



COMPETITION COMMISSION OF INDIA
Case No. 42 of 2013

In Re:

Builders Association of India (Kerala Chapter)
38/1870 A, Builders Chamber,
Gandhinagar, Kochi

Informant

And

- 1. The State of Kerala**
Government Secretariat,
Thiruvananthapuram, Kerala **Opposite Party No. 1**
- 2. The Kerala Public Works Department**
Thiruvananthapuram, Kerala **Opposite Party No. 2**
- 3. The Kerala State Construction Corporation Limited**
Post Box-Door No. 30/1521-A,
Northern side of Railway, Ponnurunny,
Vyttila, Kochi **Opposite Party No. 3**
- 4. Finance Department, Government of Kerala**
Data Processing Building,
Kerala University Office Campus,
Palayam, Thiruvananthapuram, Kerala **Opposite Party No. 4**

CORAM

Mr. Ashok Chawla
Chairperson



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Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Appearances: Advocates Ms. Shweta Bharti, Shri Shantanu, Shri Sachin Sharma, and Ms. Mishika Singh for the Informant.

Advocates Shri Reegan S. Bel and Shri Jogi Scaria for the Opposite Party Nos. 1, 2 and 4.

Advocates Ms. Beena Nair and Shri Zulfiker Ali for the Opposite Party No. 3.

Order under Section 26(6) of the Competition Act, 2002

1. The present information has been filed before the Commission under section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as the ‘Act’) by the Builders Association of India (Kerala Chapter) (hereinafter referred to as the “**Informant**”) against the State of Kerala (hereinafter referred to as the “**Opposite Party No. 1**”), Kerala Public Works Department (hereinafter referred to as the “**Opposite Party No. 2**”), Kerala State Construction Corporation Limited (hereinafter referred to as the “**Opposite Party No. 3**”), and Finance Department, State of Kerala (hereinafter referred to as the “**Opposite Party No. 4**”) [collectively, hereinafter referred to as the “**Opposite Parties**”], *inter alia*, alleging contravention of the provisions of sections 3 and 4 of the Act.



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2. **Facts, in Brief**

2.1 The Informant is an association of contractors, real estate developers, manufacturers and dealers of construction machineries and materials in India. The Opposite Party No. 1 is the State Government of Kerala and the Opposite Party No. 2 is the statutory authority under the Opposite Party No. 1 and is responsible for design, implementation and maintenance of all public works undertaken by the Opposite Party No. 1. The Opposite Party No. 3 is a registered company of the Government of Kerala (under the administrative control of the Opposite Party No. 2) and is engaged in undertaking construction works of the Government of Kerala such as roads, bridges, national highways, dams, canals and other public structures. The Opposite Party No. 4 is one of the departments of the Government of Kerala and is responsible for all financial and budgetary allocations of the State of Kerala.

2.2 As per the Informant, public works such as construction of roads, bridges, national highways, dams *etc.* in Kerala are executed by the Opposite Party No. 1 through the Opposite Party No. 2 by floating tenders and inviting bids from various contractors. It is stated in the information that by virtue of its 100% market share in terms of the total number of tenders floated, the Opposite Party No. 2 is in a dominant position in the market for tender procurements relating to construction works in Kerala. Further, owing to its substantial size and resources, the Opposite Party No. 2 has been stated to enjoy a position of dominance in the said market. It has been alleged that because of its dominance, the Opposite Party No. 2 was acting in collusion with the Opposite Party No. 3 with the intention to oust other contractors from the market. As per the Informant, because of the preferential treatment given by the Opposite Party Nos. 1 and 2, the Opposite Party No. 3 is getting all the tenders floated in Kerala for construction of public works.



2.3 The Informant highlighted clause 1901 of the Kerala Public Works Department (PWD) manual which classified contractors into four categories on the basis of their financial resources, professional experience and past records. As per the PWD manual, 'A Category' contractors are entitled to apply for tender for all works in any office, 'B Category' contractors are entitled to apply for tender for all works upto Rs. 55 lakhs in any office, 'C Category' contractors are entitled to tender for works up to Rs. 15 lakhs in any office, and 'D Category' contractors are entitled to tender for works up to Rs. 6 lakhs in any office. Further, clause 1404.2.6 of the said manual states that any registered contractor can bid for the works in two rounds *viz.* pre-qualification and post-qualification.

