

## CCI on Leniency Regulations

### 1. Introduction

Leniency programme is a whistle-blower protection of the Competition Commission of India (“**CCI**”) available to those enterprises or individuals that disclose their role in a cartel and cooperate with subsequent investigations. They are rewarded by a reduction or complete amnesty from penalty. To effectuate the leniency programme, CCI had introduced the CCI (Lesser Penalty) Regulations, 2009 (“**Regulations**”).

On May 01, 2018, the CCI issued only its third leniency decision in the case of *Nagrik Chetna Manch vs. Fortified Security Solutions and Ors.*<sup>1</sup>, wherein it granted partial leniency to four out of six leniency applicants involved in bid rigging. This newsletter aims to critically analyze the CCI’s decision and discusses important factors that companies and individuals should evaluate before availing benefits under the Regulations.

### 2. Facts

**2.1** Nagrik Chetna Manch (“**Informant**”), a public charitable trust had filed information before the CCI against Fortified Security Solutions, Ecoman Enviro Solutions Pvt. Ltd. and Pune Municipal Corporation (“**PMC**”), alleging formation of an anti-competitive agreement by rigging bids. The Informant found that PMC had floated five tenders for “*Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s)*” and on reviewing the tender documents submitted by bidders on PMC’s website, it appeared that the bidding involved anti-competitive practices. CCI, after examining this information, was of the view that a prima facie case exists under section 3<sup>2</sup> of the Competition Act, 2002 (“**Act**”) involving bid rigging and/or collusive bidding and, accordingly on September 29, 2015, directed the Director General (“**DG**”) to investigate the matter. On advice of the DG, CCI ordered that all six bidders to the tenders also be made Opposite Parties (“**OPs**”).<sup>3</sup> During the course of the DG’s investigation, which lasted a little over a year, all OPs filed leniency applications within a gap of few days under Regulation 5<sup>4</sup> of the Regulations read with section 46<sup>5</sup> of the Act.

**2.2** DG’s report: The DG concluded its investigation and filed his report on November 23, 2016. According to him, all OPs had indulged in bid rigging based on the following findings:

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<sup>1</sup> Case No. 50 of 2015

<sup>2</sup> Section 3 prohibits any type of agreement between enterprises that has an appreciable adverse effect on competition in India. Bid rigging or collusive bidding qualify as anti-competitive and are defined as any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provisions of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding

<sup>3</sup> The remaining 4 companies which were made OPs are Lahs Green India Pvt. Ltd., Sanjay Agencies, Mahalaxmi Steels and Raghunath Industry Pvt. Ltd.

<sup>4</sup> Regulation 5 provides the procedure for filing leniency applications

<sup>5</sup> Section 46 of the Act provides that CCI has the power to grant lesser penalty, than otherwise leviable if any producer, distributor, trader or service provider who is part of a cartel and alleged to have violated section 3, discloses full, true and vital information and cooperates with the CCI till the completion of the proceedings

- (i) L-1 bidder: Only one party emerged as the L-1 bidder in all the five tenders and the remaining OPs had only provided cover or proxy bids;
- (ii) Common place of business and contact details: Even though they bid as competitors, some OPs had a common place of business and were managed by a common person. Even, the contact details submitted by some bidders were the same;
- (iii) Demand Drafts: Drafts submitted as earnest money deposits along with the bids had consecutive serial numbers, and were issued on the same day by the same bank, even though the offices of the OPs were situated in different cities;
- (iv) Internet Protocol Address: IP address used by some OPs to upload the tender documents was same. Some of them were registered to the same mobile number and log in and log out time showed that the bid documents were uploaded at short intervals;
- (v) Personal connection: The individuals, who owned/managed the bidding entities, belonged either to the same family or shared close personal bonds.

In view of the aforesaid, the DG concluded there was meeting of minds and co-ordination between OPs. As a result, OPs and their officers were held liable on account of engaging in bid rigging under the Act.<sup>6</sup>

### 3. Issues

All OPs filed their affidavits responding to the DG's report. Ultimately, three issues arose before the CCI. First, whether the OPs were exempt from prosecution under Section 3(3) of the Act since they were not engaged in "identical or similar trade of goods or provision of services", which is a pre-requisite for section 3. Second, whether there was breach of confidentiality by the DG or CCI when statements given by OPs during investigation were disclosed and forwarded to the other OPs. Third, how would the CCI objectively quantify the penalty based on the leniency applications filed by the OPs.

### 4. Arguments & Findings

**4.1 Applicability of Section 3:** On the first issue, the OPs contended that even if the finding of the DG was accurate, they were outside the ambit of section 3(3) of the Act as they were neither "competitors" nor engaged in "identical or similar trade of goods or provision of services", but involved in various other trades and industries such as pharmaceuticals, sales and services of electronic security systems, etc. The OPs argued that should any penalty be imposed on them for violation of section 3, only their "relevant turnover" can be considered. They cited the *Excel Crop Case*<sup>7</sup>, where "relevant turnover" was held to mean the turnover pertaining to products and services that have been affected by their alleged contravention. Accordingly, they pleaded that since they did not have any "relevant turnover" or "relevant profit", on account of being in

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<sup>6</sup> Section 48 of the Act provides that every person in charge of and responsible for the conduct of the business of the company is liable when a company contravenes any provision of the Act

<sup>7</sup> *Excel Crop Care vs. CCI & Anr.* [Comp. LR 0355 (SC)] in which the Supreme Court held that the penalty imposed under section 27(b) of the Act should be determined on the basis of the "relevant turnover"

different businesses, no penalty should be imposed on them. They further justified their participation on the ground that as the tenders were in the form of an e-auction and open for all bidders, entry was not restricted in any manner.

