



(Case No. 09 of 2013)

In Re:

M/s Transparent Energy Systems Pvt. Ltd.  
Through  
Mr. Sopna Mate  
1<sup>st</sup> Floor, Pushpa Heights,  
Bibwewadi Corner, Pune 411037,  
Maharashtra, India

Informant

And

TECPRO Systems Ltd.  
106, Vishwadeep Tower, Plot No.4,  
District Centre, Janak Puri,  
New Delhi-110058, India

Opposite Party

CORAM:

Mr. Ashok Chawla  
Chairperson

Mr. H. C. Gupta  
Member

Dr. Geeta Gouri  
Member

Mr. Anurag Goel  
Member

Mr. M. L. Tayal  
Member

Mr. Justice (Retd.) S. N. Dhingra  
Member

Mr. S.L. Bunker  
Member

Present: Sh. M.M. Sharma, Counsel for the informant



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

M/s Transparent Energy Systems Pvt. Ltd.(TESPL) filed the instant information against TECPRO Systems Ltd. (hereinafter referred to as ‘the opposite party’ – ‘the OP’) alleging violation of section 4 of the Competition Act, 2002 (hereinafter referred to as “the Act”) in the market of setting up Waste Heat Recovery plants in Cement manufacturing Industries.

2. As per the information, the Informant Company was engaged in the business of manufacturing very high efficiency equipment and had expertise in energy and resource conservation. The informant averred that it introduced a system for fuel saving through Waste Heat Recovery projects with a very high thermal efficiency for Cement industries and others.

3. The OP, as per the informant was a Company predominantly in the business of bulk material processing and handling systems such as crushers, grinding plant, screens, classifiers and conveying systems needed in power, cement, steel industries as well as in Balance of Plant (Bop) and Engineering, Procurement and Construction (EPC) space etc.

4. On 02.05.2011 the OP entered into an exclusive collaboration with Nanjing Triumph Kaineng Environment and Energy Company Limited, China (NTK) for supply of Boilers, Turbine and Generators (BTG). It was the case of the informant that the OP thereupon entered in the Indian market of setting up Waste Heat Recovery Power Plants (WHRPP) and owing to its collaboration with NTK, the OP was strategically quoting very low prices in all bids approximately at the Raw Material Cost (RM) of the Informant with an intention to eliminate the Informant from the market.

5. It was stated in the information that the maximum number of WHR Systems in cement industries that had been awarded in India on an annual basis since 2010 did not exceed four, whereas the total potential was of 250-



300 systems and the total number of projects commissioned in Indian market since 2005 till 2013 was only 19 for a total value of INR 1825 Crore.

6. The Informant, furnished following data in respect of Businesses of WHR Projects done by various players, worldwide and in India after the collaboration of the OP with NTK:-

| Name of Company        | Group Sales revenue for 2011-12 | Sales revenue from WHR Projects of cement companies | Collaborator of respective party                             | Cement WHR orders received outside India in collaboration/by collaborator of respective party till date |       | Cement WHR orders received in India after January 2011 |       |
|------------------------|---------------------------------|---|--|---|-------|--|-------|
|                        |                                 |   |  | No. of projects   | In MW | No. of Projects  | In MW |
| Informant              | 114                             | 114   | Self   | 1   | 5     | 2  | 21    |
| Thermax Ltd. India     | 5300                            | Nil   | Tahiiyo engineering Japan                                    | Nil   | Nil   | Nil  | Nil   |
| OP                     | 2541                            | 323   | Nanjing Triumph Kaineng Environment & Energy Co. Ltd., China | 82  | 750   | 5  | 42    |
| Cethar Vessels, India  | 5600                            | 78  | self   | Nil   | Nil   | 1  | 10    |
| Dalian East New Energy | 458                             | 458   | self   | 150   | 400   | 1  | 22    |



|  |      |      |      |  |      |   |     |
|--|------|------|------|--|------|---|-----|
| Development co. Ltd., China            |      |      |      |  |      |   |     |
| Sinoma Energy Conservation Ltd., China | 2000 | 2000 | self |  | 1100 | 1 | 7.5 |

The informant thus alleged that the OP was dominant player, as there were only 5-6 main players in the Indian WHR system market and the OP was holding about 50% market share in the Indian WHR system market in terms of number of projects after its collaboration with NTK.

