



COMPETITION COMMISSION OF INDIA

Case No. 51 of 2020

In Re:

**Mr. M. L. Ravi, Advocate
No. 2, Venkatraman Street, Mint,
Chennai- 600079
Tamil Nadu**

Informant

And

**The Superintending Engineer,
Construction and Maintenance,
Highways Department
TVS Tollgate,
Tiruchirappalli – 620020
Tamil Nadu**

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 is filed by Mr. M. L. Ravi (hereinafter, “**Informant**”) under Section 19(1) (a) of the Competition Act, 2002 (hereinafter, the “**Act**”) against the Superintending Engineer, Construction and Maintenance, Highways Department, Trichy circle of the State of Tamil Nadu (hereinafter, “**OP**”) alleging contravention of provisions of the Act.



2. The Informant is stated to be an Advocate practising in the Hon'ble High Court of Madras and a public-spirited person.
3. As per publicly available information¹, OP is a government department, established to maintain and improve roads under the control of the Government of Tamil Nadu. The vision of the OP is to increase capacity, connectivity, efficiency and safety of the highways system so as to enable balanced socio-economic development of all sections of people and regions of the State of Tamil Nadu.
4. The Informant has claimed that the OP is slowly changing its general contract system from 'input-based' to 'output-based or performance-based' as a lot of demerits were being detected in the former system. The Informant avers that in the 'output-based' contract, the requirements of a project are defined broadly and the contractor comes up with his own technique to complete the project which satisfies the specification requirements. As per the Informant, though output/performance-based contract system for roads is designed to increase efficiency and effectiveness of road asset management and maintenance, yet such system purportedly does not contemplate major works like widening of long stretches, construction of major bridges and flyovers *etc.*
5. The Informant states that the OP is following the practice of grouping many works for issuing tenders, since 2012, despite agitations by small contractors. It is stated in the information that as per the OP, grouping of packages helps in the emergence of contractors with capability of executing big ticket projects that entail latest construction technology and management. However, the Informant has alleged that no such development has taken place and the system is allowing certain contractors to occupy domineering positions and reduce competition. It is further alleged that the OP does not follow any fixed procedure/norm for grouping various works and purportedly OP's only object is to reduce competition.
6. The Informant has submitted that the OP invited tenders for the following works:
'Initial Rectification including Widening, Strengthening and Improvements and

¹ <https://www.tnhighways.gov.in/index.php/en/>



Performance Based Maintenance Contract for a period of 60 months in State Highways and Major District Roads for a length of 462.211 KMs in Thanjavur, Orathanadu , Pattukottai and Peravoorani [Phase I] Sub-divisions of Thanjavur (H) C&M Division' (hereinafter, '**February 2020 Tender**') and '*Initial Rectification including Widening, Strengthening and Improvements and Performance Based Maintenance Contract for a period of 60 months in State Highways and Major District Roads for a length of 371.447 KMs in Kumbakonam, Thiruvidadaimaruthur, Papanasam and Thiruvaiyaru [Phase II] Sub-divisions of Thanjavur (H) C&M Division'* (hereinafter, '**March 2020 Tender**'). These works were estimated for ₹1947.24 crores as it envisaged all major developments of the network of roads comprising State Highways ('**SHs**') and Major District Roads ('**MDRs**') in Thanjavur Division. The Informant has further stated that the title/name of works of the February 2020 Tender (project of development of roads in Thanjavur, Orathanadu, Pattukottai and Peravoorani Sub-divisions of Thanjavur) was allegedly changed and retendered in June 2020 which could not materialise and, thus, bids were invited again through two separate tenders, *i.e.* Tender Notice No. 27/20-21/HDO dated 12.10.2020 (hereinafter, '**Impugned Tender 1**') and Tender Notice No. 28/20-21/HDO dated 13.10.2020 (hereinafter, '**Impugned Tender 2**') (collectively referred to as '**Impugned Tenders**').