The CCI held that, for Section 3(3)(d) to be applicable, the business activity for which parties participate in the bid is relevant. The “actual” business is immaterial. The CCI held that, if such a contention were to be accepted, then new entrants in the market would always be exempt from bid rigging since they would not be involved in that business at the time of bidding. It further held that in the *Excel Crop Case*, the intent of the Supreme Court was that the infringer does not suffer punishment which may be disproportionate to the seriousness of the infringement. Such interpretation cannot deem to mean that the infringer should not be punished at all. Since bid rigging includes an agreement that has the effect of reducing competition for bids or adversely affecting or manipulating the process of bidding, it is presumed to cause an appreciable adverse effect on competition irrespective of the duration or purpose and whether benefit was actually derived or not from the cartel.<sup>8</sup> CCI was of the view that, OPs cannot be absolved on the ground that other bidders could also have bid for the tender, or that their “actual” business activity is different.

**4.2 Confidentiality:** OPs contended that information submitted by them under the Regulations has been disclosed which was in breach of Regulation 6.<sup>9</sup> According to them, as whistle blowers, anything disclosed by them should have been confidential and not made part of DG’s report. The CCI drew a distinction between an OP’s information provided under Regulations and the evidence collected by the DG during investigation.<sup>10</sup> It held that confidential treatment granted under the Regulations does not extend to evidence obtained or collected by the DG. Statements of the OPs recorded by the DG are independent evidence even if reiterated and repeated in the leniency application. The CCI is not legally bound to keep any information confidential which the DG obtained during the course of its investigation.

**4.3 Computation of Penalty:** The CCI found all the six OPs and its officials guilty of bid rigging and, accordingly, imposed a penalty of 10% of their average turnover of three preceding financial years. The table below highlights the final penalty imposed and reasons for according any leniency.

#	Applicant	Date & time of filing	Reduction	Penalty on OPs and its officials <sup>11</sup> (in USD)	Rationale
1.	OP – 6 Mahalaxmi	August 04, 2016	50%	OP: 245,100	Made a critical disclosure regarding <i>modus operandi</i> of the cartel, persons

<sup>8</sup> An agreement that directly or indirectly results in bid rigging or collusive rigging is deemed to have an appreciable adverse effect on competition. Thus, even if a subset of bidders collude amongst themselves to rig or manipulate bidding process, it would violate section 3(3)(d) of the Act

<sup>9</sup> Regulation 6 provides that the CCI or DG shall treat the identity, any information, documents and evidence furnished by an applicant confidential. Such confidential information shall only be disclosed if required by law or an applicant agreed to such a disclosure or made it public himself

<sup>10</sup> This evidence is governed by the confidentiality blanket provided in Regulation 35 of General Regulations. Under this, an informant on making a request in writing to the CCI or DG may request for his identity to remain confidential

<sup>11</sup> No separate penalty was imposed on officials of OP – 6 and OP – 1 as they are proprietorship firms

#	Applicant	Date & time of filing	Reduction	Penalty on OPs and its officials <sup>11</sup> (in USD)	Rationale
	Steels	4:18 p.m.			involved, made available copies of contentious e-mail exchanges and provided bank statements to show transfer of funds after cancellation of tender.
2.	OP – 5 Sanjay Agencies	August 04, 2016 12:19 p.m.	40%	OP: 132,200 Off: 2,000	Disclosed the <i>modus operandi</i> , names of more individuals involved, made available copies of contentious e-mail exchanges and provided bank statements.
3.	OP – 4 Lahs Green India Pvt. Ltd.	August 04, 2016 4:18 pm	50%	OP: 30,600 Off: 250	Admitted to submitting proxy bid, disclosed the <i>modus operandi</i> and furnished copies of e-mail exchanges. This helped the CCI in substantiating evidence already in its possession.
4.	OP – 2 Ecoman Enviro Solutions Pvt. Ltd.	August 05, 2016 12:40 p.m.	25%	OP: 49,450 Off: 1,500	Admitted to orchestrating the cartel in all five tenders. It disclosed the <i>modus operandi</i> , which confirmed what OP-4, OP-5 and OP-6 had already stated, furnished additional contentious documents and disclosed how tender documents were uploaded from OP – 2's computer by collecting digital keys.
5.	OP – 7 Raghunath Industry Pvt. Ltd.	August 05, 2016 2:32 p.m.	Nil	OP: 44,500 Off: 1,400	Information provided did not make any value addition to the information already collected by the DG.
6.	OP – 1 Fortified Security Solutions	Sept 20, 2016 3:00 p.m.	Nil	OP: 19,000	Same as above.
7.	OP – 3 PMC		No monetary penalty imposed	Nil	PMC was not found in contravention of section 3(3)(d). Held that PMC did not exercise due diligence while scrutinizing bid documents despite clear evidence of collusion amongst the bidders.

## 5. Conclusion

The instant order clarifies that if any company or individual intends to take advantage of the Regulations, the leniency application should be filed at the earliest available opportunity. As is apparent from the instant case, even a delay by a few hours can impact whether penalty would be waived or not. In fact, as soon as an individual or company is made aware of a possible cartel allegation against it, it should consult experts to evaluate if and when disclosures ought to be made under the Regulations. Notwithstanding this, it is important to remember that information shared with a DG during investigation will be treated very differently from information disclosed under the Regulations. Information obtained by a DG could form a part of his report, thereby making the name of the informant public, whereas information shared as a whistle blower will be kept confidential. Accordingly, potential applicants should have a thorough understanding of the procedure followed by the CCI to take optimum advantage of the Regulations. Since the eventual concession in penalty is subject to CCI's discretion, the right timing of disclosure and an overall strategy is the key.

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