

CENTRAL VIGILANCE COMMISSION: THE COMPETITION COMMISSION'S NEW ALLY?

1. INTRODUCTION

The Competition Commission of India (the “**Commission**”)¹ has held that bids by entities belonging to the same group cannot *per se* be considered as amounting to *cartelisation* under the Competition Act, 2002 (the “**Act**”).

2. BACKGROUND

In a tender for the procurement of steel cord belt floated by NLC India Limited (“**NLCIL**”), three group companies (the “**Phoenix Entities**”) pitched to supply NLCIL with the material, along with one other entity, Bridgestone Engineered (“**Bridgestone**”) (together, the “**Tenderers**”).

Bridgestone was denied participation in the said tender due to its inability to meet the technical pre-qualification requirements. Subsequently, Sumeru (the authorised representative of Bridgestone) wrote to NLCIL, suggesting that if Bridgestone was not considered, there would be no competitive bidding as the other remaining bidders were sister concerns.

Subsequently, the Commission received a letter from the Central Vigilance Commission (the “**CVC**”) alleging cartelisation by the Phoenix Entities in the tender. NLCIL was also advised to notify the Commission, although NLCIL had stated that it was not aware of any cartelisation amongst the Tenderers.

The Commission therefore treated the matter as a reference received from the CVC under Section 19 (1)(b) of the Act and not as information received from NLCIL under Section 19(1)(a) of the Act.

In view of the background, the Commission finally held that the inability of a bidder to meet the technical pre-qualification requirements for a tender cannot be deemed to infer that the qualifying bidders, being sister concerns, had colluded during the bidding process.

3. KEY TAKEAWAYS

3.1 The Role of CVC in Competition Law

The CVC is a body constituted under The Central Vigilance Commission Act, 2003 to *inter alia* ensure probity in the procurement of goods and services by providing tender advice to central government, corporations established by or under any central legislation, government companies, societies and local

¹ *NLC India Limited v M/s Phoenix Conveyor Belt India Private Limited and Ors* (Case No. 42 of 2018)

authorities owned or controlled by the central government and is conferred with the power to make rules and regulations therein.

In this regard, the CVC has been actively issuing circulars and guidelines which are available on its website². The CVC monitors public procurement in India and has issued guidelines related to transparency in the tendering system, the tendering process negotiations with *L1 (lowest bidder)* and prequalification criteria in the tendering process. The CVC has the authority to look into matters pertaining to public procurement.

3.2 A contrasting view?

The decision in the NLCIL case sensibly confirms that more competitive bids, which do not meet the technical bid requirements, will not in itself mean collusion between related bidders. Interestingly, in *Grasim Industries*³ the parties who were sister concerns submitted separate bids in every tender application. However, on being accused of collusive bidding, the parties resorted to the defense of being a *single economic entity*.

In that case, the Commission held that the parties cannot take the benefit of being single economic entity while also taking the benefit of bidding and posing as separate legal entities for the purpose of the tendering process and held the alleged parties to be in contravention of Section 3 (*Anti-competitive agreements*) of the Act.⁴

The Commission distinguished the *Grasim Industries* case and held that the mere fact that bidders were *related parties* is not sufficient to establish a case of collusive bidding or bid rigging. There must be an existence of an agreement, arrangement or understanding amongst the bidders to that effect.

4. INDUSLAW VIEW

The CVC, in the course of its enquiry into the tender floated by NLCIL, took an interesting and unusual step of informing the Commission of a possible *cartelisation* among the bidders even though there was no violation of the tender conditions.

The CVC appears to have been encouraged by the *Grasim Industries* case where the Commission held that, “a fair and transparent tendering process is a reflection on the procurer’s conduct in the market. If the procurer favours a particular organisation or individual, it will lead to distortion of competition in the market.”

² Please visit: <http://www.cvc.nic.in/>

³ *Delhi Jal Board v. Grasim Industries and Ors.* (Ref. Case Nos. 03 & 04 of 2013)

⁴ Avimukt Dar, Shreya Suri and Ritwik Mukherjee, *Competition Commissions’ perspective on lifting the corporate veil when determining bids from sister concerns*, IndusLaw Infolex News Alert, available at : <https://induslaw.com/app/webroot/publications/pdf/alerts-2017/infolex-newsalert-abuse-of-dominant-position-inquiry-ordered-against-roche.pdf?src=Website&CTA=ReadMore&Date=12-May-2017>

Moreover, the Commission in the present order, while respecting the independence of the procurement authority in setting the pre-qualification criteria and other related terms of the tender, advised NLCIL on a non-binding basis that its procurement policy should be in harmony with competition law principles.

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