7. The Informant has alleged that the OP imposed unfair conditions in the Impugned Tenders, which made it difficult for small contractors to participate in the same. The Informant has, *inter alia*, alleged the following to be unfair:
- a) The OP awarded tenders at the rates estimated by the tender inviting authority or at a premium, which inflated the project costs.
 - b) The OP ought to have invited national-level competitive bidding but instead restricted participation to only financially sound and technically capable contractors.
 - c) Though the tender was invited through online only mode, yet the tender conditions stipulated that the Earnest Money Deposit (**EMD**) and the relevant



documents should reach the office of the tender inviting authority on the specified date and time else the tender will be rejected, which as per the Informant is a condition unheard for online tenders.

- d) One of the pre-qualification criteria stipulated that the bidder should own as much as 78 machineries and in respect of the same, produce a working condition certificate from the concerned Divisional Engineer (H), Quality Control. As per the Informant, such a condition was difficult to comply with as it was difficult to gather all machines at one place and check their working condition in a month's time. The Informant averred that the Divisional Engineer (H)- Quality Control was not qualified to certify about the working condition of such heavy machineries.
- e) Estimates in the Impugned Tenders were inflated to discourage fair competition. Moreover, there was no rationale behind fixing maintenance for five years which, as per the Informant, was a way to award contract for large sums and keep many contractors off from the Impugned Tenders. The Informant further alleged that a lump sum quantity was estimated for emergency works which is to reinstate a structure or right of way where damage occurs as a result of a natural disaster and the quantity could be estimated only after the damage is caused by natural disaster and not otherwise.
- f) Similar works were being executed under different programmes which led to the emergence of a few dominant contractors which would make cartelisation easier. The OP has failed to ensure fair competition and invited tenders prone to rigging.
- g) The same contractor bagged all previous tenders except one which should have been scrutinised.
- h) The OP is at liberty to fix longer period for submission of tenders, though minimum period for submission of tenders is 30 days as provided under the Tamil Nadu Transparency in Tender Rules, 2000 (hereinafter, '**T. N. Tender Rules**'),



which is allegedly to limit the participants. The Ministry of Road Transport and Highways provided 45 days' time for a tender of value ₹319.20 crores and ₹281.73 crores in its tender floated on 05.11.2020 in respect of its work in Jaipur.

- i) The OP should have opted for national competitive bidding but failed to do so and required registration of the contractor with the Tamil Nadu Highways Department.
8. The Informant has also requested for interim relief by way of granting a stay on finalisation of bids invited through Impugned Tenders till the Commission completes its inquiry.
 9. In view of his above assertions, the Informant prayed for detailed investigation into the anti-competitive bid conditions and cancellation of the Impugned Tenders with a direction to the OP to design the tenders in a competition-efficient manner.
 10. The Commission considered the information in its ordinary meeting held on 13.01.2021 and decided to obtain the response of the OP on the information along with other information pertaining to the Impugned Tenders.
 11. The OP filed its response dated 26.02.2021 to the information along with the requisite information and denied all the Informant's allegations and based its submissions on three aspects; *firstly*, on Performance-Based Maintenance Contract ('PBMC') system and its relevance in the context of development SHs and MDRs; *secondly*, background and status of Impugned Tenders and *thirdly*, on the alleged unfair conditions imposed in the Impugned Tenders.
 12. With respect to contracts being invited under PBMC system, the OP submitted that the upkeep and maintenance of State roads is under control of 41 Divisions of Tamil Nadu and considering the relative priority, funds are allocated to the Divisions which vary between ₹ 75-₹100 crores annually, both for original works and maintenance. Besides annual maintenance and repairs, such funds are used for priority and exigencies in selected identified stretches of roads. The OP further pointed out that due to increase



in vehicular population in Tamil Nadu, capacity restraints were felt in roads which were hard to improve due to budgetary constraints, resulting in distressed roads causing longer travel time and higher operating costs and unqualifiable loss.

