



BEFORE THE

COMPETITION COMMISSION OF INDIA

Date of Order: 27-7-2011

M.R.T.P. Case No. C-57/09/DGIR ($\frac{26}{28}$)

Dy. Chief Materials Manager, Integral Coach Factory, Chennai - Informant

Versus

1. M/s Celtek Batteries (P) Ltd., Bangalore
2. M/s Mysore Thermo Electric (P) Ltd., Bangalore
3. M/s Southern Batteries (P) Ltd., Bangalore
4. M/s United Lead Oxide Products (P) Ltd., Goa
5. M/s Kirloskar Batteries (P) Ltd., Bangalore
6. M/s Exide Industries, Kolkata
7. M/s Bharat Batteries, Kolkata
8. M/s HBL Power Systems, Hyderabad

- Opposite Parties

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

The present matter before the Commission arises out of the two complaints dated 11.03.2009 and 25.03.2009 filed before the Office of erstwhile Director General of Investigation & Registration (DGIR), Monopolies and Restrictive Trade

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Practices Commission (MRTPC) which was later transferred to the Competition Commission of India (the Commission) under Section 66 (6) of the Competition Act, 2002 (Act).

2. The complainant in the case is Dy. Chief Materials Manager, Integral Coach Factory, Chennai (hereinafter referred to as complainant). The complaint has been filed against certain suppliers of Lead Acid Batteries , namely, M/s Celtek Batteries (P) Ltd, Bangalore, M/s Mysore Thermo Electric (P) Ltd, Bangalore, M/s Southern Batteries (P) Ltd, Bangalore, M/s United Lead Oxide Products (P) Ltd, Goa, M/s Kirloskar Batteries (P) Ltd, Bangalore, M/s Exide Industries, Kolkata, M/s Bharat Batteries, Kolkata and M/s HBL Power Systems, Hyderabad, (hereinafter referred to as the Opposite Parties) alleging that they have formed cartel with respect to supply against two tenders – Tender No. 06/08/1308 and Tender No. 06/08/1116 floated by the complainant for the supply of 14000 sets of 120 AH Lead Acid Batteries and 304 sets of 90 AH Lead Acid Batteries respectively.

3. The facts as mentioned in the complaint, in brief, are as under:

3.1 As per the complainant, Integral Coach Factory (ICF) is a production unit of Indian Railways, manufacturing railway passenger coaches. In the process of its manufacturing activities, it procures 6 Volts 120 Ampere Hour (AH)

and 110 Volts 90 Ampere Hour (AH) Lead Acid Batteries (hereinafter referred as 120 AH and 90 AH Batteries respectively) by inviting tenders.

3.2 In the complaint dated 11.03.2009 sent to the erstwhile DG(I&R), MRTPC, it was brought out by the complainant that it had issued an open Tender No. 06/08/1308 for the procurement of 14000 sets of 120 AH Batteries. This Tender was opened on 12.11.2008. As per the policy of Railways, these batteries have to be procured from approved firms of RDSO (Research Designs and Standards Organization) only. In this particular Tender for the supply of 120 AH Batteries, six out of the eight RDSO approved firms had participated. According to the complainant, it had procured 120 AH Batteries at an all inclusive rate of Rs. 4972.76 per set from one source and Rs.5255.02 per set from two sources during the month of October 2007. However, the rate against the Tender of 12.11.2008 quoted by the lowest acceptable firm was higher by 13.41% over the last purchase order rate.

3.3 According to the complainant, since higher rates were quoted in the Tender of 12.11.2008 as compared to the previous Tenders, apprehending cartel formation by RDSO approved firms, it was considered that there was a need to discourage cartelisation. Thus, an attempt was made by the Tender Committee to bring down the rates by means of negotiations and M/s

4

Mysore Thermo Electric Ltd. (OP-2) was called for negotiations on 03.02.2009. However, the firm agreed to reduce the quoted price only by Rs.100 per set, which as per the complainant, indicated that the firm was part of a cartel. The complainant has further brought out that it had no option, except to proceed with the procurement of this item, without which production of coaches would have been affected. Therefore, it placed a part order (about 28% of the total quantity, which was to be procured through the Tender under consideration) to meet the urgent requirements.

