In re: Surendra Prasad v. Maharashtra State Power Generation Co (Case No 61 of 2013)

Decision Date: 10.01.2018

Keywords: *bid rigging*

Issue: Whether the OPs had engaged in the practice of bid rigging?

Rule: Sec. 3 of the Competition Act, 2002

MAHAGENCO has been incorporated by the Government of Maharashtra for generation of power in the State of Maharashtra. For the purpose of running its 7 Thermal Power Stations ('TPSs'), it obtains raw coal from the subsidiaries of Coal India Limited ('CIL'). In order to procure quality coal and to make proper supervision of the said supply through rail and other modes of transportation, MAHAGENCO engages services of liasoning agents. The Informantavers that in March, 2005, MAHAGENCO had invited tenders for coal liasoning, to supervise the quality and quantity of coalsupplied to its TPSs from the subsidiaries of CIL. Four companiessubmitted their bids to the said tender process *i.e.* B.S.N. Joshi & SonsLtd. ('BSN') and OP-2 to OP-4. The rate quoted by BSN was the lowest.However, the said company was not awarded the work in spite of beingthe L1 bidder due to commencement of litigation before the Hon'bleBombay High Court. After prolonged litigation before the Nagpur Benchof the Hon'ble Bombay High Court in Writ Petition Nos. 2444 and 4514 of 2005 and thereafter before the Hon'ble Supreme Court in Civil AppealNo. 4613 of 2006, work order was finally issued to BSN in 2009.However, the same, after a while (9 months) was terminated. The termination of work order was stated to be pending arbitral proceedings under the Arbitration and Conciliation Act, 1996. Post-termination, the contracts were awarded by MAHAGENCO to OP-2 to OP-4 on area-wise basis and the Informant has alleged that since then, MAHAGENCO has been awarding contracts regularly in favour of OP-2 to OP-4 only inthe geographically distributed market, which was actually agreed between them by means of entering into a cartel.

It is also stated by the Informant that OP-2 to OP-4 have violated clause (d) of Sub-Section (3) of Section 3 of the Act as they have engaged incollusive bidding for projects with MAHAGENCO thereby scuttling anycompetition between themselves and raising unnecessary

dispute withregard to qualification of any other competitor in the market.Lastly, it is submitted that there is also violation of clause (c) of Sub-Section (2) of Section 4 of the Act as together with MAHAGENCO,three of the leading players in the market of coal liaison/ quality/supervision work, have all colluded to deny access to other players in the market and thereby were preventing new players, if any, from participating in the bidding process. Hence, it was alleged that there wasa clear violation of Section 4 of the Act also by OP-1 alongwith OP-2 toOP-4.

It was pointed out that the canvas of Section 3(1) of the Act is pan-India and DG has not brought out any evidence of appreciable adverse effect on competition on such basis. Alternatively, it was argued that as per the decision of the Hon'ble Supreme Court of India in *CompetitionCommission of India* v. *Coordination Committee of Artists and Technicians of West Bengal Film and Television and others,* (2017) 5SCC 17 (para 36), the Commission is required to determine the relevantmarket in terms of the provisions of Section 2(r) of the Act.Next, the alleged distinct pattern of quoting by OP-2 to OP-4 is merely amathematical consequence of costing methods adopted by OP-2 to OP-4in determining the appropriate bid for the impugned tenders. As has beenstated on record by the representatives of OP-2 to OP-4, the costingmethod applied by them is largely based on internal assessment. Suchinternal assessment coupled with the largely similar nature of work andsimilar economic parameters applied by OP-2 to OP-4 leads to aninevitable conclusion that bids, especially amongst the market leadersengaged in coal liasoning in the State of Maharashtra, would fall within a narrow band, while falling well short of being identical.

The geographical spread of OP-2 to OP-4's respective primary areas of operation - which was alleged to be due to collusive activity - was in fact,a consequence of each party's well-established infrastructure. The centralfeature of establishing an infrastructure catering to the work of coalliasoning is that of developing human resources. This entails training ofall personnel, which is mandated by law *i.e.* the Mines Vocational Training Rules, 1966. Employing personnel for the purpose of coal liasoning entails extensive technical training and supervisory staff, which takes time as well as financial expenditure to be incurred by the contractor. Furthermore, the finding of the DG that exchange of pre-bid queries and account statements between OP-2 to OP-4 bring out understanding between them was denied as being devoid of any basis. Queries shared between the parties concerned were nothing but technical queries relating to penalty clauses, linkage materialisation, loading and unloading requirements

etc. in order to have a better grasp of the requirements of the prospective tender in order to ensure that the parties met the technical eligibility criteria with the underlying aim to simplify the entire process.

