



COMPETITION COMMISSION OF INDIA

Case No. 33 of 2018

In Re:

Kelvion India Private Limited

403/404, Odysey IT Park

Road No.9, Wagle Industrial Estate

Thane- 400604

Informant

And

Apollo Industrial Corporation

Indo Industrial Estate No.2, Navghar

Vasai Road, East

District Palghar

Maharashtra- 401210

Opposite Party No. 1

LEEL Electricals Limited

159, Okhla Industrial Estate, Phase-

III, New Delhi – 110020

Opposite Party No. 2

Present

For the Informant

Mr. Annirudh Deshmukh, Advocate

Mr. Shrey Patnaik, Advocate

Mr. Virendra Jhamb, Managing
Director

Mr. Nishant Gupta, Sales/Kelvion
India Private Limited

For the office of Chairman,

Mr. Kanwalpreet, Director, Railway



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Railway Board

For Chittaranjan Locomotive Work,
Chittaranjan (CLW)

For Diesel Locomotive Works,
Varanasi (DLW)

For Diesel Loco Modernisation
Works, Patiala (DMW)

Stores/IC

Mr. Rajeshwar Singh, Advocate
Mr. Jagmohan Garg, CMM/CLW
Mr. Goutam Ghosh, SMM/CLW
Mr. Manoj Kumar Gupta, PS/CLW
Mr. S.B.K.Sinha, CLA/CLW

Mr. Joydeep Mazumdar, Advocate
Ms. P. Chakraborty, Advocate
Mr. Ajit Kumar Mishra, CLA/DLW

Mr. S.C. Rajpal, Advocate
Mr. Praveen Kumar Gupta,
SMM/DMW
Mr. Purushottam Lal, PA

CORAM

Mr. Sudhir Mital
Chairperson

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

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

1. The present information has been filed by Kelvion India Private Limited, (hereinafter **the 'Informant'**) under Section 19 (1) (a) of the Competition Act, 2002 (hereinafter, **the 'Act'**) against Apollo Industrial Corporation (hereinafter, **'OP-1'**) and LEEL Electricals Limited (hereinafter, **'OP- 2'**), (hereinafter collectively referred to as the **OPs**) alleging violation of the provisions of Section 3 of the Act. The Informant also sought certain reliefs under Section 33 of the Act.
2. The Informant is stated to be a Pune based company engaged in the manufacturing of heat exchangers and other cooling and heating systems. The





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Informant participated along with the OPs, in the tender number 34182634 floated by Chittaranjan Locomotive Works (hereinafter, CLW) (opened on 14.06.2018), tender No. 081713801 floated by Diesel Locomotive Works (hereinafter, DLW) (opened on 01.06.2018) and tender number DMW-201890170 (opened on 22.01.2018) for supply of oil cooler radiators (hereinafter, “OCR”) to the aforementioned entities, *i.e.*, CLW, DLW and DMW.

3. The Informant alleged that the Public Procurement (Preference to Make in India) Order, 2017 is applicable to the above mentioned tenders and it has participated in the said tenders with local content declaration of 55 % and has quoted lower than the OPs, but still its bid has not been preferred by the procuring entities, *viz.*, CLW, DLW and DMW. Further, the Informant alleged that it suspected cartel formation by the OPs for the supply of OCR to CLW, DLW and DMW.
4. The Informant submitted a cost analysis for the specified product, *viz.*, OCR as per which the price arrived at was Rs 2,73,537 (approx). The Informant has further submitted data/ computation of figures to elaborate on its allegation of cartelisation for the period 2015 to 2018. Based on the submitted data , the Informant has alleged that during the aforesaid period, the price quoted by unapproved suppliers, has stayed in the range of Rs 2,88,645- Rs 4,83,525(approx.), while those of approved suppliers, like OPs and one M/s. Tesio Cooling, has been in the range of Rs 5,25,999.60 - Rs 6,62,741.76 (approx.) .
5. The Informant stated that the aluminium prices went up from \$ 1.423/kg in 2015 to \$2.597 /kg in 2018 in international market. However, as per the Informant, such change in price of Aluminium was not reflected in the prices quoted by both the parties, *i.e.* OP-1 and OP-2 and they continued to submit similar rates in their bids in response to tenders floated by the entities mentioned above.
6. The Informant, *vide* its letter dated 07.08.2018 and 08.08.2018, requested the Commission for an urgent hearing in the matter stating that the award of tender number 34182634, floated by CLW (opened on 14.06.2018) and tender



number 081713801, floated by DLW (opened on 01.06.2018) shall lead to a loss of approximately 47 crore rupees to the ex chequer.