13. Considering the findings of a study by the World Bank showing reduction in maintenance cost by 30-50% as a result of contracting out road maintenance to private sector under PBMC system and with an objective of enhancing the service level of road infrastructure by pooling of resources over a period of time to improve the condition of SHs and MDRs, a policy decision was taken by the State Government to improve SHs and MDRs in a comprehensive manner. Thus, Tamil Nadu Legislative Assembly in 2011-12 announced PBMC system on a pilot basis which was to be extended throughout Tamil Nadu in a phased manner. The OP further stated that the Other District Roads (**ODRs**) were not covered under PBMC, so the funds allotted every year could be exclusively used for development of ODRs.
14. The OP submitted that under PBMC system , the strategy of comprehensive integrated improvement and maintenance of all SHs and MDRs, stretches over a period of five years and covers the following items of work in the scope of contract: (a) Strengthening/improving the existing pavement, widening of SHs and MDRs in needed stretches, reconstruction/widening of cross drainage structures, providing drain cum footpath, centre median, retaining/breast walls wherever necessary, (b) Providing road furniture, avenue plantation, emergency component works *etc.* (c) Periodic renewal and maintenance *etc.*
15. The OP also asserted that the payment to contractor is made after checking the execution quality with designated quality indicators like surface roughness value, patch free maintenance, shoulder maintenance execution and this system also provides for reduction in payment for non-maintenance as per the levels prescribed in the agreement/contract.
16. The OP further averred that PBMC was first introduced in Pollachi Division in 2012-13 and the work was successfully completed. Similarly, PBMCs for Krishnagiri,



Ramnad and Thiruvallur Division were implemented in 2015-16 and the work, at present is in progress.

17. In respect of Impugned Tenders, the OP submitted that the announcement of PBMC for Thanjavur Division, which was made in Tamil Nadu Assembly in FY 2019-20 led to invitation of February 2020 Tender (Phase I) and March 2020 Tender (Phase II). The March 2020 Tender, which was invited for **Phase II**, was awarded on 01.09.2020 and the work is in progress. The February 2020 Tender, which was invited for **Phase I**, could not be put to execution due to nil response and was, thus, cancelled. The Tender for Phase I was called again *vide* Tender No. 17/2020-21/HDO dated 09.06.2020, in which three bidders participated, however, the quoted value was above the estimated value and despite multiple efforts, the rate could not be negotiated downwards and the tender was ultimately cancelled on 17.09.2020.
18. The OP re-evaluated the work to be done under Phase I and bifurcated the proposal into two considering areas instead of zones, with revised nomenclature about the scope of work to avoid any ambiguity from the perspective of general public: (a) **Proposal I.A** for development of 208.334 km length of road in Thanjavur and Orathanadu, and (b) **Proposal I.B** for development of 253.877 km length of road in Pattukotta and Peeravoorani. The Impugned Tenders were invited in October 2020 for Proposal I.A and Proposal I.B, respectively. The Tender for Proposal I.A, *i.e.* Impugned Tender 1 was awarded, however, Tender for Proposal I.B, *i.e.* Impugned Tender 2 could not be awarded due to the lowest bidder refusing to reduce its quote. The Tender for Proposal I.B was invited again in December 2020 and the contract was awarded, accordingly.
19. With regard to the alleged unfair condition of submitting original documents along with uploading of documents online, the OP stated that it is important to ensure /verify genuineness of the bid security/EMD. Moreover, as per Rule 18 of the T.N. Tender Rules, the copy of uploaded documents along with the original EMD can also be sent to the Tender inviting authority through speed post. The OP further stated that till date there were no complaints of non-receipt of original EMD/copy of tender documents *etc.*, from the intending contractors for the Tenders invited for Phase I and Phase II.