2.4 It is the case of the Informant that for many years the Opposite Party No. 1 had been exempting the Opposite Party No. 3 from applying for pre-qualification for various works tendered by the State Government Departments, State Public Undertakings, Local Bodies *etc.* The Informant alleged that the Opposite Party No. 1, through the Opposite Party No. 2, had also issued orders declaring the Opposite Party No. 3 as an 'A Category' contractor. Further, exemption was granted to the Opposite Party No. 3 with respect to earnest money deposit, payment of cash deposit of Rs. 50,000/- for getting 'A' Class registration, declaring it as eligible for 'pre-qualification' to undertake civil works, allowing a price preference of 10% over the lowest quoted rate, *etc.*

2.5 As per the Informant, the above exemptions and preferential treatment accorded to the Opposite Party No. 3 distorted competition in the relevant market by ousting private contractors at the time of awarding tenders. Further, it is stated that the Opposite Party No. 3 had recently started sub-contracting the tenders to private contractors by accepting illegal gratification from those contractors due to which the Opposite Party No. 1 is losing about 10% on all projects. It is also alleged that due to preferential status granted to the Opposite Party No. 3, it receives civil works even if another contractor has quoted lowest bid and after



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securing the tenders/ contracts, the Opposite Party No. 3 sub-contracts the work to its empanelled private contractors/ sub-contractors which also includes members of the Informant. As per the Informant, the conduct of the Opposite Party No. 3 in sub-contracting the works to its empanelled private contractors by entering into MoU (Memorandum of Understanding) with them amounts to collusive bidding in contravention of the provisions of section 3(3)(d) read with section 3(1) of the Act.

3. The Commission *prima facie* found merit in the allegations raised by the Informant and accordingly, *vide* its order dated 08.10.2013, directed the Director General (hereinafter referred to as the 'DG') to investigate into the matter for contravention of the provisions of the Act.

4. **DG's Findings**

4.1 In terms of section 26 (3) of the Act, the DG has submitted a detailed investigation report in the matter to the Commission on 24.11.2014.

4.2 In line with the facts and circumstances of the case, the DG has first examined whether the Opposite Parties are covered under the definition of 'enterprise' in terms of section 2(h) of the Act before proceeding to examine any infraction of the provisions of section 4 of the Act in the matter. The DG has also examined possible violation of the provisions of section 3 of the Act in the matter.

4.3 The DG has reported that the Opposite Party No. 1 and the Opposite Party No. 4 are not engaged in any activities enumerated in section 2(h) of the Act and therefore, are not covered within the definition of enterprise. As per the DG report, the nature of activities performed by the Opposite Party Nos. 1 and 4 are not relating to production, storage, supply, distribution, acquisition or control of articles or goods or provision of services and the functions discharged by them are



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in the nature of sovereign functions undertaken by a welfare State. With regard to the Opposite Party No. 2, it was observed in the DG report that it is a department of the Government of Kerala responsible for design, implementation and maintenance of all public works, construction of roads, bridges, buildings *etc.* The Opposite Party No. 2 is undertaking civil construction works as per its budget and these activities do not comprise of any commercial venture, despite the fact that these activities involve financial transactions. As such, the Opposite Party No. 2 was found to be not falling within the definition of 'enterprise'. However, the DG has reported that the Opposite Party No. 3 is an enterprise as the activities performed by it fell within the purview of section 2(h) of the Act. It was reported by the DG that the Opposite Party No. 3 has stopped its construction activities in 1998 and started outsourcing the same and is now participating as a competitor along with other private contractors. Thus, it is operating in the market of bidding for tenders issued by the Opposite Party No. 2 for execution of various works.

4.4 As per the DG report there are two relevant markets involved in the matter *i.e.*, 'the market for procurement of services for civil construction work by tendering in the state of Kerala' and the second is 'the market of the provision of services for civil construction works to the Opposite Party No. 1 and the Opposite Party No. 2 in the State of Kerala'. As per the DG report, in the first relevant market the Opposite Party Nos. 1 & 2 are operating and in the second relevant market the Informant and the Opposite Party No. 3 are operating.

