

COMPETITION COMMISSION OF INDIA

Case No 54/2010

Date: 24.11.2010

CSR Nanjing Puzhen Co. Ltd.

Informant

Versus

1. Kolkata Metro Rail Corporation Ltd.
2. Union of India through Secretary Ministry of Urban Development

Opposite Parties

ORDER UNDER SECTION 26(2) OF THE COMPETITION ACT, 2002

The present information has been filed under section 19 of the Competition Act, by CSR NANJING PUZHEN CO. LTD, a Company incorporated in China (hereinafter referred as informant) against the Kolkata Metro Rail Corporation Ltd. (KMRCL) and Ministry of Urban Development (MOUD), Govt. of India. The informant alleged bid rigging and abuse of dominant position by the opposite parties in floating the tenders for Metro Train Cars.

2. The brief facts of the case are as follows:
 - 2.1 It is alleged by the informant that KMRCL had issued a pre-qualification tender notification on 20.01.2009 for the design, manufacturing, supply, testing and commissioning of Electric Multiple Units and training of personnel for its project. Total requirement was 16 train sets of 4 cars configuration i.e. 64 coaches to start with.
 - 2.2 The initial eligibility criteria for the prospective bidders was an experience of manufacturing, integrating, assembling and supplying a minimum of 200 cars in the preceding 10 years ending 31.03.2009, whereas in the check list for applicants in pre-qualification, an additional criterion was inserted that at least 50% of the cars should have been supplied and proven to be in service for a period of five years or more in a country other than the country of manufacturer.

- 2.3 It is alleged that the informant and many others would have qualified for the bid, being most competitive in prices and highly experienced in delivering state of art products, but they could not bid because of this additional condition. The KMRCL issued corrigendum for this amendment in the eligibility criteria and simultaneously issued revised pre-qualification documents dated 25.03.2009.
- 2.4 It has been mentioned in the information that only 4 bidders had qualified for the bids of said tender because of such stringent conditions. Out of those 4, only 1 qualified for the purpose of opening of financial bid, which was found to be very highly priced and therefore the KMRCL decided to scrap the tender altogether.
- 2.5 KMRCL invited a fresh tender on 02.09.2009 and further made the pre-qualification condition more stringent. The participation in the tender was sought from those firms only who had the experience of designing, manufacturing, supplying, testing, commissioning and integration of minimum of 200 stainless steel cars with similar features including Traction, Propulsion System etc in the preceding 10 years ending 31 .07.2010. Further, at least 50% of the said 200 cars should have been supplied and proven to be in service for a period of 5 years or more (ending 31.12.2009) in India or in a country other than the country of manufacturer.
- 2.6 It is alleged by the informant that the additional conditions of manufacturing 200 stainless steel cars in preceding 10 years restricted the competition as the cars are normally manufactured out of aluminum, carbon steel and stainless steel. Further, the condition that at-least 100 cars should have been supplied in India OR in a country other than the country of manufacture, would go to benefit the Indian manufacturer only, as for an Indian manufacturer both the conditions i.e. supply in India as well as supply abroad would qualify the manufacturer. In contrast, a foreign manufacturer who had not supplied to India or to some other foreign country would be disqualified. The words "in India " were added to accommodate some specific enterprise which shows that an element of discrimination was introduced despite the fact that it is an international tender .
- 2.7 It is also alleged by the informant that such stringent conditions mentioned in the above paragraphs are discriminatory and prohibited under the provisions of the Competition Act, 2002. Further, by way of such tender the KMRCL is guilty of abusing its dominant position in the market as well as rigging the bid to the detriment of a large number of foreign competitors who could not bid due to such unwarranted and abusive stringent condition.

2.8 The informant prayed for the following reliefs:

- (i). Initiate appropriate enquiry against KMRCL including but not limited to rigging of, and collusion in the bids and such other aspects as the Commission may deem fit and proper;
- (ii). Direct KMRCL to suitably modify and relax/omit the particular qualification condition as envisaged by Clause 11 of the Check list (discussed above in paras 2.5 & 2.6) so as to invite wider and healthier competition globally.

3. Shri Rajiv Kapoor Advocate, appeared before the Commission on behalf of the informant and made his submission in support of the information and has also filed the written submission mostly reiterating the facts in the information.