7. The Commission considered the matter in its ordinary meeting dated 14.08.2018 and decided to call the Informant for a preliminary conference on 11.09.2018. A meeting was also held with the officers of the Commission on 21.08.2018.
8. In the preliminary conference dated 11.09.2018, the Informant submitted that for the period from 2015 to 2018, the price at which CLW, DLW and DMW procured the OCRs from the OPs and one M/s. Tessio Cooling may be contrasted with the prices quoted by the unapproved vendors including the Informant. The Informant alleged that by maintaining a close price parallelism and acting in concert, the approved vendors of the product connived to keep the price maintained at an artificially high level, thereby, violating Section 3 of the Act.
9. For ready reference, the data submitted by the Informant to substantiate violation of Section 3 of the Act, is tabulated as under:

Table No.1 – Bids and orders placed for CLW, DLW and DMW during 2015- 2018

Tender No.	Tender Quantity	Company	Offered Price per Unit	Order Price Per Unit	Order received Qty.
CLW - 34182634 opened on 14.06.2018	1768 units	Kelvion India	Rs.2,88,645.00		
		OP No.2	Rs. 5,53,999.95		
		OP No.1	Rs. 5,71,987.50		
		Tesio Cooling	Rs 5,59,803.34		
		Unapproved party (Range of price)	Rs. 3,00,247-4,83,525		
DLW 81713801 opened on 01.06.2018	628 units	Kelvion India	Rs.2,92,950.00	0	
		OP-2.	Rs. 5,81,999.25		
		OP-1	Rs. 5,53,000.35	Rs 5,15,000***	742
		Tessio Cooling	Rs 5,67,307.37		
		Unapproved	Rs. 3,06,022-		



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Tender No.	Tender Quantity	Company	Offered Price per Unit	Order Price Per Unit	Order received Qty.
		ed party (Range of price)	Rs 4,73,550		
DMW - 20189 0170 opened on 22.01. 2018	160 units	Kelvion India	Rs 3,09,017.10		
		OP- 2	Rs 5,25,999.60	Rs 5,25,999.60	96
		OP-1	Rs 5,26,974.00	Rs 5,25,999.60	64
		Tessio Cooling	Rs 6,05,602.45		
		Unapproved party (Range of price)	Rs 3,00,000- Rs 4,45,500		
DLW-08171 0341 opened on 31.07. 2017	200	Kelvion India			
		OP-2	Rs, 5,56,549.86		
		OP-1	Rs 5,54,925.00	Rs. 5,25,120.12	60
		Tessio Cooling	Rs. 4,40,744.00	Rs 5,24,400	140
		Unapproved party (Range of price)	Rs 3,12,900- 4,19,998.95		
CLW-34201 82634 opened on 10.07. 2017	822 units	Kelvion India			
		OP-2	Rs.5,63,073.00	Rs.5,25,120.12	232
		OP-1	Rs. 5,64,900	Rs.5,25,120	155
		Tessio Cooling	Rs. 5,74,833.18	Rs.4,28,175.42*	349
		Unapproved party (Range of price)	Rs 3,98,500- Rs 4,09,500		
CLW - 34201 72634 opened on 09.08. 2016	651	Kelvion India Private Limited			
		OP-2	Rs 5,40,884.49	Rs 5,40,884.49	98
		OP-1	Rs 5,99,725.80	Rs5,56,446.00	359
		Tessio Cooling	Rs 6,62,741.76	Rs.470410.52**	194
		Unapproved vendors (Range of price)	Rs 4,34,070		



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Tender No.	Tender Quantity	Company	Offered Price per Unit	Order Price Per Unit	Order received Qty.
CLW Tender No. 3420162634 opened on 22.07.2015	637	Kelvion India			
		OP-2	Rs5,35,509.34	Rs.5,35,509.34	96
		OP-1	Rs. 6,61,187.50	Rs.6,32,382.37	241
		Tessio Cooling	Rs.6,30,901.66		
		Unapproved party (Range of price)	Rs. 3,63,075- Rs.4,39,838.44		