20. The OP further stated that the working condition certificate is required to ensure availability of requisite machineries in working condition with the intending contractor, failing which the project implementation may get delayed, leading to time and cost overrun. Hence, the requirement of inspection and certification of such machineries is crucial by the Divisional Engineer(H) Quality Control. The OP further stated that it has not received any complaint with regard to request for working condition certificate being denied by the Divisional Engineer regarding Thanjavur PBMC projects. Further, in regard to the time period given for the submission of bids, the OP submitted that it has complied with the requirement of providing minimum 30 days as stipulated under the T. N. Tender Rules.
21. Besides the above, the OP submitted that all the tenders invited for development of roads in the Thanjavur Division were widely publicised by publishing the same in English and vernacular dailies and were also placed on the website of Tamil Nadu e-procurement system to facilitate participation by interested bidders.
22. The Commission considered the information and the aforesaid response of the OP in its ordinary meeting held on 17.03.2021 and has given a careful consideration to all the material available on record. The Commission notes that the Informant has not charged the OP of having violated any specific provisions of the Act. The allegations levelled by the Informant against the OP relate to imposition of unfair terms in the tender conditions issued by it for carrying out development of SHs and MDRs in the Thanjavur Division. Accordingly, the Commission has proceeded to examine the aforesaid allegations under provisions of Section 4 of the Act.
23. To attract the rigours of Section 4, it first needs to be seen that whether the entity against whom the allegations are made is covered within the term 'enterprise' as defined under Section 2(h) of the Act. In the present case, the OP is a government department under the Highway Department of the State of Tamil Nadu, which is carrying out activities such as to develop, maintain, improve, expand and carry other related works of SHs, MDRs and ODRs.



24. The erstwhile Hon'ble Competition Appellate Tribunal (hereinafter, '**the Hon'ble Tribunal**') in the case titled *Shri Rajat Verma v. Public Works (B&R) Department and others* has held that the Public Works Department, Government of Haryana fell within the definition of the term 'enterprise' under Section 2(h) of the Act, as it is engaged in the activity of construction or repair which is covered under Section 2(h) of the Act, and whether such activity is undertaken with a view to earn profit or not is not the concern of the Act. The Hon'ble Tribunal was of the view that by inviting tenders the department (PWD Haryana) interfaces with the wide market of road and bridge construction services in the State and cannot escape inclusion in the term '*enterprise*'. In terms of the aforesaid principle laid down by the Hon'ble Tribunal, the Commission observes that the OP being a department engaged in the activity of developing and maintaining roads in the State of Tamil Nadu, also invites tenders for carrying out various activities entrusted to it, and thus, interfaces with the market of construction of roads in the state. Accordingly, the Commission observes that the OP falls within the ambit of the term '*enterprise*' under Section 2(h) of the Act.
25. The next step is determination of relevant market in terms of Section 2(r) of the Act and assess dominance of the OP though the Informant has not delineated any relevant market. Without going into this aspect in great detail, it can be presumed from the publicly available information that the OP appears to hold a significant position in the construction, upkeep/maintenance *etc.* of roads in the State of Tamil Nadu. However, the Commission, in the facts and circumstances of the present case, observes that it may not be germane to define a precise relevant market in the instant matter and that even if it is assumed that the OP is dominant in a given relevant market, it needs to be seen whether the OP's conduct has led to any abuse.
26. The Commission notes that the concern of the Informant is primarily with respect to two aspects: (a) use of PBMC system for large projects resulting into lessening of competition, as only few selected entities are eligible to participate to the exclusion of small players, and (b) unfair conditions in Impugned Tenders.
27. With regard to introduction of PBMC for development of SHs and MDRs, the Commission notes the submission of the OP that it is a policy decision taken by the



Government of the Tamil Nadu based on the announcement in the Legislative Assembly in FY 2019-20, keeping in view the objective of need for development of road infrastructure, success of PBMC system in upkeep of roads and budgetary constraints faced by the Government. The Commission also notes that introduction of PBMC is expected to yield benefits to the public at large in terms of reduced travel time, lower vehicle operation cost *etc.*, besides efficient use of financial resources of the State.

