India and can provide their services without getting constrained by regional geographical barriers. Therefore, the relevant geographic market is “*the Territory of India*”. Accordingly, the relevant market in the instant case is “*the Market for procurement of Anti-TB drugs in the Territory of India*” and/or “*the Market for procurement of HIV drugs in the Territory of India*”, as the case may be.

11. After delineating the relevant market(s), the next step is to assess the dominance of OPs in the relevant market(s). The Informant has not placed any information on record to establish that any of OPs holds a dominant position in the concerned market. Further, there is no information available in public domain to show that OPs are dominant procurers in the market for procurement of Anti-TB/HIV drugs. In the absence of any concrete information, it cannot be ascertained that any of the OPs is dominant in the relevant market delineated above. The dominance of an enterprise in the relevant market has to be *prima facie* established before pressing into service the provisions of the Act relating to abuse of dominant position.
12. Notwithstanding, the Commission noted that the instant matter relates to procurement of medicines/drugs and the allegations relate to prescribing a requirement in tender in respect of having a specific certification from the World Health Organisation, a well-known specialised agency of the United Nations concerned with international public health, as a pre-



condition to participate in the tender process for procurement of drugs. It is further noted that such certification is a globally accepted standard of quality, safety and efficacy and the same would have been incorporated in the tender to improve the quality standards of the drug and public safety. Such a condition for supplying drugs for treating the critical diseases, on the face of it, cannot be termed as arbitrary or favouring the particular companies unless the same is wholly irrelevant or illusory.

13. Further, the Commission in previous cases<sup>2</sup> has not been inclined to intervene in the prerogative of the procurer/buyer to decide the tender conditions/technical specifications/ conditions/ clauses in the tender document as per its requirements, unless the same appears to be demonstrably unfair/discriminatory. Based on the information provided by the Informant and otherwise available in public domain, the prescription of WHO pre-qualification certification, as prescribed in the present matter, does not appear to be unfair/discriminatory. Any manufacturer with the prescribed certification is eligible to participate in the tender.
14. As far as the allegations of the Informant as to the violation of provisions of Drugs and Cosmetics Act, 1940 or Public Procurement (Preference to Make in India) Order, 2017 issued by Department of Industrial Policy and Promotion are concerned, the remedy for such alleged violations do not lie under the Act and the Informant may approach the relevant authorities for redressal of its grievances under such provisions, if so desired.
15. In the light of the above analysis, the Commission finds that no case of contravention of the provisions of Section 4 of the Act is made out against

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<sup>2</sup> Case No. 69 of 2016 (Suntec Energy Systems and National Dairy Development Board and Amul Dairy); Case no. 03 of 2010 (Pandrol Rahee Vs. DMRC); *etc.*



the OPs in the instant matter. Accordingly, the matter is closed under the provisions of Section 26(2) of the Act.

16. The Secretary is directed to communicate to the Informant, accordingly.

**Sd/-**  
**(Ashok Kumar Gupta)**  
**Chairperson**

**Sd/-**  
**(Sangeeta Verma)**  
**Member**

**Sd/-**  
**(Bhagwant Singh Bishnoi)**  
**Member**

**New Delhi**  
**Dated: 10/02/2020**