*513810 FOB converted to approx. delivered date

**564492 FOB converted to approx delivered date

***As per DLW submissions, the tender was finalised at 5, 40,750 /-

10. The Commission considered it necessary to take inputs from the procurers to provide clarity in the matter. Accordingly, the office of Chairman, Railway Board, CLW, DLW and DMW were asked to provide certain information and they were also called for another preliminary conference scheduled on 04.10.2018. As CLW was absent on 04.10.2018, and its inputs were considered crucial to understand the issues in the allegations levied in the Information, the Commission gave additional time upto 10.10.2018, to all such entities to explain their views and also scheduled a hearing on 10.10.2018.
11. During the course of hearing on 10.10.2018, the Informant contended that the present procurement policy followed by the CLW, DLW and DMW was anti competitive as the policy of approved/ unapproved vendors followed by them created and maintained entry barriers for new players to enter the market. As per the Informant, though the Public Procurement (Preference to Make in India) Order, 2017 dated 15.06.2017, had removed such entry barriers by giving preference to local manufacturers, the aforementioned procuring entities of Railways reinforced such barriers by still recognising and thereby placing orders according to the categorisation of approved and unapproved vendors.



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12. The Informant further submitted that it strongly suspected cartel among the OPs in the matter, in view of the prices quoted by the said parties, which bore no relation with either the input costs or the output of the product. In these circumstances, it was submitted that it was rather incumbent on the procurer to have filed a reference before the Commission, as a case of bid rotation between the OPs was quite evident in respect of the tenders floated by DLW, DMW and CLW for procurement of OCR.
13. To substantiate its allegations, the Informant sought to highlight the conduct of the OP-1 and OP-2 in DLW Tender No. 81713801 (opened on 01.06.2018) and DMW tender number 201890170 (opened on 22.01.2018). According to Informant, in the DLW tender, OP-1 accepted the counter offer of DLW of Rs.5, 40,750 per unit for 742 units but OP-2 refused to provide at this rate. This is despite the fact that OP-2 had submitted an offer of Rs 5, 25,999.60 per unit for 160 units in the earlier tender of DMW and had in fact accepted the order at Rs 5, 25,999.60 per unit for 96 units. As per the Informant, this amounted to bid rigging as parties agreed to accept bids by rotation.
14. On the other hand, the entities of railway presented their perspective before the Commission, during the course of hearing. CLW stated that as per the tender conditions contained in tender number CLW-34182634 (opened on 14.06.2018), it had reserved the right to procure entire or bulk quantity from CLW approved sources for OCR, and the unapproved firms were required to submit the details of the equipment/ quality control, machinery and plant, QAP, ISO, credentials of similar items and other documents to substantiate their capacity to develop this item.
15. CLW further submitted that for any new vendor who had participated in the tender, capacity assessment had to be done as per standard practice followed by it, since passenger safety is primary concern. Accordingly, capacity assessment of the Informant was done at its premises, and vide letter no. ELDD/1720/Kelvion dated 18.08.2018, certain shortcomings were pointed out to the Informant.



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16. It also submitted that both OP-1 and OP-2 were local manufacturers of the product in question, and were manufacturing in India whereas the Informant was buying the core of the equipment from China and further, its parent company is based in Germany.
17. DMW and DLW submitted that the Informant has been awarded a part of the tender quantity issued vide tender No. DMW-201890170 (opened on 22.01.2018) and tender no. DLW – 081713801 (opened on 01.06.2018), respectively as developmental orders.
18. The Commission after hearing the submissions of the Informant and representatives/ authorised officers of the Railway Board, CLW, DLW and DMW, directed the Railway Board and the other entities to file their respective written submissions latest by 23.10.2018.
19. Accordingly, CLW, DLW and DMW submitted their respective written submissions on 23.10.2018.

Written Submissions of CLW:

20. CLW submitted that with reference to CLW Tender No. 34182634 (opened on 14.06.2018), the Informant was L-1 amongst the unapproved sources and OP-2 was L-1 amongst the approved sources. As the Informant fell under the category of unapproved supplier, it was only eligible for developmental orders. Further, if CLW placed bulk orders on OP-2, it wouldn't violate the Make in India policy as OP-2 was an Indian source.
21. It further submitted that for placement of developmental order, capacity cum capability of the firm has to be assessed by the technical department as per requirement of the item to be manufactured, which is presently under process. CLW also submitted that OCR is a very critical component of the locomotive and its failure could result in the rise of oil temperature in transformer and converter, which may even lead to fire in the locomotive, endangering passenger safety.
22. With regard to the allegation of the Informant that though the cost of aluminium was increasing, but the price of the item, viz. OCR was falling, CLW attributed the same to increase in quantity produced due to hike in



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demand and that competition had also intensified as the number of approved vendors increased from 2 approved sources to 3 approved sources. In this regard, to substantiate its stand, it submitted that the quantity procured was 349 units *vide* tender that opened on 05.08.2014, 637 *vide* tender that opened on 05.08.2014, 637 *vide* tender that opened on 22.07.2015, 651 *vide* tender that opened on 04.08.2016 and 822 *vide* tender that opened on 10.07.2017 for CLW.

