(2025) 03 CCI CK 0442

In the Competition Commission Of India

Case No : Case No. 15 Of 2024

Mr. Vinish Khanna APPELLANT

Vs

M/s A&T Europe SpA; M/s Myrtha Pools India Private Limited; Public Works Division Akola, Maharashtra RESPONDENT

Date of Decision : 21-03-2025

Acts Referred:
Competition Act, 2022 — Section 2(h), 2(r), 2(s), 2(t), 3, 4, 19(1)(a), 19(4), 26(2), 33

Citation : (2025) 03 CCI CK 0442

Hon'ble Judges : Ravneet Kaur, Chairperson;Anil Agrawal, Member;Deepak Anurag, Member

Bench : Full Bench

Judgement

Order under Section 26(2) of the Competition Act, 2002

1. The present Information has been filed by Sh. Vinish Khanna ('Informant') under Section 19(1) (a) of the Competition Act, 2002 ('the Act') against (i) M/s A&T Europe SpA ('OP-1'), (ii) M/s Myrtha Pools India Private Limited ('OP-2'), and (iii) Public Works Division Akola, Maharashtra ('OP-3') (collectively, referred to as 'Opposite Parties/OPs'), alleging contravention of provisions of Section 3 and 4 of the Act in a tender floated for inviting bids for construction of swimming pool by the OPs.

2. The Informant has stated himself to be a director in one of the bidders for this tender viz. M/s Renaissance Aqua Sports (P) Ltd., but has filed this information in his individual capacity.

3. OP-1 is a company incorporated in Italy. It is operating in India since 2016-17. OP-1 is stated to be engaged in business of making stainless steel pools. OP-2 is a company incorporated in Bangalore, India in 2019 and is a wholly owned subsidiary of OP-1. OP-1 is stated to be operating in India through OP-2.

4. OP-3 is a division of public works department in Akola in the State of Maharashtra, who has invited e-tender notice no. 30 of 2023-24 bearing E-

tender No. 2024_PWR_ 988365_1 in early 2024 for construction of world aquatics (FINA) compliant, Olympic standard, pre-engineered Swimming pool having size 25M x 50M along by dismantling the existing swimming pool in the premises of Sanskrutik Bhavan for District Sports Office, Akola (hereinafter, 'the Impugned Tender') at an estimated cost of rupees 8.1 crores.

5. The Informant has alleged that OP-3, while inviting the Tender, has contravened the provisions of the Act by imposing certain restrictive conditions which require a Memorandum of Understanding ('MOU') to be entered into by the potential bidder and OP-1 so as to become technically eligible for the Impugned Tender. Resultantly, the technology and material for building the pool has to be taken from OP-1. As per the Informant, OP-3 ought to have provided the specifications of material to be used in the project and not the name of any particular seller or its brand. It is further stated that OP-

3 has used the word 'similar' as an eye wash, the tender goes on to mention the address of OP-1 in one of the conditions of clause 4.1.13 of the Impugned Tender.

6. The Informant has alleged that there appears to be an anti-competitive agreement in contravention of Section 3 of the Act between OP-1 and OP-3 due to which material and technology of OP-1 is a pre-requisite for carrying out the work under the Impugned Tender. This is giving OP-1 a monopoly over the supply of materials/technology. It appears to enhance the potential of OP-1's related entity to bid and win the tender.

7. The Informant has also alleged that OP-3 has abused its dominant position in favour of OP-1 in contravention of Section 4 of the Act by putting restrictive tender conditions in the Impugned Tender thereby making it a limited tender disguised as an open tender. Due to this conduct of OP-3, except OP-1 all other providers (including Indian entities) of material and technology are restricted to access/ take part in Impugned Tender and in effect, fair competition is restricted. Resultantly, OP-1 is stated to have used this in its favour by increasing the cost of material required for the project by 400%. As per the Informant, OP-1 has in the past quoted Euro 2,07,000 (estimated rupees 2 crore) for construction of a swimming pool of similar dimensions. Inflating the project cost is unduly causing a waste of public money.

8. The Informant further stated that three bidders viz. M/s MEIT Multitech (a partnership firm formed in 2020 as per partnership deed), M/s S.D. Dounde Infra Pvt. Ltd. (company incorporate in 2018) and M/s Renaissance Aqua Sports (P) Ltd. (company incorporated in 1995) applied for the tender. Out of these three bidders, first two are selected on the basis of sole criteria of having MOU with OP-1, overlooking crucial aspects such as experience, expertise etc. It is further stated that the third bidder namely M/s Renaissance Aqua Sports (P) Ltd is rejected even at the technical stage.

9. The Informant also stated to have complained to OP-3 highlighting certain issues such as use of specific seller name, inflated cost of project, evaluation

criterion not properly defined, wastage of public funds etc. However, no response was received regarding the same.

10. The Informant has asserted that inclusion of a clause mandating the submission of MOU with specific supplier in public projects not only effectively creates a barrier to entry for other potential bidders undermining principles of fair competition but also gives undue advantage to that specific supplier to charge exorbitant prices causing wastage of public money. The Informant has annexed documents such as copy of tender, tender documents of three bidders, copy of the complaint etc. in support of his allegations/assertions.

