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LENIENT TREATMENT METED OUT TO MSMES IN SBI SIGNAGE BID RIGGING

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On 3 February 2022, the Competition Commission of India (CCI) passed an order under Section 27 of the Competition Act, 2002 (Act), imposing a penalty of INR 12.447 million on seven entities for bid rigging in supply of signages for branches/offices/ATMs of State Bank of India (SBI), India's largest public sector bank.¹

Background

Pursuant to a complaint alleging bid-rigging in a tender floated by SBI Infra Management Solutions Private Limited (SBIIMS) for supply and installation of new signages/replacement of existing signages for branches/offices/ATMs of SBI located at metro centres of its circles across India (Tender), the CCI took *suo motu* cognizance of the complaint and directed the Director General (DG) to investigate the allegations. During the pendency of the investigation, Avery Dennison Private Limited (ADPL) applied for leniency under Section 46 of the Act read with the CCI (Lesser Penalty) Regulations, 2009 (LPR).

CCI's Decision

- **Prior Agreement on Bid Prices:** The CCI reviewed several email exchanges between the opposite parties (OPs) as well as depositions of employees of the responding bid participant OPs and found that the final bid price matched the figures previously discussed and shared among the OPs for most geographical circles. Further, in six circles (i.e. Bhopal, Chandigarh, Chennai, Delhi, Hyderabad and Mumbai circles), the bidding sequence as well as the bid figures tallied verbatim. In their depositions, most of the OPs admitted to having partaken in anticompetitive discussions with their competitors.

In some other circles, the L-1 rate either matched with the figures previously discussed among the OPs (i.e. for Bangalore and Jaipur circles), or the L-1 rate was very close to such figures (i.e. for Kolkata, Lucknow and Patna circles). However, the CCI did not find it necessary that the discussed bidding sequence and bid price should inevitably match with those actually quoted in the bidding and emphasised that any exchange of commercially sensitive information could be violative. The CCI further restated that the Act also forbids anticompetitive agreements that are even *likely* to cause harm to competition.

¹ In Re: Alleged anti-competitive conduct by various bidders in supply and installation of signages at specified locations of State Bank of India across India, Suo Motu Case No. 02 of 2020 dated 3 February 2022.

- **Prior Agreement not a Tutorial:** The CCI categorically rejected the proposition advanced by the OPs that the excel worksheet containing the discussed bid figures, etc., was merely a tutorial to explain the tendering process. It reasoned that not only should have such a tutorial been prepared by the tendering authority, but it was very comprehensive and unexpected of a tutorial document as it included data for all the circles and even revised later based on additional inputs received from another OP. The CCI held that under the garb of the tutorial, the OPs had meticulously planned the whole exercise and resorted to fixing the bidding price and geographically allocating the market in the Tender.
- **Call Data Records (CDRs):** Reviewing the CDRs of the OPs, the CCI noted that they were in constant touch prior to, during, and post the e-reverse bidding process of the Tender, and the timing of the actual bid submissions closely matched the calls made among the OPs.
- **Involvement of Macromedia Digital Imaging Private Limited (MDIPL):** MDIPL argued that it did not participate in the Tender and therefore, it should not be held liable. The CCI relied on depositions to note that MDIPL *executed* the Tender work on behalf of the other OPs. Further, the CCI clarified that actual participation in the tender is not a *sine qua non* for a finding of bid rigging in terms of Section 3(3)(d) of the Act.

It also rejected the argument that Mr Naresh Kumar Dasari, who led the preparation of the excel worksheet, was acting independently of MDIPL since MDIPL did not gain any financial benefit from the involvement of Mr. Dasari. The CCI clarified that financial gain from collusion is also not a prerequisite to find a violation.

- **Lack of Appreciable Adverse Effect on Competition (AAEC):** Disagreeing with the submission that the bid rigging did not result in any harm as SBIIMS did not suffer any loss, the CCI held that "*any manipulation in the competitive price discovery process, in this case e-reverse auction system, would affect the final price to be paid by the tendering authority*".
- **Scope of Relevant Turnover:** Relying on Supreme Court's decision in *Excel Crop*,² the OPs argued that relevant turnover should be based on the Tender value, or the type of signage involved and not all types of advertising/marketing materials they supply. Negating this, the CCI held that relevant turnover is not limited to specific customers or tenders and noted that different types of signages are not multiple products but different varieties of the same product.
- **Penalty and Leniency:** Accordingly, the CCI imposed a penalty on the OPs at 1% of the average of their relevant turnover for three financial years (FY) i.e. FYs 2015-16 to 2017-2018, and at 1% of the average of income of their individuals for the three FYs under Sections 27 and 48 of the Act, respectively. With respect to ADPL, the CCI considered its lesser penalty application and noted that though it became aware of the violation in 2018, it approached the CCI only in 2020. It also noted that the lesser penalty application was filed after the CCI had directed investigation, and therefore, granted it a 90% reduction in penalty.

² *Excel Crop Care Limited v. Competition Commission of India & Anr (2017) 8 SCC 47.*

Comment

This is yet another order of the CCI, whereby it acknowledged the MSME status of the OPs and the COVID-19 pandemic. In line with its previous orders, the CCI has taken a considerate view while levying penalties. Interestingly, the CCI has been reemphasising that giving effect to anti-competitive information exchange or actual harm to competition is not relevant to find a violation of the Act, if it is established that parties have exchanged confidential information and manipulated a tender or interfered with the price discovery process. The CCI premises its views on the Act which also prohibits conduct that is likely to cause an AAEC, in addition to conduct which actually causes an AAEC.

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