23. CLW also explained the difference in the price range between the approved and unapproved sources by stating that that as per Railway Board's order, an unapproved source can be considered for developmental orders only if their quoted price is lower than L-1 approved vendor. The trend, therefore was, that most of the unapproved sources who wanted to get some developmental order, generally tend to quote below the price of approved sources.

24. It further stated that for placement of developmental order, capacity cum capability of the firm had to be assessed by the technical department, which was under process as per letter number ELDD/1720/Kelvion dated 18.08.2018 and letter number ELDD/ 3241 dated 21.08.2018.

25. With regard to the allegation of cartelisation by the Informant, CLW referred to their letter number ELDD/ 3241 dated 21.08.2018, addressed to Secretary (Elec) Railway Board wherein they had conveyed the following view point:

"The firm have claimed suspicion of cartel formation in their representation. It may be noted that the Indian manufactures are competing with foreign sources. In the past, many a times, foreign manufactures have quoted lower rates than the Indian manufactures and obtained the order for a larger quantity. Observing the rates quoted by all the manufactures, (Indian as well as foreign) it doesn't appear that it is a case of cartel formation."

Written Submissions of DMW, Patiala

26. DMW submitted that as per eligibility criteria, the Informant stood at L-2 in tabulation ranking for developmental order category in tender number 201890170 opened on 22.01.2018, as such they were found eligible for developmental order only and the purchase committee awarded the Informant



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the developmental order for 8 numbers quantity, *i.e.* 5 % of the tendered quantity on 29.05.2018.

Written Submissions of DLW, Varanasi

27. DLW submitted that as per Railway Board Guidelines, OCR was to be procured from CLW approved sources only and for bulk procurement only approved firms were to be considered. Since the Informant was not an approved source, it was not eligible for bulk/ regular order. The Informant was awarded a developmental order for 37 sets as per its eligibility.
28. DLW further submitted that the rates of approved vendors could not be compared with a vendor whose product was yet to be manufactured, tested and established. New sources had quoted rates based on drawings/ specifications. They were yet to be assessed for capacity – capability and technical knowhow to manufacture the item. Therefore, the rates quoted by them could not be said to indicate the real cost of material. Also, many a time new firms quoted unworkable rate just to get a developmental order.
29. DLW further submitted that in the tender opened on 01.06.2018, the entire order was placed on OP-1 @ Rs 5, 40,750.00 and no counter offer was given to OP-2 and thus, there was no question of refusal by OP-2.
30. DLW also submitted that according to it all the firms quoted competitive rates without any hint of cartel formation.

Written submissions made by Informant on 25.10.2018

31. The Informant submitted that DLW tender was not compliant with the Make in India policy. CLW and DLW both being arms of the Indian Railways were abusing their dominant position and skewing the open market and fair competition.
32. The Informant reiterated that in DLW tender number 081713801 (opened on 01.06.2018), the entire quantity was allocated to OP-1. In the stated tender, the price was finalised at Rs 5.40 lakhs per unit but OP-2 refused to supply the product at that rate. CLW has stated that OP-2 was to be awarded the CLW tender number 34182634 (opened on 14.06.2018) for the entire quantity. Thus, the pattern of bid rotation highlighted by the Informant stood confirmed.