4.5 With regard to the position of dominance of the Opposite Party No. 3 in the relevant market of 'provision of services of civil construction works to the Opposite Party No. 1 and the Opposite Party No. 2 in the State of Kerala, the DG found that out of the total works tendered by the Opposite Party No. 2 in the financial year 2012-13, the share of the Opposite Party No. 3 comes out to be 0.60% on the basis of number of works awarded and 17.25% on the basis of value of works awarded. In the narrow sub-market of Class A tenders only, the percentage of value of works awarded to the Opposite Party No. 3 cumulatively in



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all the four years from 2010-11 to 2013-14 was 15.44%. In terms of size and importance of competitors, the DG reported that there are numerous contractors operating in the relevant market who pose a significant competitive constraint to the Opposite Party No. 3. The DG has reported that despite exemptions and privileges it received from the Opposite Party Nos. 1 & 2, the Opposite Party No. 3 does not possess dominant share in the relevant market so as to operate independently of the competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. As such, DG reported that the Opposite Party No. 3 is not dominant in the relevant market of 'provision of services of civil construction works to the Opposite Party No. 1 and the Opposite Party No. 2 in the state of Kerala.

4.6 It was observed by the DG that the exemptions granted to the Opposite Party No. 3 are a result of policy decision of the Opposite Party No. 1 to enable the Opposite Party No. 3 to compete with private contractors and restrict the private contractors from quoting exorbitant rates and delivering inferior quality of work. Based on the above discussion, the DG has reported that the Opposite Parties have not infringed any of the provisions of section 4 of the Act.

4.7 The DG has examined the conduct of the Opposite Parties *vis-à-vis* the provisions of section 3(3) and 3(4) of the Act and found that none of the provisions of either section 3(3) or section 3(4) of the Act are violated in the instant matter by the Opposite Parties. As per the DG report, the Opposite Parties are neither engaged in identical or similar trade or business to be covered under any of the provisions of section 3(3) of the Act nor the preference given to the Opposite Party No. 3 by the Opposite Party Nos. 1 & 2 can be treated as vertical agreement in terms of section 3 (4) of the Act.



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5. Reply/objections of the Informant in response to the DG report

5.1 The Informant has submitted that the Opposite Party Nos. 2 and 3 are both 'enterprises' within the definition of section 2(h) of the Act and that DG's conclusions in this regard are misconceived. It is submitted that mere fact that the Opposite Party No. 2, instead of discharging its obligations on its own, sought assistance from private contractors to undertake the same construction works, would not make the function of provision of construction services for building of roads and construction of buildings as 'sovereign function'.

5.2 The Informant relied on various judgments and reiterated that the activity carried on by the Opposite Party No. 2 is that of a service provider as per the KPWD Manual, which is being undertaken through publication of tenders for construction of buildings, roads, *etc.*, thereby making the Opposite Party No. 2 also a procurer of services as opposed to an entity discharging 'sovereign function'.

5.3 It is also submitted that the DG has wrongly concluded that the Opposite Party Nos. 2 and 3 are not engaged in similar/identical trade. It is submitted that the Opposite Party No. 2 has been held to be a procurer of service since it issues tenders for procurement of services for construction of buildings. Similarly, the Opposite Party No. 3 has also now become a procurer of services because since 1998, the Opposite Party No. 3 stopped the construction activities on its own and has started to outsource the same. Thus, it is apparent that the Opposite Party No. 3 has also become a procurer of service like the Opposite Party No. 2, hence, they both are covered squarely under the provisions of section 3(3) of the Act.

5.4 Further, it is contended that the selection procedure adopted by the Opposite Party No. 3 suffers from serious lacunae, in as much as the Opposite Party No. 3 has devised its own selection procedure for selecting sub-contractors with whom the pre-tender MoU has to be signed. Further, it is submitted that the procedure



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adopted by the Opposite Party No. 3 do not conform to the norms of transparency directive of the Central Vigilance Commission (CVC) issued from time to time. The Informant has also stated that along with adopting faulty and malicious selection procedure, the Opposite Party No. 3 is colluding with the Opposite Party No. 2 and exploiting the exemptions given to it by the Opposite Party Nos. 1 and 2.