28. The Commission further notes from the written submissions of the OP that sufficient bids were received in respect of the tenders for the Thanjavur Division in the year 2019-20 and 2020-21, which pursuant to evaluation were awarded at negotiated rates to different entities, *viz. KCP Engineers, R.R. Infraa Construction and JSV Infra*, for Phase II, Proposal I.A of Phase I and Proposal I.B of Phase I, thereby indicating that the process was competitive. This, thus negates the averments of the Informant that the tenders under PBMC system would benefit only one/ few entities.
29. The Commission, having gone through the submissions of the OP with respect to conditions such as time stipulated for submission of tenders, insistence on hard copy along with online bid submission, requirement of working condition certificate from the competent authority, registration with the Tamil Nadu Highways Department *etc.*, notes that the allegations of abuse are not made out against the OP.
30. The Commission, in this regard, notes that normally a procurer has the choice to procure goods and services as per its needs and requirements. The case at hand pertains to alleged use of PBMC system by the OP in inviting tender for development of road infrastructure for various divisions in general and Thanjavur Division in particular, which has purportedly resulted in lessening of competition to the exclusion of small players/contractors. The Commission further notes that in a given case the procurer/consumer, based on its requirement and other commercial considerations, has the freedom to specify the kind of service, machineries, time lines, mode and the manner in which it requires the same; and the same cannot be dictated to the procurer. However, regard may be given to the fact that it should not result in violation of express provisions of the Act. Any public procurement mechanism adopted should yield best



possible and efficient outcome, not just from the procurer's perspective, but it should also strive to greater public good by allowing maximum participation from entities to ensure competition. The procurement process should be intended with an inclusionary approach (wider participation) rather than an exclusionary approach (eliminating competition) subject, however, to the holistic requirements that the procurement system strives to achieve larger common good. The Commission, has earlier also, acknowledged the consumers' freedom to choose in Case No. 03/2010 titled *Pandrol Rahee v. DMRC* that:

“A consumer must be allowed to exercise its consumer choice and freely select between competing products or services. This right of consumer's choice must be sacrosanct in a market economy because it is expected that a consumer would decide what is best for it and free exercise of consumer choice would maximize the utility of the product or service for the consumer. For an individual, that consumer's choice is based on personal assessment of competing products or services, their relative price or personal preferences. For any other type of consumer, this process of decision making in exercise of consumer's choice is more structured and reflected in procurement procedures. Such a consumer may use experts or consultants to advise, do its own technical assessment, take advice of others it may trust or even purchase from known and reliable sources. The process of such decision making may result in purchase by nomination or limited tender or open tender. Normally, open tenders without a brand bias are desirable as it may give the best value for money. However, each of the purchase process is acceptable and valid as a process of decision making. The consumer is the best judge. In case of public entities, the entity is a representative consumer on behalf of the public. There are administrative mechanisms in place for carrying on the due process of exercising consumer's choice on behalf of the public.” (emphasis supplied)

31. Based on the discussion above, the Commission, in the present case, has no reason to interfere with the process adopted by the OP. Further, the Commission is satisfied with



the submissions of the OP that the implementation of PBMC system is a policy decision mandated by the Government of Tamil Nadu, based on deliberation in the Legislative Assembly and also the implementation of PBMC system has been successful in the State of Tamil Nadu.

32. In the facts and circumstances of the present case, the Commission finds that no *prima facie* case of contravention of the provisions of Section 4 of the Act is made out against the OP in the instant matter. Accordingly, the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act. Consequently, no case for grant for relief(s) as sought under Section 33 of the Act arises and the same is also rejected.
33. The Secretary is directed to communicate to the Informant and the OP, accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi
Dated: 08/ 04 /2021