7. It was further alleged by the informant that the OP had large economic strength as compared to the Informant and to buttress this averment the informant contended that the OP was a renowned player in coal, ash handling as well as in BoP and EPC space with impressive growth backed by escalation perspective of over Rs. 1,300 billion in BoP space during the ensuing five years. The OP catered to various sectors e.g. cement, steel and mainly power which contributed a large part to its revenue. Over last few years the OP had seen significant rise in order intake on account of huge Investments in core sector. The OP had grown from Rs. 1,000 million in financial year 2008 to over Rs. 46 billion during financial year 2012. Power segment contributed over 70% to the OP's order book, followed by orders from steel sector and with 8% in cement. The OP after entering into an exclusive collaboration with Nanjing Triumph Kaineng Environment and Energy Company Limited, China (NTK), for supply of boilers, turbine and generators (BTG) booked five orders worth INR 3.24 billion in the WHR segment. NTK was the leader of WHR power plants in China, having executed more than 120 WHR projects. The OP was a major player in the EPC market with a turnover of Rs. 2541.22 crore during the financial year 2012 and the Informant had an annual turnover of



only INR 114 Crore during the financial year 2011-12. Furthermore, after the entry of the OP into the WHRPP market in March 2011, the OP had been continuously winning orders from cement companies, the latest being in June 2012, by quoting an abnormally low prices, which could not be justified as per the standard norms for working out cost in project related systems like WHRPP. The gravamen of the information was thus that the OP abused its dominance in collaboration with the major Chinese Company NTK by strategically quoting very low prices with an intention to eliminate the Informant from the market. Apart from this apparent predatory pricing strategy, the OP had also indulged in non-price predatory behaviour against the informant by hiring its key managerial staff.

8. The informant also elucidated that it was a common practice for the customers to prefer to execute the project on EPC basis for the WHRPP market in India. It might be considered that the process of retrofitting the boiler and it's accessories in an existing cement plant, wherein the original layout of the plant future heat recovery boiler was not envisaged, threw certain unique challenges to the boiler designer so as to fit the same in available space. In a typical WHRPP project, the cost of abovementioned activities was stated to be about 55 to 60% of the total project cost. The costs of those activities (other than WHR Boiler) for a given project were nearly the same (in a narrow range) for all the EPC bidders and did not significantly change with the design of the WHR boiler. This being the case, the overall project cost could not be significantly low for one specific bidder and an abnormally low price bid by a contractor could only be predatory pricing with an ulterior motive of driving out a genuine competitor like the Informant.

9. On the basis of the above, the Informant alleged that there was unfair practice on the part of the OP and the OP was abusing its dominant position which was in violation of section 4(2) (a) (ii) read with 4(1) of the Act.



10. The informant thus, *inter alia*, prayed for initiation of an enquiry and investigation on the abuse of dominant position by the OP and provide for other suitable relief which the facts and circumstances justify in the course of time.

11. The Commission has carefully perused the information and the documents filed therewith and considered the informant's oral submissions.

12. Section 2(t) defines relevant product market as 'a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use' The relevant product in the instant case would be "setting up of waste heat recovery based power plants in cement industries". Further section 2(s) defines relevant geographic market as 'a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas'. Thus the relevant geographic market in the instant case would be pan India, as the cement manufacturers are spread across the country. The relevant market in the instant case would be "setting up of waste heat recovery based power plants in cement industries in India".

13. As regards to the question of dominance, explanation (a) to Section 4 and Section 19(4) of the Act state that the Commission needs to consider various factors stated under those sections while assessing whether an enterprise enjoyed a dominant position or not. From the information, it is apparent that there were five players in the relevant market. As per the averments of the informant, the OP entered the relevant market only in the year 2011. From one year data given by informant, it cannot be concluded that OP was a dominant player. Though OP got five projects out of 10 in that year, but looking at MW power of the project, its share was about 40% (42 MW out of 102.5 MW). The dominance of OP in other markets cannot be a ground to



consider OP as dominant in WHR area where it entered only recently. It is informant's own case that OP was a major player in Ash Handling Plants (AHP), Coal Handling Plant (CHP) and Balance of Plant (BOP) markets. It was also active in a big way in material Handling Equipments (MHE). It is informants own case that order book of OP consisted primarily by BOP, AHP, CHP and MHE orders, from thermal power plants and Cement Industry. WHR a recent technological development, was admittedly not a big component of its orders. The WHR projects take long time in completion and commission. One can be said a successful player only if it has successfully completed and commissioned some projects. Thus it cannot be said that OP was dominant in the WHR plants market.

14. Presuming that OP was a dominant player, let us see if it resorted to predatory pricing as alleged. As per the informant, OP has been continuously winning orders from cement companies since 2011, the latest being in June 2012, by quoting low prices as compared to the Informant. It is alleged that prices quoted by OP were predatory prices and had the effect of driving out existing competitors of the market.

