

IN RE: NLC INDIA LIMITED V M/S PHOENIX CONVEYOR BELT INDIA

Case No. 42/2018

Decision date: 09/11/2018

Keywords: tender, collusive bidding, related parties

Issue: Whether the participation of related entities in a bidding process would amount to cartelisation.

Rule: Sec. 19 (1)(a) and Sec. 3(3)(d) read with Sec. 3 (1) of the Competition Act, 2002.

The case arose out of a letter received by the CCI from the Central Vigilance Commission (“CVC”), alleging cartelisation by 3 entities, namely M/s Phoenix Conveyer Belt India (P) Ltd M/s Phoenix Conveyer Belt Systems GMBH, and M/s IMAS SA, (“OPs”). The CVC letter stated that these three entities, which belonged to Phoenix Group, were participating in the tender since 2005 and cornering the order at apparently rigged prices and there was no reasonable explanation for accepting the rates of the items available in their file except the previous years’ orders. Accordingly, the CVC referred the matter to the Commission for further examination.

NLC India Limited (“NLCIL”) was subsequently advised to file an Information. The CCI observed that though the Information has been filed pursuant to its direction, NLCIL has also stated that according to it, there is no contravention of the provisions of the Act. As per documents available on record, the CCI held that it was clear that NLCIL was aware that the three participating entities were related entities. Phoenix Yule Limited had intimated NLCIL through a letter that the three companies (OPs) were inter-related. Thus, it was not the case that the procurer was misled by fictitious competitive bids by related entities. Rather, the OPs specifically informed the said fact to NLCIL. The CCI accordingly observed that it is for the tenderer to specify the terms and conditions of the tender such that competition is promoted amongst bidders. It was also highlighted that the eligibility criteria in the case had been broadened by NLCIL to ensure wide participation which could possibly extend to cover other entities in respect of future tenders. Further, the CCI observed that for establishing a case of collusive bidding or bid-rigging under the provisions of Section 3 (3)(d) read with Section 3 (1) of the Act, the existence of an agreement/arrangement/understanding amongst the bidders is a sine qua non.

The CCI also went on to reiterate its views taken in several previous cases that the procurement policy of the public sector undertakings should be in harmony with competition law principles. While the facts and evidence in this case did not reveal any contravention of the provisions of the Act so as to mandate an investigation under Section 26(1) of the Act, the tender conditions appeared to create entry barriers thereby restricted competition and allowed related entities to participate in the tenders as independent entities without sufficient safeguards. This could severely impact the competitive process and lead to inefficient procurement. Further, while the CCI also stated that while it respects the independence of the procurement authority in setting the pre-qualification criteria and other terms and conditions of the tenders, caution should be exercised not to set qualifying conditions in a manner which prevent legitimate suppliers from engaging in the tendering process. Therefore, it advised NLCIL to align its policies with the tenets of competitive principles in order to ensure better participation by independent suppliers and avail the best value of the goods/services procured.