3..1 The informant in his written submission dated 09.11.2010 has submitted that the present case squarely falls within the ambit and scope of the provision of section 3(3)(d) as well as section 4(2) (i) of the Act. The action of KMRCL amounts to putting restrictions and limiting the participation in the tender and to select few to the detriment of others. It is alleged by the Informant that Opposite Parties are abusing their dominant position in the sector of Metro Train in India especially in Kolkatta. It has also been mentioned by the Informant that it is an elementary principle of law that the process of bidding has to be transparent and equitable so as to attract more competitive bids. The conditions imposed in the standard process have to be transparent and such process should not culminate into monopolistic, restrictive or anticompetitive results.

3..2 In his submissions, Shri Kapoor, Advocate has reiterated facts about the tender process as had been mentioned in the original information filed.

3..3 It has further been submitted that the said condition was included to benefit the Indian manufacturer only and as there is hardly any difference between stainless steel cars or cars made of any other metal or alloy. The said condition has been stipulated in the global tender for reducing the competition and restricting the same to a few only.

3..4 It has also been submitted that the KMRCL, on 20.10.2010, once again altered the condition of the prequalification of the bidder unilaterally without informing any of the bidders or purchasers of the documents individually or specifically. It has also been submitted that the publication of the change in terms and conditions by the KMRCL on its own website cannot be termed as intimation to the public. It has been submitted that the Opposite Parties are rigging the process of bidding and are also barring the entry of the new entrants.

3..5 It has further been submitted by the Informant that after relaxing prequalification condition KMRCL has extended the date of the bid to 03.12.2010, but the omission by it to inform the general public is unfair and discriminatory and an attempt to avoid a healthy competition in bid process.

4. The Commission has heard the Counsel for Informant and examined the written submission filed on behalf of informant and the material on record.

5. From the close scrutiny of the material on record it is borne out that the fist allegation leveled against the Opposite Parties is that by prescribing the impugned eligibility conditions in bid documents are violative of section 3(3)(d) of the Act. Fallacy of this contention is exposed from plain reading of the provisions of section 3(3). It is amply clear that the anti competitive practice of bid rigging or collusive bidding can be resorted to only by competitors on supply side. In the present case, none of Opposite Parties are themselves bidders of supply of rail coaches to KMRCL. Even otherwise, the bidding process is still not over and at this stage it cannot be said that bids have been rigged. The informant has not even made any assertion that the enterprises who have participated in the bid have indulged into bid rigging or collusive bidding. Therefore, the contention raised by the informant is devoid of any merit and cannot be sustained.

6. It is evident from the facts and circumstances of the case that the allegation of abuse of dominance against the Opposite Parties cannot be sustained. The informant has not furnished any material to show that the KMRCL is in a dominant position in the relevant market of metro rail coaches in India. Furthermore, the impugned condition that the bidders should have experience of manufacturing minimum 200 stainless steel coaches in the preceding 10 years and that 50% of them should have been supplied and proven in service for a period of 5 years or more in India or a country other than the country of manufacturer also cannot be termed as discriminatory or unfair just because the informant company is unable to meet that requirement. It has also not been shown that it is incumbent on all the metro rail corporations to have identical terms and conditions for supply of rail coaches. The conditions can vary according to specific requirements of a particular metro rail corporation having regard to local conditions obtaining therein. Thus the impugned conditions not being unfair or discriminatory cannot be said to be abusive.

7. On the basis of the foregoing analysis the Commission is of the view that neither dominance of KMRCL has been established, nor is there any prima facie indicator of any unfair or discriminatory conditions that may be treated as abuse. Similarly, the facts do not indicate any collusion or agreement that would come within the mischief of section 3 of the Act. Thus,

the informant has also not been able to place any credible or cogent evidence/material to show or establish the infringement of section 3 or 4 of the Act in this case. Hence the allegations made by the informant have remained unsubstantiated and uncorroborated. The Commission, therefore, is of the view that no prima facie case is made out for making a reference to the Director General for conducting investigation into this matter under section 26 (1) of the Act and the proceedings relating to this information are required to be closed forthwith.

8. In view of the above, the matter relating to this information is hereby closed under section 26(2) of the Competition Act.

9. Secretary is directed to inform the informant accordingly.

sdr
Member (G)

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member (A)

sd
member (P)

sdr
Member (G)

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member (A)

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member (T)