Further, since the parties concerned have been in the field of coal liasoning for a considerable period of time, they also have in their employment, technically trained staff in various niche areas of coal liasoning due to which it was a common practice amongst the parties concerned to take limited assistance of other parties in some areas of their job. Moreover, such assistance is also sought in emergent circumstances such as non-availability of trained manpower. Accountstatements were shared simply for financial clarity amongst the parties

On perusal of their testimonies, the Commission is of the opinion that their depositions did not reveal any justification for quotation of such identical rates, OP-2 to OP-4 could not give any basis of working of the costing carried out by them before quoting such identical rates. It is instructing to note that such identity of rates was not found to be present when these OPs bid for selected TPSs and decided to become L1 for the chosen TPSs by allocating market amongst themselves.

From the perusal of the statements of the representatives of these OPs, it emerges that the justification given by them for quoting lower rates for the selected TPSs and higher for the others where other two bidders had quoted lower rates, was essentially that they had existing infrastructure at those TPSs only. Thus, it is apparent that OP-2 to OP-4 did not compete in securing business as would have been expected as prudent business behaviour in a competitive market. Rather, OP-2 to OP-4 seem to be comfortable in continuing with their existing businesses under an arrangement to divide the market.

In view of the above, the Commission is of the considered opinion thatOP-2 to OP-4 have not been able to give any valid justification for quoting lower rates for the chosen TPSs as compared to other TPSs where the other two respective bidders had quoted higher rates and *viceversa* in a consistent manner over a long period of time. The Commission notes that such conduct of OP-2 to OP-4 goes a long way in pointing towards a concerted action in geographically sharing the markets.

Moreover, the DG also examined the representatives of OP-2 to OP-4 to seek their response in respect of such pattern followed by them in purchasing tender documents whereupon it emerged that the representatives of these OPs have admitted that purchasing of tender

documents on the same day in sequential serial number is possible due to the fact that this was done by their local officials. In fact, it also came to light that sometimes, these OPs also gave their authorization to each other for purchasing of tender documents. This clearly reflects a concerted practice being resorted to by these OPs. The Commission also finds no merit in the plea of OP-4 that procurement of tender documents is a mere secretarial task which involves no discussion or meeting of minds. The Commission notes that such behaviour coupled with other factors in no uncertain terms reflects the close coordination amongst these OPs when they were expected to compete to secure maximum business for their firms. The Commission notes that it is not even the case of these OPs that the same was done to increase efficiency in providing services.

Thus, the DG noted that the said fact of exchange of pre-bid queries between these OPs for Tender No. T-16/2013 of MAHAGENCO showed that their agreement for geographically sharing the tenders and bid price fixing was continuing in 2013 also.

The DG conducted an elaborate analysis of the books of OP-2 to OP-4during the period 2005-06 to 2014-15 and concluded that these OPs had various transactions on their books which were done to share profits or make payments for cover bids in respect of various tenders. It is not necessary to reproduce in detail the analysis conducted by the DG as OP-2 to OP-4 have not seriously disputed the entries and the bills analysed by the DG. Rather, the thrust of the response of these OPs in this regard is that they were working as sub-contractors for each other in contracts, where a particular party did not have adequate infrastructural facilities. The Commission finds the response quite revealing. In fact, it has clearly been admitted that these OPs were working as sub-contractors for each other and such clear admission seen in the light of several plus factors joined together by the DG unerringly indicates a deliberate and intentional arrangement agreed amongst these OPs. The Commission also finds it quite amazing that these OPs acted in a transparent manner in executing their understanding to such an extent that they even shared their ledgers *inter se.*

Applying the aforesaid legal test to the evidence detailed in the present case, the Commission is of the considered view that OP-2, OP-3 and OP-4, through their impugned conduct, have contravened the provisions of Section 3(3)(c) and Section 3(3)(d) read with Section 3(1) of the Act, by acting in a collusive and concerted manner which has eliminated and lessened the competition besides manipulating the bidding process in respect of the tenders floated by MAHAGENCO.