11. The Informant has inter alia requested to pass appropriate order(s) restraining the OPs from doing any further work in relation to the Impugned Tender and directing the OPs not to re-enter such agreement/ arrangement and/ or discontinue such abuse of dominant position.

12. Asserting that allowing the OPs to go ahead with the tender will cause huge loss to the public at large due to inflated prices by OP-1, the Informant also requested for grant of interim relief in the form of order restraining the OPs from doing any further work in relation to the Impugned Tender.

13. The Commission first considered the matter in its ordinary meeting held on 14.08.2024 and decided to forward a copy of information to OP-3 to obtain its response/ comments apart from seeking details about: (a) Rationale for specifying name of only one technology and material supplier i.e. OP-1, in the Impugned Tender while there are other suppliers for construction of World Aquatics (FINA) compliant Olympic standard swimming pools and (b) Details about other players and market share data with respect to procurement of construction services for World Aquatics (FINA) compliant Olympic standard swimming pools. The Commission decided to seek the information pertaining to (b) above from the Informant also.

14. In the absence of response from the Informant and OP-3 within the stipulated time, the Commission, vide order dated 06.11.2024, provided one more opportunity to OP-3 and the Informant to file details/submissions with respect to para 13 above.

15. OP-3 filed its response dated 27.11.2024 on 03.12.2024 and the Informant filed its response dated 04.01.2025 along with request for condonation of delay in filing.

16. The Commission considered the matter in its ordinary meeting held on 19.02.2025, condoned the delay and decided to pass an appropriate order in due course.

17. The Commission has perused the Information, material provided by the Informant and OP-3 as well as publicly available information and observes that the gravamen of allegations of the Informant is alleged imposition of restriction by OP-3 in the Impugned Tender by specifying the name of OP-1 and its

technology in contravention of provisions of the Act.

18. Before proceeding in the matter, it is relevant to assess whether OP entities qualify to be an enterprise in terms of Section 2(h) of the Act. In this regard, it may be noted that OP-1 and OP-2 are companies engaged in the provision of services pertaining to construction/installation of swimming pool etc. and as such, qualify to be an enterprise under the Act. With respect to OP-3, it is noted that the same is a division of a government department engaged in activity involving provision of various services to public at large in the district of Akola in the State of Maharashtra. Erstwhile Hon'ble Competition Appellate Tribunal, in the matter of Shri Rajat Verma v. Public Works (P&R) Department, Government of Haryana & Others, held that "Whether the activity of procuring construction services is with a view to make profit is not the concern of the Act. What is important is that the Public Works Department by inviting tenders for award of contract for construction of roads, bridges etc. is interfacing with the wide market of road and bridge construction services in the State. Therefore, there is no escape from the conclusion that it is an enterprise within the meaning of Section 2(h) of the Act". Thus, the extant jurisprudence considers Public Works Department ('PWD') including its division as an enterprise for the purposes of Section 2(h) of the Act. Accordingly, the Commission is of the view that OP-3 is covered under the definition of the term 'enterprise' in terms Section 2(h) of the Act.

19. Now, the Commission proceeds to examine the matter on merits. The Commission notes that the Informant has alleged abuse of dominant position by OP-3, in contravention of Section 4 of the Act, by specifying brand product/ technology of OP-1 rather than specifications for the material and/or project which has foreclosed competition for other players to participate in the Impugned Tender. The Informant has also alleged existence of an anti-competitive agreement between OP-1 and OP-3 due to which OP-1 is having monopoly over supply of material and technology in the Impugned Tender and resultantly, charging exorbitant money for carrying out the project under the Impugned Tender in contravention of Section 3 of the Act. This conduct of OPs is allegedly causing Appreciable Adverse Effect on Competition ('AAEC') in markets in India in the form of loss of public money as well as denial of participation to potential bidder in the Impugned Tender.

20. With respect to analysis under Section 4 of the Act, the first requirement is to delineate the relevant market as per Section 2(r) of the Act which comprises of relevant product market and relevant geographic market in terms of Section 2 (t) and 2(s) of the Act. The next step is to assess the dominance of an OP in the relevant market so delineated, in terms of the factors enumerated under Section 19(4) of the Act. Once the dominance of an OP is established, the final step is to analyse the allegations pertaining to abuse of dominance in terms of provisions of Section 4 of the Act.

