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COMPETITION COMMISSION'S PERSPECTIVE ON LIFTING THE CORPORATE VEIL WHEN DETERMINING BIDS FROM
SISTER CONCERNS

1. INTRODUCTION

In a recent order¹ dated October 5, 2017 (the "Order"), the Competition Commission of India (the "CCI") found Grasim Industries Limited ("GIL"), Aditya Birla Chemicals (India) Limited ("ABCIL") and Gujarat Alkalies and Chemicals Limited ("GACL") in contravention of Section 3(1) read with Section 3(3)(d) of the Competition Act, 2002 (the "Act") for rigging Delhi Jal Board ("DJB") tenders, which were floated for the public procurement of Poly Aluminium Chloride ("PAC") used in the purification of water.

2. BACKGROUND

Following the information filed by the DJB, alleging GIL, ABCIL, GACL and Kanoria Chemicals and Industries Limited ("KCIL") (collectively, the "Opposite Parties") of collusively tendering and price cartelisation over a series of annual tenders for the public procurement of PAC, the CCI had, in its *prima facie* opinion, found the Opposite Parties to be in contravention of the provisions of Section 3 (*Anti-Competitive Agreements*) of the Act. Accordingly, the Director General was directed to investigate the matter.

DJB asserted that it had been procuring PAC for the purification of water through annual tenders and each year, in response to those tenders, the Opposite Parties not only quoted identical or nearly identical prices (*with a difference in range of only INR 200-400*) in their bids but also indulged in collusive price setting by decreasing prices from the quoted price by the same extent during the negotiation rounds.

It is pertinent to note that as the Opposite Parties are the *only* manufacturers of PAC in the market, conforming to the standards laid down by the Bureau of Indian Standards and the DJB had no scope for procuring PAC at an economical price.

3. KEY HIGHLIGHTS OF THE ORDER

3.1 Single Economic Entity

One of the defenses raised by ABCIL and GIL before the CCI was that there could be no allegation of collusion between them as they constituted a single economic entity within the meaning of Explanation (b) (*Meaning of 'Group'*) to Section 5 (*Combinations*) of the Act, as they have common management, promoters, directors and shareholders. It was further submitted that the central marketing team was responsible for the evaluation of tenders, determination of the proposed approach and the final submission of bids to the tender issuing bodies, including submissions for DJB tenders. Moreover, the same set of personnel were taking all key business decisions for both companies.

However, in this context, the CCI observed that in every tender application, ABCIL and GIL submitted separate bids and that if they were in fact a single economic entity, they had no reason to participate *individually* instead of as one entity

¹Ref. Case Nos. 03 & 04 of 2013 (also available at <http://www.cci.gov.in/sites/default/files/Ref.Case%20Nos.%2003%20%26%2004%20of%202013.pdf>)

and create the impression that the bids submitted by them were intended to be *competitive* in nature at every stage of the bidding process.

The CCI finally held that ABCIL and GIL cannot take the benefit of being a single economic entity while also taking the benefit of bidding and posing as separate legal entities for the purpose of the tendering process. The CCI also settled and clarified the legal position that the definition of “*group*” under Section 5 does not apply to proceedings relating to anti-competitive agreements under Section 3.

GACL being a company floated by the Government of Gujarat was not held to be part of the single economic entity, but the CCI proceeded to impose a penalty on the basis of the reasoning set out in the following section.

3.2 Reliance on Circumstantial Evidence

While the CCI conceded that no *direct* evidence had been afforded in order to establish the existence of an “*agreement*” between the Opposite Parties, the CCI concluded that the presence of an “*agreement*” could be adduced by relying on certain ‘*plus factors*’ (that is, certain additional evidence, which when assimilated together, could be tangible enough to arrive at a conclusion that the prices quoted in the bidding process were a result of concerted action or a result of ‘*meeting of the minds*’).

On analysis of the facts of the case, the CCI identified certain ‘*plus factors*’, which it considered substantial enough to ascertain that there existed no room for a plausible alternate conclusion to be drawn:

Such ‘*plus factors*’ include:

- (a) the *proximity* of the bid prices quoted and negotiated by the Opposite Parties;
- (b) the extremely small margins between the bid prices of ABCIL, GIL and GACL year after year, notwithstanding the variable and fixed costs of production; and
- (c) given that the data shared by GACL showed a sustained and constant low cost of production as compared to the other bidders, GACL was able to reduce the price of the bid submitted by them, but was not willing to do so.

3.3 Penalty

The CCI proceeded to impose a penalty of INR 2.30 crore (approximately USD 350,000), INR 2.09 (approximately USD 320,000) and INR 1.88 crore (approximately USD 289,000) on ABCIL, GIL and GACL, respectively.

Keeping in line with the settled legal position in the Supreme Court judgment of *Excel Crop Care v. CCI*, the penalty was levied at the rate of 8% (eight per cent) of the *average relevant turnover* of GIL and ABCIL for the preceding three years and at the rate of 6% (six per cent) in the case of GACL.

4. INDUSLAW VIEW

The notion of competitive bidding by seemingly separate legal entities (which in fact have common day-to-day management) has been frowned upon by the CCI and it has made a clear statement that it will come down hard on such entities that bid under the façade of separate legal entities.

This decision is a welcome and rational approach by the CCI, essentially preventing sister concerns from bidding at prices that increase the likelihood of a member of the group winning competitive tenders.

By denying the applicability of section 5 of the Act (benefitting single economic entities) to the competitive bidding process, the CCI has essentially clamped down on collusion between seemingly separate legal entities, directed by common management.

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