

**M/S MANJEET PLASTIC INDUSTRIES (INFORMANT) AND CHARANPAADUKA INDUSTRIES
PRIVATE LIMITED (OPPOSITE PARTY I), OTHERS**

Decision date: 01/11/2019

Keywords: Cartelization, collusion, price parallelism

Rule: Sec. 3(3), 3(4) and 4(2) of the Competition Act, 2002.

The Informant supplied school footwear to the Government of Tamil Nadu. In order to implement the announcements of the Chief Minister of the State of Tamil Nadu pertaining to the scheme of supply of cost-free School bags to school children studying in Government / Aided Schools in the State of Tamil Nadu for the year 2019-20, OP-11 (“Corporation”) published a Tender on 05.03.2019, for inviting bids from the manufacturers of School Bags (“Tender”). On 09.04.2019 and 26.04.2019, the Corporation, allegedly in the utmost arbitrary and unjustified manner issued separate corrigenda thereby amending the initial tender condition, *inter alia*, by allowing the applicants to the Tender to participate through a consortium containing a maximum of 3 entities.

The Informant had alleged that the concession of allowing the consortium to participate was not a part of the Tender’s initial terms and conditions and were included through a corrigendum. The Informant mentioned that the said process of inclusion was an attempt to frustrate the purpose of the competitive tender by colluding or attempting to limit the competition. Moreover, the Corporation, as per Clause 4.8.1 of the Tender, could only issue the amendment upto 48 hours before, two days prior to, the last date of submission of the Tender, which was 11.04.2019. Thus, apparently, the process of the entire tender was abused in a deliberate manner to affect competition as after floating of the Tender. This *per se* creates a strong possibility for manipulation of the entire process in favour of select parties. As a result of this, the tender conditions were relaxed in favour of Consortium(s), primarily two companies, namely, VT and Sumaja. These entities were not the manufacturers of school bags and did not meet the criteria for participating in the Tender earlier but were able to participate in the Tender on the strength of such amendment.

It was alleged that when the samples submitted by all the respective bidders were opened for examination, a common pattern was noticed whereby nine companies had submitted samples with same or similar markings bearing pictures of Late Ms. S. Jayalalitha as well as the current

Chief Minister of the State of Tamil Nadu. The same was a clear violation of clause no. 4.15.2(1) of the Tender. Therefore, it was likely that pursuant to a mutual understanding with some officials in the process of Tender, such goods were deliberately 'marked' in order to obtain favour or the bags were manufactured at the same location. According to the Informant, both instances demonstrated collusion.

Subsequently, the Corporation sent letters to all the bidders to submit 03 new samples without any printing/any other marking for further evaluation which was totally in violation of tender conditions. In compliance of the same, the Informant, apparently being one of the bidders, also resubmitted 03 new samples. The Informant stated that the price quote of the Opposite Parties was the same or had a "de minimis" difference, while the actual price was likely to be approximately 25% higher than the price quoted by the Informant in its Tender due to there being differential production costs.

The Informant alleged that many of the companies have the "beneficial owners" and were micro cartels in themselves and the "de minimis" price difference was not the product of coincidence when the cost structure should be different given the different locations of production, varying economies of scale and other factors of production. The concession of allowing consortiums to participate benefited companies like VT and Sumaja. Thus, the facts and circumstances were allegedly indicative of an implicit agreement/arrangement between the Opposite Parties through the veil of Corporation in the Tender and were detrimental to the process of fair play and competition in the Relevant Market and were thus, violative of the provisions of Sections 3(3), 3(4) and 4(2) of the Act.

The Informant, *inter alia*, argued that the Opposite Parties, with the help of the Corporation, cartelised in the Tender and undue favour was given to the Opposite Parties by the Corporation by, *firstly*, amending the Tender conditions and allowing the submission of consortium bids which was contrary to the original Tender conditions and *secondly*, instead of rejecting the Technical bids of the Opposite Parties on ground of submission of samples containing markings, being contrary to Clause No. 4.15.2(1) of the Tender, it allowed resubmission of fresh samples from all the bidders including the Informant.

Analysis of the Commission

At the outset, the Commission notes that though it was stated in the information that the case involves contravention of relevant provisions of Sections 3(3), 3(4) and 4(2) of the Act, however, the facts as stated and as admitted during the hearing was that the case pertains to alleged contravention of Section 3(3) of the Act.

It was alleged that the amendment of Tender terms and conditions by the Corporation

facilitated the cartel of bidders (OP-1 to OP-10). In respect of this, the Commission inquired from the counsel for the Informant whether the Corporation violated any procedure as laid down in the Tender in issuing the corrigenda to Tender terms and conditions. The counsel for the Informant replied in negative. Moreover, based on the facts and evidence before it, the Commission did not find any force in the contention of the Informant that the corrigendum, allowing for the submission of consortium bids, indicated any collusion as it was quite evident that not only the condition with respect to permitting the participation of consortium was amended but several other conditions were also amended by the Corporation.

The Informant raised suspicion that there was a strong possibility of cartelization amongst the bidders. On gathering of facts from the documents filed by the Informant, the Commission observes that it appears that during the pre-bid meeting the prospective bidders were shown the samples with the markings and the impression was attained that the samples had to be submitted with the markings. Consequently, the samples with markings were submitted which were then not accepted by the Corporation and all the bidders were asked to resubmit the samples including the Informant. The Commission notes the construction of Tender's Clause No. 4.15.2(l) which states that '3 Samples of School Bag in each size i.e., Small, Medium & Large (Samples with any marks/printings will not be accepted)' did not signify outright rejection of bids as suggested by the Informant. The Tender contains other terms and conditions which may entail rejection of bids. No evidence of price parallelism in submission of bids can be examined at this stage as the financial bids have not been opened by the Corporation.

Conclusion

Therefore, the Commission noted that the allegations as raised by the Informant were based on mere suspicion or conjecture that such instances had led to collusive bidding. This was so as there was no evidence on financial bids available before the Commission and the final assessment of bids had not been done by the Corporation. Thus, the Commission was of the view that the case was clearly premature as this facts and circumstances before it cannot become the basis of forming a *prima facie* opinion on cartelisation by the bidders. In view of the foregoing, the Commission was of the opinion that there exists no *prima facie* case and the information filed was closed forthwith under Section 26(2) of the Act.