- 3.4 The second complaint dated 25.03.2009 sent by the complainant to the erstwhile DG I&R, MRTPC related to a Tender No.06/08/1116 for the procurement of 304 sets of 90 AH Batteries, which was opened on 03.11.2008. In the said Tender, five out of six RDSO approved firms had participated. The complainant had earlier procured this item through Tender from one source in March 2008 at an inclusive rate of Rs.87695.88 per set with Price Variation Clause (PVC). Since last purchase rate was with PVC, the effect of same was updated to the date of Tender opening and updated basic rate was taken at Rs.82,599.68 per set. Compared to this updated last purchase basic rate, the rate received in the Tender opened on 03.11.08, was Rs.86,776/- per set.

3.5 According to the complainant, the rate quoted by the lowest acceptable firm was higher by 5.05% over the last purchase order rate even after taking into consideration increase on account of PVC. Apprehending cartel formation, the firm quoting the lowest acceptable rate was called for negotiations to bring down the rates. During negotiations, M/s Celtek Batteries Pvt. Ltd. (OP-1) did not reduce prices, which indicated that they were part of a cartel formed by the battery suppliers. The complainant has also brought out that as there was no option except to go ahead with the procurement of the item without which production of coaches would have been impacted, a part quantity order was placed to meet the urgent requirements.

3.6 Based upon above facts of Two Tenders for the procurement of batteries, the complainant has alleged that the firms engaged in the supply of batteries to ICF and Indian Railways have formed a cartel and are fixing the Tender rates by manipulating the bids.

4 The Commission considered the matter and having formed an opinion under Section 26(1) of the Act that there exists a *prima facie* case, referred the matter to the Director General (DG) for conducting investigation vide an order dated 23.11.2010.

5 The DG submitted the investigation report dated 31.05.2011 to the Commission under Section 26(3) of the Act.

5.1 The DG after considering the nature of the information in the case took a view that since the allegations pertain to the alleged cartelization in the bidding process, the conduct of Opposite Parties need to be examined in accordance with the provisions of Section 3 of the Act. Accordingly, the investigation was conducted by the DG in light of the said provisions of the Act.

5.2 To investigate the issues, the DG collected data (primary as well as secondary) from the complainant and the Opposite Parties. In the process, the DG also examined the Tender documents, alleged escalation in the rates in the two Tenders under investigation and compared the data with the previous as well as subsequent Tenders of ICF. Facts and evidences were gathered through a detailed questionnaire from various parties and information was also obtained from the other RDSO approved suppliers, who had not participated in the Tenders under consideration.

5.3 The DG, after analyzing the facts of the case, arrived at a conclusion that the Tenders of ICF which were the subject matter of investigation required the batteries of a particular specification as per the conditions stipulated in the said Tenders, which could be procured only from the RDSO approved suppliers. Accordingly, DG determined relevant market for the purposes of investigation in the case as procurement of 120 AH and 90AH Lead Acid batteries by ICF from RDSO approved suppliers in India as per technical specifications laid in Tenders, which opened on 12.11.2008 and 03.11.2008 respectively.

5.4 DG has examined the procurement system of Indian Railways in detail in his report. It has been gathered in course of investigation that the work of vendors' approval for Railways and its production units is done by RDSO, which was established in 1957. The vendors which are approved by RDSO are broadly divided into two categories; a) Part II vendors - A new or fresh supplier on completion of formalities as specified by RDSO in this regard and b) Part I vendors - who are supplying the items to the Railways on a regular basis. Part-II suppliers may also be upgraded as Part-I supplier, if all the conditions are fulfilled. Railway Board issues directives from time to time relating to the items dealt by RDSO. In case of 120 AH Lead Acid Battery,

RDSO has granted approval to 8 firms under Part-I category and 2 firms under Part-II category. For 90 AH Lead Acid Battery, RDSO has granted approval to 7 firms under Part-II sources. There is no Part -I approved firm for 90 AH Battery.