15. The Act was enacted with the intention to promote and sustain competition, to protect the interests of consumers and to ensure freedom of trade carried on by other participant in markets, in India, but the same does not envisage the protection of any competitor from losing due to stiff competition in the market.

16. It is submitted by the informant that in a WHRPP, the cost of components like Steam Turbine Generator, MCC and control panels, wall mountings and instruments and cost of activities like ducting, piping, civil and structural works, erection and installation was 55% to 60% of the total project cost. This cost remains the same for all EPC bidders and does not significantly change with the design of WHRPP. The technical consultants of the cement plants ensure that the bids match all the tender specifications including engineering specifications and quality standards. Thus there cannot



be wide variance in quantities or specifications or the costs involved. In case of OP, since the supplies were to come from China, the transport cost would have been more. The administrative cost could also be computed based on industry standards and had to be comparable. The cost accounting standards established in project engineering industries are expected to be followed meticulously by the bidders. This being the case, the overall project cost cannot be significantly low for one specific bidder. Therefore, an abnormal low price bid by the OP would only mean that the price quoted was unfair price with a motive of driving out an equally efficient competitor.

17. It is submitted that the informant conducted its business operations of WHR projects at customer site based on customer specifications. Therefore, informant used to quote the price of its product on full cost absorption basis by building specific costs and overheads specific to the project requirements. The process of costing and pricing of a WHRPP was different from the normal costing and pricing of mass produced goods/services. Therefore, the normal pricing methods given in the regulations of the Competition Commission would not be applicable and the concept of variable cost for determining predatory pricing as mentioned in the regulations for determination of cost of production framed by CCI would not be relevant. The costing in case of WHR projects has to be activity based costing where under identification of intermediate cost objects are accumulated and estimation of cost is done under suitable cost elements for these activities /services. The informant referred to the guiding standards laid down by Institute of Costs Accountants of India for estimating the costs in customer specific projects.

18. The informant has also drawn the attention of the Commission to the method of costing as laid down in book titled "Project Management" by Harold Kerzner. A perusal of the costing model provided in this work of the Author shows that the Author visualised that in the pricing and estimating there was a possibility of a wide variation and one has to live with the low accuracy in such costing. The Author writes that the project pricing (para 15.8 – page 581) was often based upon best guesses rather than



concrete estimates and the cost of bid may vary between \$50,000 to \$ 5,00,000. The author while dealing with the costing under different heads has given the accuracy level. The accuracy level of different costing varies between  $\pm 35\%$ .

19. In the additional submissions filed by the informant, informant has given comparative bid price of various competitors for WHR PP projects staring from March, 2011. The tables are reproduced here under:-

**Unfair pricing by Tecpro Systems Ltd. in Comparison with Other Bidders.**

**A) Shree Cement Ltd. Ras, Rajasthan – March 2011**

| Sr. No. | Name of Bidders                      | Prices (Lacs)                                    |
|---------|--------------------------------------|--|
| 1.      | Tecpro Systems Ltd.                  | INR 2080=00                                      |
| 2.      | Transparent Energy Systems Pvt. Ltd. | INR 2250=00                                      |
| 3.      | Cethar Vessels                       | INR 2375=00                                      |
| 4.      | Dalian East                          | “***” Prices were higher than Transparent Energy |

**Note:** “\*\*\*” Not selected for final round commercial discussions

**B) Siddhi Vinayak Cement Pvt. Ltd., Ahmedabad – March, 2012**

| Sr.No. | Name of Bidders                      | Prices (Lacs)                                    |
|--------|--------------------------------------|--|
| 1.     | Tecpro Systems Ltd.                  | INR 3950=00                                      |
| 2.     | Transparent Energy Systems Pvt. Ltd. | INR 4350=00                                      |
| 3.     | Thermax Ltd.                         | INR 5300=00                                      |
| 4.     | Thyssen Krupp                        | INR 7800=00                                      |
| 5.     | Sinoma International                 | “***” Prices were higher than Transparent Energy |
| 6.     | FL Smith                             | “***” Prices were higher than Transparent Energy |
| 7.     | Cethar Vessels                       | “***” Prices were higher than Transparent Energy |