6. **Reply/objections of the Opposite Party Nos. 1, 2 and 4 in response to the DG report**

6.1 It is submitted that the DG has not found any unfair trade practices being adopted by the Opposite Party Nos. 1, 2 and 4. Further, the Opposite Party Nos. 1 and 2 are only exercising their sovereign functions as contemplated under the Constitution of India. It is submitted that the Opposite Party No. 3 is a Government Company which was incorporated in 1975 in order to prevent the then prevailing unethical practices adopted by private contractors such as forming cartels, quoting exorbitant rates in civil works and other fields and thereby exploiting government exchequer.

6.2 It is submitted that the Opposite Party No. 3 and the private contractors are not on equal footing and therefore the question of treating them equally does not arise. It is further contended that it is a policy matter of the State Government to decide what preferences and exemptions are to be granted to various agencies. It is also stated that such policy decisions are subjected to review and discussion of Government from time to time. The Opposite Party No.1 submitted that Government has reviewed the preferential concession extended to the Opposite Party No. 3 as per GO (P) No. 14/15/Fin dated 13.01.2015 and thereafter has ordered that preferential concession enjoyed by the Opposite Party No. 3 for the execution of public works will be allowed only to works directly executed by the Opposite Party No. 3 without any involvement of sub-contractors.



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6.3 It is also contended that the preferences and privileges are scrutinized from time to time to ensure that only such preferences are retained which are necessary according to the circumstances.

7. Reply/objections of the Opposite Party No. 3 in response to the DG report

7.1 The Opposite Party No. 3 has submitted that it has no serious objections against the DG report except against certain observations regarding the procedure of sub-contracting of work and periodical review of preferential treatments. It is submitted that these preferential treatments are outside the ambit of the Act since no case against the Opposite Parties is made out.

7.2 It is submitted that the State Government has conferred certain preferences and exemptions not only to the Opposite Party No. 3 but also to few other entities as a policy decision which should not be interfered with. The preferential concession to the Opposite Party No. 3 is withdrawn with respect to the works executed through sub-contractors and the Government has decided to maintain only few minor concessions after considering the capacity of the Opposite Party No. 3 to deliver *vis-à-vis* other competing contractors, changes in the market situations and changes in the modus of working of the Opposite Party No. 3 from time to time.

7.3 The Opposite Party No. 3 has denied the findings of the DG with respect to the procedure followed by it in awarding sub-contracts. It is submitted that being a state agency the Opposite Party No. 3 is following all legal and constitutional principles while granting sub-contracts to private contractors. The procedure followed by it was upheld by various High Courts as reasonable and legally permissible. It is submitted that the procedure followed by the Opposite Party No. 3 is with a view to eliminate incapable contractors, ensure speed and quality work



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with ultimate supervision of the Opposite Party Nos. 2 & 3. It is submitted that the selection of contractors from the approved panel of contractors is done in the most transparent manner and it has already withstood the judicial scrutiny in numerous decisions. It is further submitted that at present there are 110 contractors in the approved panel which is revised annually and all the qualified contractors are equally entitled to get them empanelled. On the basis of aforesaid, the Opposite Party No. 3 has contended that the case made out against the Opposite Parties be closed.

8. Issues and Analysis

8.1 The Commission has perused the material available on record, besides hearing the counsel appearing for the Informant and the Opposite Parties.

8.2 The Informant is essentially aggrieved by the alleged preferential treatment given to the Opposite Party No. 3 by the Opposite Party Nos. 1 & 2 in floating tenders and inviting bids for construction of public works in the State of Kerala. The Informant has alleged contravention of the provisions of sections 3 and 4 of the Act in the matter by the Opposite Parties.

8.3 On a perusal of the report of the DG and the replies/ objections filed by the Opposite Parties, arguments advanced by the Advocates appearing on behalf of the parties and other materials available on record, the Commission is of the opinion that in order to arrive at a conclusion in the matter, following issues need to be determined: (i) whether the conduct of the Opposite Parties is abusive in terms of section 4 of the Act, and (ii) whether the conduct of the Opposite Parties is in contravention of section 3 (3) of the Act read with section 3(1) of the Act.