5.5 As regards the procurement of Lead batteries, DG has brought out that apart from coach manufacturing factories i.e. Integral Coach Factory (ICF), Chennai and Railways Coach Factory (RCF), Kapurthala, which procure these batteries for lightening and ventilation of coaches manufactured by it.; all other Zonal Railways have also been procuring the two types of batteries in order to replace them in the coaches owned and operated in various divisions, on completion of the working life of the batteries.

5.6 As regards Tenders which are under the subject matter of investigation, the DG called for the comments of ICF. While replying, the ICF has submitted that Lead is the major raw material constituting approximately 75% of the cost of battery. Generally the quotes are submitted based on the Lead price prevailing one month prior to the opening of the tender. At the time of comparison of bids, Price Variation Clause (PVC) effect for the raw materials is taken into account. Apart from PVC, an escalation of 5-6% annually is also

considered on account of increase in the prices of other inputs and overheads.

5.7 In submissions before DG, ICF has also submitted that in the Tenders under investigation, the lowest acceptable rate was more than the last purchase order updated rate. Although negotiations were held with the supplier firms, the firms reduced the prices only marginally indicating that they were part of cartel. However, since the items were necessary to be procured, part quantity was procured and balance quantity was re-tendered and procured at a later date at a lower cost.

5.8 In reply before DG, Railway Board has stated that the vendors are approved by RDSO as per their laid down vendor approval procedure. As per relevant vendor approval document, expression of interest is published in the newspapers. Fresh vendors are initially approved as Part-II supplier who may be upgraded to P-I category later on, for making regular supplies.

5.9 As per the submissions of RDSO before DG, Railway Board issues directives from time to time relating to the items dealt by the organization. Based on these directives, it registers the manufacturer of these items as per the relevant vendor approval procedure laid down by it. RDSO has also

10

submitted that its role in the procurement process is limited to the grant of approval and monitoring of field performance and it does not play any role in price determination of any item. According to RDSO, as per relevant procedure, a declaration regarding part of any cartel formation is required to be submitted by the manufacturer and it is not aware of any cartelization in the supply of batteries to Railways.

5.10 During the course of investigation, DG also called for the submissions by all the RDSO approved suppliers regarding their participation in various tenders issued by various zones of Indian Railways and Coach Factories since the year 2007 for the procurement of the Lead Acid Batteries.

5.11 Before DG, it was submitted by Celtek Batteries (OP-1) that it had participated in both the Tenders dated 12.11.08 and 03.11.08 of ICF under consideration. However, it had supplied only 90 AH Batteries. OP-1 informed the DG that the quoted rates were based on the prevailing market price including raw materials, power, transport and labour etc. and also furnished the manner of calculation of the quoted rates in Tenders of 120 AH and 90 AH Lead Acid Batteries issued by ICF. OP-1 also informed the DG that it has a practice of charging certain percent of material cost towards wastage and

charging certain percent of total material cost including wastage as overhead charges. The margin is calculated as percentage of the total manufacturing cost.

5.12 It has also been submitted that OP-1 quoted higher rates in ICF Tender dated 12.11.08 compared to Eastern Railway's Tender dated 10.11.08 and South-Eastern Railway's Tender dated 19.12.08 because while batteries for ICF were in charged condition, for the other two Tenders the batteries were in uncharged conditions. Further, higher quoted rates were also due to the fact that for the supply of charged batteries, additional freight charges were incurred (reportedly 1 truck load accommodates only 180 charged batteries, whereas they can supply a minimum of 350 batteries in uncharged conditions in one truck). In addition, charged batteries also require higher loading and unloading charges, therefore, the quoted rates for their procurement in any Tender are usually more than the uncharged batteries.

