



सत्यमेव जयते



Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 13 of 2020

In Re:

**Sandeep Mishra,
57, Ajanta Apartment
36, I.P. Extension, Patparganj
Delhi 110092**

Informant

And

**National highways authority of India
Sector 10, Dwarka
New Delhi-110075**

Opposite Party

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 present Information has been filed under Section 19(1)(a) of the Competition Act, 2002 (“Act”) by Mr. Sandeep Mishra (hereinafter, the “**Informant**”) against National Highways Authority of India (hereinafter, the “**Opposite Party/ NHAI**”) alleging *inter alia* contravention of the provisions of Section 4 of the Act.



2. As per the Informant, the Opposite Party is a Department of the Government of India under Ministry of Road Transport and Highways (hereinafter, the “**MoRTH**”). The Informant has alleged that the sub-criteria for relevant experience being prescribed by the Opposite Party in its Request for Proposal (RFP) for engaging consultants, is different from the criteria followed by Ministry of Road Transport and Highways/ National Highways and Infrastructure Development Corporation Ltd. Based on this, the Informant has averred that the Opposite Party is following monopolistic and restrictive trade practice resulting in abuse of dominant position in the market. The Informant has prayed the Commission to initiate an inquiry under the Act.
3. The Commission considered the matter in its ordinary meeting held on 22.04.2020 and noted that the allegations in the Information relate to prescription of specific eligibility criteria in the tender documents for engagement of consultants by the Opposite Party. Before examining the matter any further, the Commission deemed it appropriate to seek the comments of the Opposite Party thereon along with details/ number of bidders who had qualified pursuant to the specified eligibility criteria in the concerned tender(s). The reply of the Opposite Party was received on 08.06.2020.
4. NHAI in its response submitted that the aforementioned information pertains to RFP for engagement of Authority Engineer and it follows the standard RFP document issued by MoRTH for the same. Further, depending upon the nature of works under consideration, project specific changes may also be incorporated in the RFP which is also in accordance with MoRTH standard RFP. NHAI has further submitted that there is no deviation in experience requirement between the RFP adopted by NHAI and the standard RFP document issued by MoRTH. NHAI also submitted that that there are about 60 consultants working with NHAI.



5. The Commission has carefully perused the Information, response submitted by the Opposite Party and the other material available on record. The Information essentially relates to the alleged infraction of the provisions of Section 4 of the Act by the Opposite Party as the relevant experience prescribed by it in its said RFP documents is alleged to be not in compliance with the standard RFP document of Ministry of Road Transport and Highways (MoRTH)/ National Highways & Infrastructure Development Corporation Ltd. (NHIDCL).
6. Before examining the alleged conduct, the Commission considered whether the Opposite Party falls within the purview of the Act for the purposes of Section 4 thereof *i.e.* whether NHAI is an 'enterprise' within the meaning of Section 2(h) of the Act. It is noted from the information available in the public domain that NHAI is engaged in economic activities like development, maintenance and management of national highways, collecting fee on national highways, providing consultancy and construction services in India and abroad, *etc.* NHAI is not performing any sovereign functions and therefore, the Commission holds the Opposite Party to be covered within the definition of 'enterprise' in terms of Section 2(h) of the Act.
7. For analysing the allegations in terms of 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 Opposite Party is alleged to be dominant. Be that as it may, as NHAI is the procurer, by assessing *inter alia* the availability of substitutes for suppliers and their ability to switch to alternative sales opportunities both in terms of products as well as geographies, the relevant product market in the present case may be delineated as "*Market for procurement of highway engineering consultancy services*". With regard to the relevant geographic market, the Commission



observes that in the instant case the suppliers of highway engineering consultancy services 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 highway engineering consultancy services in the Territory of India*”.

8. After delineating the relevant market, the next step is to assess the dominance of the Opposite Party in the relevant market. The Informant has not placed any information on record to establish that Opposite Party holds a dominant position in any relevant market. Further, the information available in public domain is also not sufficient to indicate dominance of the Opposite Party as a procurer in the relevant market, as defined *supra*. However, looking at the role and presence of NHAI, it cannot be denied that it is a key player in the relevant market.
9. As such, the Commission deems it appropriate to examine the issues on merits as well. In this regard, it is observed that the instant matter relates to prescription of specific eligibility criteria for engagement of highway engineering consultancy services by NHAI. In relation to prescription of specific conditions in a tender, the Commission has held on numerous occasions that it is the prerogative of the procurer to decide the tender conditions/technical specifications/conditions/clauses in the tender document as per its requirements. Specifically, the Commission, in *Suntec Energy Systems And National Dairy Development Board and Another*, Case No. 69 of 2016 decided on 10th November, 2016, while dealing with the allegation that a tender condition resulted into making only one manufacturer a preferred supplier, observed as under:



“a procurer, as a consumer, can stipulate certain technical specifications/ conditions/ clauses in the tender document as per its requirements which by themselves cannot be deemed anticompetitive. It may be noted that the party floating the tender is a consumer and it has the right to decide on the appropriate eligibility conditions based on its requirements. The Commission also observes that in a market economy, consumers’ choice is considered as sacrosanct and in such an economy, a consumer must be allowed to exercise its choice freely while purchasing goods and services in the market. It is expected that a consumer can decide what is the best for it and will exercise its choice in a manner which would maximise its utility that is derived from the consumption of a good/ service.”

10. Thus, the Commission has acknowledged the prerogative of the procurer/buyer to decide the tender conditions/technical specifications/ clauses in the tender document as per its requirements. Needless to add, such discretion of procurers would yield to the discipline of the Act if tender documents framed by dominant player contain terms and conditions which are demonstrably unfair/ discriminatory. Based on the information provided by the Informant and otherwise available in public domain, the prescription of eligibility criteria in the present matter, does not appear to be unfair/discriminatory. Any service provider with the prescribed certification is eligible to participate in the tender.
11. In view of the above, the Commission is of the view that no case is made out against the Opposite Party for contravention of the provisions of Section 4 of the Act and the Information is ordered to be closed forthwith in terms of the provisions contained in Section 26 (2) of the Act.



12. The Secretary is directed to communicate the order to the parties, accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi
Date: 08/07/2020