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8.4 Before proceeding to determine the first issue *i.e.*, whether the conduct of the Opposite Parties is abusive in terms of section 4 of the Act, it is a pre-requisite to determine whether the Opposite Parties fall within the definition of ‘enterprise’ in terms of section 2(h) of the Act.

8.5 For reasons recorded earlier in this order, the DG has opined that Opposite Party Nos. 1, 2 and 4 are not covered under the definition of ‘enterprise’ as per section 2(h) of the Act. The Opposite Party No. 3 has been held to be an enterprise as it discharges commercial functions and participates as a competitor along with other individual contractors before the Opposite Party No. 2 on behalf of outsourced registered sub contractors.

8.6 To determine whether the Opposite Parties are covered under the definition of ‘enterprise’ or not, it would be pertinent to highlight the provisions of section 2(h) of the Act, as laid down below

‘enterprise’ means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.



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8.7 For the purposes of ascertaining whether an entity is an enterprise or not within the meaning of section 2(h) of the Act, it is essential to examine the nature of the activity undertaken by the entity. Further, the assessment of whether an entity is an 'enterprise' or not is to be done based on the fact of a case and the conclusion may vary from case to case.

8.8 With regard to the Opposite Party Nos. 1, 2 & 4, the Commission observes that the nature of the activities undertaken by them do not fall within the ambit of section 2(h) of the Act. The Opposite Party No. 1 is merely carrying out the policy functions of the Government and as such is not engaged in any economic activity to be covered by the definition of an enterprise. Further the material available on record indicates that the Opposite Party No. 2 is responsible for design, implementation and maintenance of all public works undertaken by the Opposite Party No. 1 and facilitate the economic development of the State by providing required road infrastructure, development of inter-state road infrastructure facilities, road safety and enhancing the mobility of the people as well as goods and services. The activities being performed by the Opposite Party No. 2 cannot be said to be covered under the definition of 'enterprise', keeping in view its primary functions, as noted above. The functions carried out by the Opposite Party No. 2 i.e. construction of roads, bridges, highways etc. are aimed at building sound infrastructure for the benefit of the public at large. For carrying out these objectives, the Opposite Party No 2 consumes the services of the Opposite Party No. 3 and other contractors, including members of the Informant. As such, the Opposite Party No. 2 is a mere consumer of services offered by the Opposite Party No. 3 and other contractors.

8.9 Further, it is observed that the Opposite Party No. 3 was incorporated in 1975 as an outcome of a policy decision taken by the Opposite Party No. 1 to have its own construction company to undertake government construction works. The Opposite Party No. 1 holds the entire share capital of the Opposite Party No. 3 and it is functioning under the administrative control of the Opposite Party No. 2.



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It is observed that the Opposite Party No. 1 decided to establish the Opposite Party No. 3 in order to prevent the then prevailing unethical practices on the part of private contractors such as forming cartels, quoting exorbitant rates, providing inferior quality of works, go-slow tactics *etc.* The Opposite Party No. 3 is functioning in terms of policy decisions taken by the government from time to time for the construction of roads, bridges, national highways, dams, canals and like public structures. Thus, the decision to provide the Opposite Party No. 3 preferential treatment over private contractors was backed by the policy mandate. The Opposite Party No. 2 was merely implementing the order given by the Opposite Party No. 1. This, according to the Commission, neither makes the Opposite Party No. 1 nor the Opposite Party No. 2 an 'enterprise' for the purposes of the functions they are performing which have been alleged to be in contravention of section 4 of the Act in the instant case.

8.10 Similarly, the Opposite Party No. 4 is one the departments of the Opposite Party No. 1 which allocates funds to various state government departments. It also performs the function of preparing estimates of the total receipts and disbursements made by the State in each year and that of watching Government debt status. The Commission, therefore, is of the opinion that the Opposite Party No. 4 is not an enterprise within the meaning of section 2(h) of the Act.

8.11 Based on the aforesaid reasons, the Commission further observes that the activities being performed by the Opposite Party Nos. 1, 2 & 4 are not such so as to qualify them as an 'enterprise' for the purpose of Section 2(h) of the Act.