5.13 Regarding the allegations of the higher quoted rates for the procurement of 90AH battery in ICF Tender dated 03.11.08, OP-1 submitted before the DG that the quoted rate was less than their own calculated price per set based on cost. As regards increase in quoted price, it has been stated that they are

12

a Part-II supplier for these types of batteries and eligible to receive only 15-20% of the total tender quantity, if considered. Since they were eligible to get orders only for 15-20% of the total quantity, PPCP container (an essential part towards the cost of Batteries) had to be procured at a higher rate. OP-1 has also attributed the increase in quoted rates due to the enhanced cost of raw-materials, labour, electricity, freight and overhead charges.

5.14 According to M/s Mysore Thermo Electric Pvt. Ltd. (OP-2), it is a Part-I supplier of batteries and had participated in both the Tenders dated 03.11.08 and 12.11.08 of ICF under consideration and also supplied both types of batteries. The difference in the quoted prices, as per OP-2, was due to the variation in the cost of raw materials and other input costs. It was further mentioned that prices were quoted after taking into account factors like freight, handling expenses and also the ordered quantity to be delivered at different destinations.

5.15 It was submitted by OP-2 that during the period, input costs had gone up and the cost towards PPCP containers had also increased. Besides, two other items which are very critical to the production of battery – i.e. Lead, the major raw material and Sulphuric Acid had become very scarce and had to be

purchased at a premium price. Further, power cost had also become higher compared to the previous period. The higher quoted rate in the Tender was also due to increase in the transportation cost due to the fact that batteries were required to be supplied in charged conditions. It was also informed that with a view to procure enhanced orders for 120AH Batteries (as during the entire calendar year there were orders only for 7725 Nos.), the OP-2, in fact, decided to opt for lesser margin to get more supplies.

5.16 Southern Batteries (OP-3) submitted before the DG that it had participated in both the Tenders dated 03.11.08 and 12.11.08 of ICF under consideration and supplied only 90 AH Batteries. The Tender rates were determined through a consultative process by the top management taking into account factors like manufacturing cost, results of past tenders for the like items, number of orders in hand, location of delivery points and other market dynamics.

5.17 OP-3 further informed DG that higher Tender rates were also quoted due to the fact that batteries were to be supplied in charged conditions which entailed higher cost on account of the cost of electrolytes, energy, labour, overhead, additional freight , loading and unloading charges. It was also informed that it had explained ICF, the reasons for increase in prices in

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respect of various Tenders like Tender dated 15.06.2009 for the procurement of 90 AH Battery, vide letters dated 21.07.2009 and 12.08.2009.

5.18 Before the DG, United Lead Oxide Product (P) Ltd. (OP-4) submitted that it had participated in Tender dated 03.11.08 and supplied 90 AH Batteries. It has been informed that it does not work out Tender-wise costing under different heads of manufacturing and does not maintain calculation sheets for each of the Tenders. The decision as regards the price to be quoted is taken after taking into consideration the cost of the required inputs for manufacturing. As it is a small scale industry unit, the decision regarding selling price is taken to ensure that it continues to function and does not put to loss for want of orders. Considering the supplies to Railways all over the country, an average cost of transportation and insurance is also considered at 5-6% of the total cost. Further, the charging cost of 120 AH battery at around 5-7% approximately of basic battery price is also considered before quoting Tender rates.

5.19 In proceedings before DG, Kirloskar Batteries Pvt Ltd. (OP-5) informed that it had participated in both the Tenders dated 12.11.08 and 03.11.08 of ICF under consideration. However, they did not supply any type of battery. It was

16

submitted that during the period, prices of batteries had generally increased on account of increase in input material cost.

5.20 Bharat Batteries (OP-6) submitted before DG that it did not participate in any of ICF Tenders date 12.11.08 and 03.11.08. However, while offering rates against any Tender for the supply of batteries, it considers prevailing rates of batteries on the date of offer, impact of increase in prices of various components and overheads, directly or indirectly related to the cost of production along with the position of order in hand. Apart from these, it also takes into account reasonable profits in executing supply against such orders. Sometimes during the period when it is in dearth of orders, it is compelled to quote lower rates in spite of incurring loss, with a view to cover up and absorb fixed overhead cost to save itself from closure. OP-6 submitted the cost break-up in absolute and percentage terms for certain quotations in respect of both the types of batteries to substantiate the same. It was informed that ICF was the only purchaser of 120AH batteries in charged conditions, which entailed additional cost on account of transportation, handling and in some cases recharging of batteries. In order to cover expenses for the above, the prices offered to ICF for these batteries were higher. It has been stated that during 2008 there was hike in cost of inputs

16

such as PVC resin, power tariff, diesel, labour etc. which was the reason for quoting higher rates in the Tender.