**Note:** “\*\*\*” Not selected for final round commercial discussions.

**C) Ambuja Cement Ltd. Ras, Rajasthan – December, 2012**

| Sr.No. | Name of Bidders                      | Prices (Lacs) |
|--------|--------------------------------------|---------------|
| 1.     | Tecpro Systems Ltd.                  | INR 6050=00   |
| 2.     | Transparent Energy Systems Pvt. Ltd. | INR 6900=00   |



|    |                      |  |
|----|----------------------|--|
| 3. | Sinoma International | INR 7200=00                                      |
| 4. | Thermax Ltd.         | INR 7500=00                                      |
| 5. | FL Smith             | “***” Prices were higher than Transparent Energy |
| 6. | Dalian East          | “***” Prices were higher than Transparent Energy |

Note: “\*\*\*” Not selected for final round commercial discussions

**D) Dalmia Cement Ltd., February 2013**

| Sr.No. | Name of Bidders                      | Prices (Lacs)                                    |
|--------|--------------------------------------|--|
| 1.     | Tecpro Systems Ltd.                  | INR 7200=00                                      |
| 2.     | Transparent Energy Systems Pvt. Ltd. | INR 9540=00                                      |
| 3.     | Cethar Vessels                       | INR 9700=00                                      |
| 4.     | Sinoma International                 | “***” Prices were higher than Transparent Energy |
| 5.     | Thermax Ltd.                         | “***” Prices were higher than Transparent Energy |
| 6.     | FL Smith                             | “***” Prices were higher than Transparent Energy |
| 7.     | Dalian East                          | “***” Prices were higher than Transparent Energy |

Note: “\*\*\*” Not selected for final round commercial discussions

20. The argument of the informant that pricing for WHR PP is done on the basis of material/service cost plus administrative charges according to the industry standards and almost every party would have same material costs and there cannot be much difference in bids quoted by parties fails in view of this comparative chart for different WHRPP projects. The bid price quoted by Thyssen Krupp in (B) is almost double of the price quoted by OP. Chart shows a wide range of difference in bid price of different bidders. The difference is from 10% to 100%. This also shows that every company has its own pricing techniques and there is no standard pricing method normally applied by the companies for giving bids even for customer specific engineering projects.

21. Predatory pricing cannot be assessed on the basis of estimated cost projected in the information given by the informant. The informant though had executed similar kind of projects for more than five years, but has not disclosed actual cost of a project executed by it and the projected costs on



which it got the contracts so as to give to the Commission the actual data about the variance between the bid price and the actual price and the extent of profit margins.

22. Under section 4 (b) 'explanation', predatory price is defined as under:-  
“predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulation, of production of the goods or provisions of services, with a view to reduce competition or eliminate the competitors.”

23. In order to find out whether the opposite party resorted to the predatory pricing, the Commission has to give a finding that the prices of the goods or services of the OP were at a very low level with the object of driving out competitors from the market, who due to low pricing would be unable to compete at that price. In predatory pricing, there is always a significant planning to recover the losses if any after the market rises again and the competitors have already been forced out. It is considered that only a dominant company in such a market may have inclination and resources to finance such a strategy.

24. This definition makes it clear that the predatory pricing is based on actual figures and not projected figures. May be the informant was not having access to its competitors actual costs but definitely the informant was in possession of its own actual pricing figures for already executed projects which the informant did not think it proper to share with the Commission. Had the applicant supported its plea with actual costs in respect of completed projects of its own, the Competition Commission would have had a fair view of what were the costs involved, what was the level of profit and what would have been the cost of a WHRPP project. The Commission cannot consider the quotations given by another bidder predatory simply because the bidder continuously got contracts for five projects. Moreover, all these projects are long time projects and the projects are not like fast moving consumer goods that the OP would be able to recover the losses made today from the future goods. According to informant, hardly there were 4-5 projects in a year throughout



India and there were other competitors in this area. The chart filed by the applicant shows that at least there were seven competitors.

25. We, therefore, consider that the arguments raised by the applicant that the prices quoted by the OP were unfair or predatory has no force.

26. We consider that it was not a case of predatory pricing but it seems to be a case of competitive bidding given by the competitor of the applicant. It is a fit case to be closed under section 26(2) of the Act and the same is hereby closed.

27. The Secretary is directed to inform the parties accordingly.

New Delhi

Dated: 11/06/2013

Sd/-  
(Ashok Chawla)  
Chairperson

Sd/-  
(Dr. Geeta Gouri)  
Member

Sd/-  
(Anurag Goel)  
Member

Sd/-  
(M. L. Tayal)  
Member

Sd/-  
(Justice {retd.} S. N. Dhingra)  
Member

Sd/-  
(S.L. Bunker)  
Member