8.12 With regard to the Opposite Party No. 3, the Commission is of the opinion that apparently the activities performed by it brings it under the purview of the term 'enterprise' as defined under the Act. It is observed that the Opposite Party No. 3 is a registered company under the Government of Kerala and is engaged in the construction of works of the Government of Kerala such as roads, bridges, national highways, dams, canals and other public structures. It is also



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participating in the tenders floated by the Government of Kerala as a competitor along with other individual contractors in the market. The Commission is of the view that the functions discharged by the Opposite Party No. 3 are squarely covered under the definition of ‘enterprise’ in terms of section 2(h) of the Act.

8.13 Based on the above discussion, the Commission is of the view that in the present case the Opposite Party Nos. 1, 2 & 4 are not covered under the definition of ‘enterprise’; whereas the activities performed by the Opposite Party No. 3 are squarely covered under the definition of ‘enterprise’ in terms of section 2(h) of the Act.

9. **Determination of Issue No. 1: Whether the conduct of the Opposite Parties is abusive in terms of Section 4 of the Act?**

9.1 To cover the alleged anti-competitive activities of an entity within the ambit of section 4 of the Act, the essential pre-requisite is that the entity in question must be an enterprise in terms of section 2(h) of the Act. In the instant case, since the Commission has determined above that the Opposite Party Nos. 1, 2 and 4 are not covered under the definition of ‘enterprise’ within the meaning of section 2(h) of the Act, there is no need to look into their conduct for contravention of section 4 of the Act. Though the DG has carried out an alternative analysis and observed that the conduct of the Opposite Party No. 2 is not abusive, the Commission does not find it appropriate to undertake such an analysis in view of the finding that it is not an enterprise.

9.2 However, the conduct of the Opposite Party No. 3 needs to be analysed *vis-à-vis* the provisions of section 4 of the Act, as it falls under the definition of ‘enterprise’.



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- 9.3 To examine the alleged abusive conduct of the Opposite Party No. 3, first the relevant market has to be determined where it is operating and then, its position of dominance, if any, in the relevant market so defined has to be assessed.
- 9.4 As per section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. Further, the term 'relevant product market' has been defined in section 2(t) of the Act as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. The term 'relevant geographic market' has been defined in section 2(s) of the Act to provide that a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas. In order to determine the 'relevant product market', the Commission, in terms of the factors contained in section 19(7) of the Act, is required to have due regard to all or any of the following factors viz., physical characteristics or end- use of goods, price of goods or services, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products. Similarly in order to determine the 'relevant geographic market', the Commission, in terms of the factors contained in section 19(6) of the Act, is required to have due regard to all or any of the following factors viz., regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after - sales services.
- 9.5 Considering the facts of the case and the activities undertaken by OP 3, the Commission is of the view that the market for '*provision of services for civil construction work of the government*' is the relevant product market to be



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considered in the instant case. The Commission observes that civil construction works undertaken by the Opposite Party No. 1 (through the Opposite Party No. 2) form a separate category in itself and the services provided by the Opposite Party No. 2 are not substitutable by any other method. The Commission is of the view that the service of contractors for civil construction work of the government is a distinct relevant product market and cannot be substituted with any other similar services because the process of award of civil construction work by the government (through tendering) is different from that of the private parties. Moreover, various governments specifically enrol contractors for civil construction work in their administrative areas under different categories (based on the experience, expertise, *etc.*) of the contractors which generally does not happen in case of contractors who provide services to private entities/persons. The Commission also distinguishes the services of contractors for civil construction work (i.e. construction of roads, bridges, highways *etc.*) from other construction work as it requires specialised skill, expertise as well as different equipments and technology.

- 9.6 With regard to the relevant geographic market, the Commission agrees with the DG report that the relevant geographic market to be considered in this case is the '*State of Kerala*'. It is so because the allegations relate to the tenders floated by the Government of Kerala through its public works department and the parties who participated in such tenders are operating in the State of Kerala. Further, the conditions of competition in the market for the service of contractors for civil construction work of the Government in the State of Kerala are homogenous and distinguishable from other adjoining states.
- 9.7 Based on the above, the Commission is of the view that the relevant market to be considered in the instant case is the market for '*provision of services for civil construction work of the government in the State of Kerala*'.