5.21 As per submissions of Exide Industries Limited (OP-7) before DG, it had participated in Tender dated 12.11.2008 but did not secure any order. As regards the higher quoted rate for ICF Tender 12.11.08 compared to the Tender for Eastern Railway's Tender dated 10.11.2008, it has been submitted that rate quoted in ICF Tender was for charged batteries and substantially fewer quantity of batteries than Eastern Railways. Further, while Eastern Railways was located at a place near to its factory than ICF, the quoted rate for the supply of charged batteries to ICF was more on account of higher transportation cost.

5.22 As regards the reasons for quoting lesser prices for Tender in August 2010 for South Eastern Railways and for Tender dated 08.09.10 of Western Railways, it was stated that since competitors were quoting lower prices during that time, to remain in competition, it had also quoted a lower rate. It was also informed that the cost for supplying batteries in charged conditions would involve an additional cost of around 8-10 % higher than those supplied in dry conditions.

5.23 According to HBL Power Systems (OP-8), it had participated in the Tender dated 12.11.08 but did not secure any orders. OP- 8 submitted an indicative breakup of cost for 120 AH battery in absolute and percentage terms and also informed that there is difference in the cost of charged and uncharged batteries. The additional cost for supplying batteries in charged condition comes to the tune of Rs.300-400 per battery.

5.24 DG also sought details from the two other RDSO approved firms which supplied batteries to Railways. According to Lead Acid Battery Company Pvt. Ltd., in mid-2008 there was escalation in cost of inputs such as plastic materials, electricity etc. and around September 2008 there was exorbitant hike in inputs i.e. plastic material, electricity, fuel, labour etc. which could be the reasons for higher rates for the charged batteries.

5.25 Before DG, Star Batteries Ltd. another RDSO approved supplier submitted that it had participated and made supplies in Tender dated 12.11.08 for the supply of 120 AH Batteries. The Company also submitted that higher rate was quoted in ICF Tender for the supply of 120 AH Batteries due to abnormal rise in the cost of acid. It was further stated that at times, to get order they also had under quoted rates, sacrificing even the normal costs. As per the Company, the higher price quoted in the ICF Tenders dated

12.11.08 and 3.11.08 for 120 AH and 90 AH acid batteries is attributable to the increase in the cost of raw materials and other costs such as diesel , sulphuric acid, electricity charges, labour, transportation and the inflationary conditions prevailing during that time.

5.26 Based upon the above facts gathered in course of investigation, DG has concluded that the products under consideration are specified products used only by the Indian Railways and are supplied by RDSO approved suppliers. Procurement of these products is an ongoing process and almost every Zonal Railway and each coach factory procures the items for installation in the new coaches as well as for replacement in the old coaches. Price of Lead, the key input used in the manufacturing of the batteries, is very volatile. Accordingly, huge variation is observed in the prices of batteries on this account. The quotations are submitted taking into account Lead base to facilitate comparison. However, the actual supply price varies and is calculated on the basis of Price Variation Clause depending on actual prevailing price of Lead.

5.27 According to DG, the Price Variation Clause and Price Variation Factor are not applicable to inputs other than Lead involved in the manufacturing of 90 AH and 120 AH Batteries. At the same time, change in prices of these is

bound to impact the cost and thereby the batteries. As a practice, under normal circumstances, an annual inflation of 5-6% is usually considered by the procuring agencies on account of these factors. The prevailing inflation in the year of procurement was around 9% which impacted the quoted rate and subsequently procuring cost of these batteries.

