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Analysing developments impacting business

INDIAN COMPETITION AUTHORITY IMPOSES INR 2.9 MILLION PENALTY FOR BID-RIGGING IN THE PUBLIC PROCUREMENT SECTOR

29 October 2021

On 11 October 2021, the Competition Commission of India (CCI) imposed a cumulative penalty of INR 2.9 million on providers of engineering and construction services, for rigging a tender floated by GAIL (India) Limited (Informant).¹

Background

The Informant, India's largest state-owned natural gas and distribution company, routinely floats tenders to avail services related to, *inter alia*, restoration of oil-well sites and disposal of oil drilling wastes.

In 2019, the Informant's internal vigilance team raised suspicions about the participation of two bidders, namely, PMP Infratech Private Limited (OP-1) and Rati Engineering (OP-2) (collectively, OPs). The internal vigilance team noted that both OPs:

- submitted bids using the same device or same network connection; and
- submitted bids within a day's gap.

Based on this, the Informant approached the CCI alleging bid-rigging by OP-1 and OP-2. In 2020, the CCI formed a tentative view of contravention by the OPs and directed a Director General, CCI (DG) investigation.

Investigation

Confirming the Informant's suspicions, the DG found evidence² of commercially sensitive information being exchanged in a tender floated for the financial year (FY) 2018.

The DG observed that:

- the bids were submitted using the same Internet Protocol (IP) address;

¹ GAIL (India) Limited v PMP Infratech Private Ltd and Rati Engineering, Case No. 41 of 2019 of 11 October 2021.

² Evidence includes both, electronic and documentary evidence.

- OP-2 forwarded clarifications sought by the Informant to OP-1; and
- the bids were submitted withing a day's gap

Therefore, the DG's investigation concluded that the OPs had engaged in bid-rigging. This was in contravention of Section 3(3)(d) read with Section 3(1) of the Competition Act, 2002 (Act).

CCI's Findings

The CCI agreed with the findings of the DG. In doing so, the CCI rejected various arguments raised by the OPs. Certain observations are detailed below:

Defence of technical glitch

The CCI noted that both competing bids were submitted from the same IP address within a gap of one day. OP-2 argued that it was facing technical "Java" glitches due to which it requested OP-1 to submit the bid on its behalf.

The CCI rejected the argument owing to lack of evidence, also observing that it was rather egregious for competitors to use the same systems to submit a competing bid.

Assessment for remaining participants

OP-1 argued that the DG had failed to investigate the participation of two other bidders, without whose involvement the tender could not be successfully rigged.

The CCI rejected the argument since the bids by the remaining two entities were not "technically acceptable". Therefore, their participation in the process held no significance. In any case, the CCI noted that Section 3(1) of the Act prohibits agreements that are likely to cause an appreciable adverse effect on competition (AAEC). Therefore, an agreement between the OPs *in and of itself* fell afoul of the Act.

Inability to independently response to queries

In relation to the DG's finding of OP-2's inability to answer the queries raised by Informant, OP-2 argued that the subject matter of the query was purely tax based (i.e., not pertaining to commercials of the bid). Therefore, forwarding the email was not indicative of collusion.

The CCI rejected the submission and noted that the Informant's queries pertained to financial statements and the financial capability of the bidder and were, therefore, in relation to purely technical and commercial matters.

Further, CCI noted that the tender executive of OP-1 in his statements admitted that the Informant's queries were sent by OP-2 to OP-1 "for appropriate response on behalf of Rati Engineering".

Conclusion

The CCI found that the OPs colluded to a tender floated by the Informant in FY 2018 and, therefore, contravened Section 3(3)(d) read with Section 3(1) of the Act.

Further, due to failure to demonstrate that the contraventions occurred without the knowledge of the OPs key personnel, the CCI also held the director of OP-1 and partner of OP-2 liable under Section 48(1) of the Act.

Accordingly, both OPs and their key personnel were penalised to the tune of INR 2.9 million.

Comment

The following two aspects are noteworthy:

- The CCI continues to rely heavily of electronic evidence. While there has been a discernible trend towards reliance upon electronic evidence during COVID-19 pandemic, this trend is likely to remain a “sticky norm”.
- Paradoxically, in spite of the evidence described above, the CCI imposed a “symbolic monetary penalty”. The CCI’s rationale is the ambiguous phrase of “ends of justice in the facts and circumstances of the present case”.

This ambiguity instantiates that the CCI continues to remain leery of penalty guidelines. Still, the Indian competition regime is no stranger to instances of bid-rigging in the public procurement sector. The CCI’s orders often observe that competition contraventions in the sector are particularly pernicious given the direct cost to public. To that extent, the CCI continues to vigorously pursue contraventions concerning public procurement.

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