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- 9.8 Once the relevant market is defined, the next step is to examine whether the Opposite Party No. 3 is in a dominant position in the said relevant market or not. By virtue of explanation (a) to section 4 of the Act, ‘dominant position’ means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market or to affect its competitors or consumers or the relevant market in its favour.
- 9.9 The Commission, having perused the material placed on record, is convinced that the Opposite Party No. 3 is not in a dominant position in the relevant market for ‘*the provision of services for civil construction work of the government in the State of Kerala*’. The Commission finds the analysis conducted by the DG reliable as in terms of volume and value of tender awarded by the Opposite Party No. 2 during 2012-13, the market share of the Opposite Party No. 3 was 0.60% and 17.25% respectively. Moreover, it is observed from the DG report that there are many contractors who are competing with the Opposite Party No. 3 for award of the Opposite Party No. 2’s tenders in Kerala. Further it may be noted that as per the information collected by the DG, there are 2488 Class ‘A’ contractors who are competing with the Opposite Party No. 3 for award of the Opposite Party No. 2 tenders and in fact, the Opposite Party No. 3 has a small market share compared to private contractors. Thus, the Commission is convinced that the Opposite Party No. 3 is not holding a dominant position in the relevant market determined above.
- 9.10 Based on the above, the Commission is of the view that the Opposite Party No. 3 is not in a dominant position in the relevant market for ‘*provision of services for civil construction works of the government in the State of Kerala*’. Since, the Opposite Party No. 3 is not in a dominant position in the said relevant market; its conduct need not be examined under the provisions of section 4 of the Act.



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9.11 In view of the aforesaid, the Commission is of the opinion that no case of abuse of dominant position is made out against any of the Opposite Parties in terms of section 4 of the Act.

10. Determination of Issue No. II: Whether the Opposite Parties have contravened the provisions of Section 3 of the Act?

10.1 The Informant has also alleged contravention of the provisions of section 3 of the Act in the matter.

10.2 The DG has reported that none of the provisions of either section 3(3) or section 3(4) of the Act is violated in the matter because the Opposite Parties are not engaged in identical or similar trade or business to be covered under section 3(3) of the Act and the preferential treatment given by the Opposite Party Nos. 1 & 2 to the Opposite Party No. 3 cannot be treated as vertical agreement in terms of section 3 (4) of the Act.

10.3 The Informant however, contended that the Opposite Party No. 3, like the Opposite Party No. 2, is a procurer of service and as such both are covered squarely under the provisions of section 3(3) of the Act.

10.4 The Commission is not convinced with the arguments of the Informant that the Opposite Party No. 2 and the Opposite Party No. 3 are covered squarely under the provisions of section 3(3) of the Act. As stated earlier, the Opposite Party No. 2 is merely carrying on the mandate given by the Opposite Party No. 1 and undertaking the design, implementation and maintenance of all public works undertaken by the Opposite Party No. 1, economic development of the State by providing required road infrastructure, development of inter-state road infrastructure facilities etc. The Opposite Party No. 3 is an enterprise engaged in construction works like construction of roads, bridges, national highways, dams, canals and other public structures. The Opposite Party No. 1 and the Opposite



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Party No. 2 float the tenders and the Opposite Party No. 3 and other contractors bid for the tenders to undertake the work required by the Opposite Party Nos. 1 and 2.

10.5 From the activities undertaken by the Opposite Parties, it is clear that they are not engaged in similar/ identical trade or business to be covered under section 3 (3) of the Act. Also, the Opposite Parties are not operating at different levels of the same production chain to be covered under provisions of section 3(4) of the Act. The information also does not disclose any agreement between the parties to be covered under the provisions of section 3(1) of the Act. Therefore, the Commission is of the view that none of the provisions of either section 3(3) or section 3(4) of the Act are attracted by the Opposite Parties in the instant matter.

10.6 In view of the above discussion, the Commission is of opinion that no case of contravention of the provisions of either section 3 or 4 of the Act is made out against the Opposite Parties and the matter is ordered to be closed forthwith.

10.7 Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi
Dated : 12/05/2015

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