5.28 DG has noted that ICF is the only procurer of 120 AH Lead Acid Batteries in charged conditions. There is an additional cost involved in supply of charged batteries on account of cost of freight, electricity, electrolyte, insurance, labour etc. which might have been the reasons behind the higher quoted rates in these Tenders.

5.29 DG in his report has also noted that there was an increase in the supply price of 120 AH Batteries in ICF Tender dated 12.11.2008 when compared with the previous Tenders. However, the extent of increase was not high as alleged by ICF. Further, the contention of various suppliers that additional cost was involved in the supply of batteries in the charged conditions as per requirements of ICF, also requires due consideration.

5.30 DG has further noted that during the period there was a steep increase in the cost of raw materials. Apart from this, there was an inflationary trend

7

accompanied by scarcity of basic materials resulting in increase in the cost of other overheads. The increase in the prices of the suppliers appears to be justified on account of these factors. DG has found that 120 AH Batteries were procured by ICF at a higher rate in subsequent tender dated 20.04.09, after factoring the change in cost of Lead base on account of continuing inflationary conditions. Further, 120 AH Batteries were procured by other Railways during that period at the rates comparable with that of ICF. DG has reported that the minutes of some of the other railways which had procured batteries around this time also corroborate the prevalence of inflationary conditions.

5.31 DG has also found that in the case of 90 AH Batteries, increase in the rates in Tender dated 03.11.2008 appears to be on account of an increase in the cost of production during the period. The procurement rates of other Railways around that period were similar to those of ICF. The minutes of the meetings of some of these procuring agencies contain reference of increase in the cost of manufacturing of these batteries.

5.32 Based upon the facts that had come to the notice in course of investigation, DG has noted that while quoting the Tender rates, suppliers take into

v

account various factors such as the supply price in Tenders of other procuring agencies of Railways, location of the places where the consignment is to be delivered, apart from cost of Lead and that of other raw materials.

5.33 DG has concluded that scrutiny of the Tender documents has not indicated any discrepancies which could raise suspicions of action in concert by the bidders. Analysis of bids across Railways over a period of three years also did not reveal any pattern of bid rotation, market allocation and price parallelism. The investigation did not find any evidence or indication of cartelization and existence of any formal or informal agreement amongst the suppliers in connection with the bidding process of the subject products which had the effect of directly or indirectly determining purchase or sale prices, market allocation or which directly or indirectly resulted in bid rigging or collusive bidding in violation of provisions of Section 3(3) of the Act. DG, has therefore, concluded that there is no violation of provisions of Section 3(3) of the Act.

22

6 The Commission considered the investigation report of the DG and decided to send a copy of the investigation report to the parties for submitting their replies /objections, if any.

7 Replies submitted by various parties before the Commission, in brief, are as under:

7.1 In his reply dated 22.07.2011 filed on behalf of the complainant by A. Annadurai, Dy. Chief Material Manager, ICF, Chennai, it was submitted that the finding of the DG that the rise in prices was due to the volatility in the rates of Lead might not be correct, since the price of Lead had been comparatively stable during 2008-09 and 2009-10. Further the updated last purchase rate was arrived at after giving full effect on account of increase in the cost of Lead and rates of the batteries in the subsequent Tenders opened during 2009 and 2010 were less even after taking into account the Lead base rate despite the fact that inflation was prevailing at rate of 8-10% during 2009-10 and the cost of items other than Lead items were on a higher side. In addition, comparison of rates with the previous Tender rate was made by ICF taking into account the cost of charging also. The fact that there was a scarcity in the availability of Lead

23

was never brought out during the negotiations by the supplier firms and was submitted during investigation only.

