



COMPETITION COMMISSION OF INDIA

Case No. 61 of 2017

In Re:

Shri Vijay Menon

Informant

And

Maharashtra State Power Generation Company Ltd.

Opposite Party

CORAM

**Mr. S. L. Bunker
Member**

**Mr. Sudhir Mital
Member**

**Mr. U. C. Nahta
Member**

**Mr. Justice G. P. Mittal
Member**

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

1. The present information has been filed by Shri Vijay Menon ('the Informant') under Section 19(1)(a) of the Competition Act, 2002 ('the Act') against Maharashtra State Power Generation Company Ltd. ('the Opposite Party'/ OP /MAHAGENCO), alleging *inter alia* contravention of the provisions of Section 4 of the Act.
2. The Informant is Chief Executive Officer of Nair Coal Services Pvt. Ltd. which is engaged in coal liasoning business. MAHAGENCO is a public



undertaking engaged in the business of power generation and supply in the State of Maharashtra.

3. It is stated in the information that coal liaisoning services are used by thermal power stations in both public and private sectors. The requirement of power in the State of Maharashtra is 16800 Mega Watts (MW) which is met by both the public and private power generation companies. MAHAGENCO is the only public undertaking responsible for power generation in the State of Maharashtra.
4. It is averred that as the share of MAHAGENCO in power generation is more than 60%, it engages the services of coal liaisoning agents higher than those engaged by private companies.
5. It is stated that MAHAGENCO being a public undertaking enjoys a position of strength in the market of power generation as it operates independently of other competitive forces prevailing in the relevant market.
6. It has been pointed out that in the month of September 2017, MAHAGENCO floated a tender bearing Tender No. MAHAGENCO /CE(FMC) /MUM /COAL /SMC/2017/T-01/49658 for appointment of supervision, monitoring and coordination agency for the work of supervision of rake movement, coal quality monitoring and loading of quality coal and movement of sized coal for various thermal power stations of MAHAGENCO by rail mode from coal companies. The tender conditions provide for qualification criteria for the bidders who intend to take part in the tender process.
7. The Informant is aggrieved by the condition incorporated in Clause 1) (iii) (c) of Section- 1 of tender document which deals with instructions for the bidders. The same is noted below alongwith the grammatical constructions used therein:



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No any proceeding before Competition Commission of India relating to information lodged against bidder or his consortium member either alleging entered in past into anti-competitive agreement including cartels and other anti-competitive activities covered by section 3 of Competition Act 2002 and relating to abuse of dominant position shall have pending and shall not penalized in past or present for the above such activities by any order of CCI or by competent court of law.

8. The Informant has alleged that such condition is in violation of the object of the Act and the same is nothing but a result of abuse of dominant position.
9. It is further stated that a public undertaking such as MAHAGENCO is not expected to venture in such activity whereby it limits the market access to the bidders who are otherwise qualified to take part in the tender process. Such practice is further described as unhealthy to the survival of fair competition.
10. It is also brought on record that Nair Coal Services Pvt. Ltd. had forwarded a complaint to CCI on 23.08.2017 and 06.09.2017 *vide* e-mail with respect to the grievance cited *supra*. However, CCI *vide* its letter dated 03.10.2017 suggested the complainant to file information under Section 19 of the Act.
11. Based on the above averments and allegations, the Informant has alleged contravention of the provisions of Section 4 of the Act and sought an inquiry by the Director General into the matter.
12. The Commission has perused the information and the documents filed therewith.
13. The gravamen of the information filed by the Informant emanates out of the qualifying requirement put by MAHAGENCO in its tender floated in the month of September 2017 for appointment of supervision, monitoring and



coordination agency for the work of supervision of rake movement, coal quality monitoring and loading of quality coal and movement of sized coal for various thermal power stations of MAHAGENCO by rail mode from coal companies.

14. The impugned condition, as excerpted earlier, *inter alia* seeks to disqualify bidders against whom an inquiry is *pending* before the Commission or who have been already penalised. The Informant has stated that such condition is illegal, baseless and against the spirit of the Act as it seeks to disqualify an otherwise qualified bidder merely because an inquiry is pending before the Commission. It has been also argued that such condition is in the nature of barrier to entry and hence, a major restraint on the dynamics of competition.
15. On a careful perusal of the information and the documents filed therewith, the Commission is of the opinion that the issue projected in the information is purely administrative in nature as the procurer, being a consumer, retains the discretion to disqualify the bidders as per the experience gained and the exigency of the requirement. No competition issue is revealed from the facts alleged in the information.
16. The Commission is of the considered opinion that a consumer/ procurer must be allowed to exercise choice and to frame the terms and conditions of the tender documents so as to best secure an optimal outcome. 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 prices or personal preferences. For any other type of consumer, this process of decision making in exercise of consumers choice is more structured and reflected in the 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



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even purchase from known and reliable sources. Each of the purchase process is acceptable and valid so long as it does not restrict market entry and allows vendors to freely compete in the procurement process. In case of public entities, there are administrative mechanisms in place for carrying on the due process of exercising consumer's choice on behalf of the public. Of course, there could be competition concerns in rare cases where a monopoly buyer exercises the option in an anti-competitive manner but the present case does not appear to be in that category.

17. In view of the above, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against the Opposite Party and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.
18. The Secretary is directed to communicate to the Informant, accordingly.

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(U. C. Nahta)
Member

Sd/-
(Justice G. P. Mittal)
Member

New Delhi
Date: 30/11/2017