21. With respect to the relevant product market, the Commission noted that the

present matter pertains to a tender invited for dismantling of an existing pool and construction of new Olympic standard pre-engineered swimming pool in Akola district of the State of Maharashtra. It may be noted that dismantling/ construction of swimming pool may involve expertise/ experience pertaining to civil work such as expertise in construction of roads, bridges, buildings but at the same time it also appears to be work of specialised nature owing to risk factors associated with a faulty swimming pool, and thus, appears to be more than usual civil construction work. Taking all kind of construction work into account may lead to broadening of the relevant product market. Further, swimming pools may be constructed for training and holding competitions by public or private entities, in hospitality industry (hotels, clubs etc.) or personal purposes (housing societies or private consumption etc.) and therefore, due to varying purposes, the size and compliance requirements may vary. Moreover, the sizes of swimming pools for hospitality or personal purpose may vary from size of pools which meets FINA guidelines or standards. However, considering swimming pools only for Olympic style competitions and training purpose as a separate relevant market will lead to a very narrow definition of relevant product market. It is also noted that one of the bidders appears to have experience of construction of swimming pools but the other two bidders appear to have experience more of civil work and also these two bidders are technically qualified by the procurer for participation in the Impugned Tender. Accordingly, the Commission is of the view that the relevant market may be delineated as 'market for procurement of services for construction of swimming pools'.

22. With respect to the relevant geographic market, it may be noted that one of the bidders viz. Renaissance Aqua sports (the company in which Informant is a director) is based in Delhi, but it has carried out projects involving installation/ renovation/ upgradation of swimming pool at various places across the country including Madhya Pradesh, Himachal Pradesh, Bihar etc. Moreover, OP-1 is also an international entity providing such services across the world, including in India through its subsidiary OP-2. There appears no embargo on bidders pertaining to a particular State to take part in tenders of other States. In view of the above, conditions of competition appear to be homogenous across the country. Therefore, the Commission finds it apt to delineate the relevant geographic market as pan India and accordingly, the relevant market may be delineated as 'market for procurement of services for construction of swimming pools in India'.

23. Next comes the assessment of dominance of OP-3 as alleged by the Informant. Neither the Informant nor OP-3 has provided any detail in this regard despite ample opportunity being provided by the Commission. The Commission notes that every State has a PWD and may be floating tenders for construction of swimming pool for their respective district or city or area on need basis. There may be various tenders across various States within the country. Besides, the construction of swimming pool for hospitality, training etc. is also undertaken on demand from hotels, clubs, housing societies etc. and therefore, there may be

various procurers for such services. In these circumstances, a district PWD may not be the only entity procuring the services for construction of swimming pool. As such, the Commission is of the view that OP-3 does not appear to be dominant within the relevant market delineated above. In the absence of dominance, there arises no occasion to examine abuse of dominance.

24. With respect to Section 3 of the Act, the Commission notes that the Informant has alleged existence of anti-competitive agreement between OP-1 and OP-3 due to which OP-3 is stated to have prescribed the brand/technology of OP-1 in the Impugned Tender. In its response dated 04.01.2025, the Informant has stated that data relating to market share in procurement of Olympic standard swimming pool is not available with him. Informant further stated that OP-1 is a sponsor of World Aquatics (FINA), but FINA does not endorse/ recommend any specific brand/company to build Olympic standard swimming pools. The Informant also stated that apart from OP-1 and OP-2, entities such as Natare Pools (USA), Industrial Services Italia, (Italy), Skypool System, Flluidra Swimming Pools (Spain), Steela Pools (Italy) etc. are engaged in construction services for World Aquatics compliant Olympic standard swimming pools.

25. The Commission notes that OP-3, in its response dated 27.11.2024, has rejected allegations made by the Informant. OP-3 stated that primary objective of the work under the Impugned Tender is to design, build and deliver a world-class Olympic standard swimming pool that exceeds industry standards and that the swimming pool project is envisioned not only as a recreational facility but also as a centre for athletic excellence, community engagement, and wellness promotion. OP-3 further stated that based on evaluation of various options including conventional concrete pool and pre-engineered technologies like PVC coated stainless steel panels and considering sustainability as the key consideration, pre-engineered technology stated to have suited its needs. OP-3 also stated to have studied complete technical details and credentials of various technologies, not limited to Myrtha Pools, and during its assessment found Myrtha and similar technology of pre-engineered pools most suitable.

26. With regard to rationale for specifying name of only one technology material supplier, the Commission notes the submissions of OP-3 that it is committed to an open and competitive tendering process that allows multiple qualified firms to participate. It is further stated that as per tender documents and subsequent modifications viz. common set of deviations, all companies having similar specifications/work done as well as technology and material for building the swimming pool taken from A&T Europe SpA or agencies having similar technology were eligible to compete in tender process. OP-3 stated to have given all the opportunities to the prospective bidders to compete and stated to have adhered to all applicable laws and regulations governing fair competition and has not favoured a single company. The Commission also notes from the tender assessment documents provided by the Informant that the bidder who has been technically disqualified appears to be on grounds other than the requirement of

MOU with OP-1.

27. In view of the foregoing, the Commission notes that there is no material available on record to substantiate the allegations of anti-competitive conduct by the OPs in contravention of provisions of Section 3 of the Act.

28. In the facts and circumstances of the present case, the Commission finds no prima facie case of contravention of the provisions of Section 3 or Section 4 of the Act to be made out against the OPs. Accordingly, the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act. Consequently, no case for grant for relief(s) as sought under Section 33 of the Act arises and the said request is rejected.

29. The Secretary is directed to communicate to the Informant and OP-3, accordingly.