7.2 M/s Mysore Thermo Electric Pvt. Ltd. (OP-2) submitted a letter dated 26.07.2011 before the Commission to the effect that it had no comments or observations to offer against the report of DG. A letter dated 25.07.2011 was submitted on behalf of Exide Industries Limited (OP-6) stating that it was an insignificant player in the market and it had no market power and as such could not be expected to indulge in anti-competitive practices. It has also been submitted that its total turnover from 90 AH and 120 AH Lead Batteries is very less compared to the total turnover of the company. It has further been argued that since DG has himself stated that allegations of cartelization do not stand proved against the suppliers in the Tender under investigation, it cannot be said that it had indulged in any anti-competitive activity.

7.3 No response has been received from any of the other Opposite Parties.

7.4 In order to present the case on behalf of the complainant, Mr. Annadurai appeared on 27.07.2011 and made his brief submissions

24

stating that since procurement cost of batteries had increased in the Tenders under Investigation, it was suspected that the Opposite Parties had indulged in a cartel like behaviour. During the proceedings, Sagardeep Rathi and Vijay Chauhan, Advocates from Khaitan & Co. for Exide Industries Ltd., Sh. Rishikesh Kumar, Assistant Manager & Varun Sethi, Dy. General Manager for HBL Power System Ltd and B.K Goswami, Director for Bharat Batteries made their appearance and argued their respective cases. They all defended their position saying that as DG had found in course of investigation, they were not party to any anti-competitive activity and they had not committed Act which might be said to be violative of provisions of the Indian Competition Act, 2002.

8. The Commission has carefully considered the complaint, the report of the DG, oral and written submissions of various parties and other materials available on record. The Commission notes that since the basic allegation in the complaint relates to the fact that the Opposite Parties had formed a cartel since higher rates were quoted by them in the two Tenders under investigation as compared to the previous Tenders of ICF as well as the Tenders of other Railways around that time, it needs to be examined in light of Section 3(3) of the Indian Competition Act, 2002.

9. The Commission after carefully going through the investigation report observes that the DG has done an exhaustive analysis for determination of the relevant market, for ascertaining the possible reasons for an increase in quoted rates after calling for the cost details of various suppliers and also quoted rates in subsequent Tenders. The Commission notes that DG after investigation has concluded in clear terms that investigation could not establish violation of any of the provisions of Section 3(3) of the Act. Further, it has also been concluded by the DG that there is no evidence to support that bids were manipulated in terms of the provisions of Section 3(3)(d) of the Act. The complainant was given an opportunity by the DG as well as the Commission to produce any proof in its possession to support its allegations of cartelization among the Lead acid battery suppliers. However, the complainant could not present any evidence in terms of any agreement or understanding or action in concert to substantiate its allegations of cartelization against the Opposite Parties in the Tenders for supply of batteries to ICF.

10. The complainant has presented his case basically around the point that the quoted price was higher in the two Tenders under the investigation due to the cartel formation among the suppliers. The Commission does not

76

dispute this aspect of the Complaint that the quoted rate by the vendors was higher than the last updated purchase rate based upon previous Tenders and also in comparison with the rates quoted in the Tenders of other zones or other divisions of Railways during the same or at a later period. However, this by itself does not prove that there was any agreement or understanding among the suppliers which might be said to be violative of the provisions of Section 3(3) (d) of the Indian Competition Act, 2002.

11. The Commission observes that in order to establish bid-rigging in contravention of the provisions of Section 3(3) of the Act it needs to be established that the enterprises or associations of enterprises or persons or association of persons under investigation must have reached an agreement or understanding among them which;

- a) directly or indirectly determines purchase or sale prices;
- b) limits or controls production, supply, markets, technical development, investment or provision of services;
- c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

d) directly or indirectly results in bid rigging or collusive bidding.

12. The agreement so reached may be in nature of any arrangement or understanding or action in concert whether they are formal or in writing or whether or not such arrangement or understanding or action in concert is intended to be enforceable by legal proceedings. There has to be a meeting of mind among the enterprises or the persons to influence market in their favour. The Commission notes that in this case no evidence has come to fore, either before DG or before the Commission, to establish that there was a meeting of mind among the suppliers for quoting rates against the Tenders under investigation. There is no evidence of action in concert or any kind of explicit understanding among them to suggest that the quoted rates in the Tenders were a result of any agreement within the meaning of Section 2(b)(ii) of the Act.

13. The Commission further notes that there is also no evidence to the effect that the suppliers quoted similar or identical rates. In response to Tenders issued by ICF, as per submissions of the suppliers, they have quoted their rates after taking into account increase in the cost of inputs over the earlier quoted price. The investigation does not establish that the behaviour and conduct of these suppliers eliminated or reduced competition in the market in any manner.

14. The Commission also notes that the suppliers have submitted that the difference in the rates quoted in the Tenders of different procuring units of Railways could be because of variation in the location of the consignees, which meant varying transportation cost for making supplies at different locations. In addition, the suppliers have also contended that the requirement for the supply of batteries under charged conditions was one of the reasons for quoting higher rates in the Tender of ICF, since it involved higher cost on account of transportation.

15. Based upon above, the Commission observes that while the suppliers have given justification for quoting higher rates in the Tender of ICF, the investigation has not found any evidence contrary to that to support that the act and conduct of suppliers in the subject matter was a result of any agreement or understanding among them to manipulate the Tender process. The mere fact that suppliers quoted higher rates in the Tender do not make them part of any cartel like arrangement. While quoting in a Tender, the suppliers usually take into account their input cost and also the prevalent conditions in the market so they can remain competitive vis-a-vis other players.

29

16. The Commission feels that the contention of the complainant that since the battery suppliers had quoted a higher rates in these two Tenders as compared to other Tenders of ICS and other Zonal Railways and did not reduce the quoted rates during negotiations, therefore, they were part of a cartel does not by itself establish cartelisation among the battery suppliers. While making supplies to a procurement agency, any supplier would take into account several factors like the cost of transportation, the requirement of nature of products by the agency and the cost of materials involved in manufacturing that product. Therefore, the cost of procurement would vary from one procuring agency to another agency. The mere fact that the cost of supply is different for one agency as compared to the other, does not by itself establish common understanding or any action in concert among the suppliers.

17. The Commission observes that it is possible that while making supplies against the subsequent Tenders, suppliers might have quoted lower rates. However, this also does not establish any kind of agreement or understanding among them to prove cartelization. The factors for quoting higher or lower rates in a Tender may depend upon prevailing cost of raw materials, transportation charges, rate of inflation and financial worth and standing of a particular supplier. Unless identical or similar pattern of behaviour arising out of

any agreement or understanding among the suppliers is established, it cannot be said that the suppliers acted in a cartel like manner to manipulate the Tenders.

18. The Commission notes that the orders for supplies were placed not on one but many suppliers who had quoted the rates in the Tender. This was done as per policy of Railways to distribute the quantities to ensure smooth and time bound supplies. There were hard negotiations with the suppliers. However, the negotiations did not yield much result in terms of substantial reduction in the rates, although one of the suppliers did reduce the rates by Rs.100/- per battery. The rates could not be brought down to a level desired by the complainant since the suppliers expressed their inability to do so, due to higher input cost and other reasons like higher transportation cost involved in supply of batteries under charged conditions. ICF considered higher rates quoted by the suppliers, coupled with their refusal to reduce the rates during negotiations, as cartelisation and referred the matter to Railway Board and the MRTP Commission for making inquiries in the conduct of battery suppliers. ICF neither had any evidence of any agreement or understanding among the suppliers nor had any evidence of concerted action to establish that the suppliers were indeed part of a cartel.

19. In view of the foregoing and after considering the entire material on record, the Commission holds that evidences furnished by the informant in course of proceedings or collected during investigation are not sufficient enough either to establish cartelization as alleged in the information or to establish violation of any of the provisions of Section 3 (3) of the Act in the instant matter.

20. In view of the above, the Commission is of the considered view that the proceeding relating to the instant information should be closed forthwith under Section 26 (6) of the Act.

21. Secretary is directed to inform the parties accordingly.

Sd/-
Member (R)

Sd/-
Member (GG)

Sd/-
Member (AG)

Sd/-
Member (T)

Sd/-
Member (G)