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Findings of the Commission

33. The Commission has carefully considered all the submissions made by the Informant, Railway Board, CLW, DLW and DMW. The Commission notes that the primary allegation levelled by the Informant in the instant matter is with respect to alleged cartelisation by OPs with respect to tenders floated by CLW, DLW and DMW, for procurement of OCRs for transformers.
34. The Informant alleged that the OPs have quoted similar prices as per pre-concerted understanding for bid rigging. The Informant has submitted the following data to the Commission to substantiate its allegation:

Table Number 2- Bids of OP-1 and OP-2 in CLW, DMW and DLW tenders

Tender No.	Tender Quantity	OP-2	OP-1	Difference
DMW – 201890170 opened on 22.01.2018	160 units	Rs.5,25,999.60	Rs5,26,974.00	Rs 974
DLW- 081710341 opened on 31.07.2017	200 units	Rs.5,56,549.86	Rs5,54,925.00	Rs 1,624
CLW- 34201 82634 opened on 10.07.2017	822 units	Rs 5,63,073	Rs 5,64,900	Rs 1,827

35. The Commission notes that though the quotes of OP-1 and OP-2 are in close range, the Informant has not taken into consideration the prices quoted by the third approved provider, M/s. Tesio Cooling, in the above mentioned tenders. As per a chart submitted by the Informant to the Commission on 04.10.2018, M/s.Tesio Cooling quoted the following prices in the tenders in question:



Table No.3- Bids of OP-1, OP-2 and M/s. Tessio Cooling

Tender No.	Tender Quantity	OP-2	OP-1	Tesio Cooling
DMW – 201890170 opened on 22.01.2018	160 units	Rs.5,25,999.60	Rs5,26,974.00	Rs6,05,602.45
DLW- 081710341 opened on 31.07.2017	200 units	Rs.5,56,549.86	Rs5,54,925.00	Rs 4,40,744
CLW- 34201 82634 opened on 10.07.2017	822 units	Rs 5,63,073	Rs5,64,900	Rs5,74,833.18

36. The Commission therefore notes that the inference drawn by the Informant is untenable when viewed having regard to bidding by M/s. Tessio Cooling and the competitive constraint provided by it. The Commission notes that if the quotations of M/s. Tessio Cooling were to be taken into account, the variations in the price quotations by the three parties, viz., OP-2, OP-1 and M/s. Tessio Cooling would tend to dispel the allegation of concerted action on the part of OPs.

37. The Commission further notes from Table Number 1 that for DLW-081710341 (opened on 31.7.2017) and CLW -3420182634 (opened on 10.07.2017), M/s. Tessio Cooling, was awarded the highest quantity under the respective tenders. These facts, on the face of it, belie the allegation made by the Informant against cartelisation by the OPs.

38. The Informant has further alleged that while the cost of raw materials i.e. aluminium rates had gone up from \$ 1.423/kg in 2015 to \$2.597 /kg in 2018,



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the prices quoted by both the parties, i.e. OP-1 and OP-2 remained unaffected by such increase in aluminium rates. In this regard, the Commission finds merit in explanations given by CLW that prices for OCRs had become competitive, and decreased over the past few years for two reasons- firstly, the quantity of OCRs required by the Indian Railways had been increasing over the past few years, thereby providing the advantages of economies of scale to manufacturers, and secondly, the number of approved vendors of OCRs had increased from 2 to 3 with the inclusion of OP-2 as an approved vendor, thereby making the market competitive.

39. The Informant has also contended that huge difference between the bids by unapproved vendors and approved vendors are indicative of collusive behaviour amongst the OPs. The Commission, however, agrees with the submissions of the procuring entities of Railways that such a comparison may not be appropriate as approved and unapproved vendors are not similarly placed. The Commission notes the submissions of CLW that as per Railway Board's order, an unapproved source could be considered for development order only if its quoted price is lower than L1 approved vendor and there may be a trend where the unapproved sources for procuring some development order may quote below the price of the approved sources. The Commission also notes the submissions of DLW that the quoted rate by unapproved vendors may not indicate the real cost as they are yet to be assessed for capacity – capability and technical knowhow to manufacture the item.
40. Here, the Commission would also like to mention that high profit, if any, by itself is not frowned upon by competition authorities unless the same is achieved by violation of provisions of competition law.
41. The Informant's contention regarding alleged bid rotation by OP-1 and OP-2 in DMW Tender No. 201890170 (opened on 22.01.2018) and DLW tender No. 081713801 (opened on 1.06.2018) is also not tenable on account of the clarification provided by DLW that no counter offer was made to OP-2 and thus there is no question of refusal by OP-2 to the said offer.



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42. As regards Informant's submissions regarding CLW tender number 34182634 (opened on 14.06.2018), the Commission notes that the said tender has not been finalised yet. Thus, no conclusions can be drawn by the Commission with regard to the allegation of bid rotation by the Informant in respect of the said tender.
43. In view of the foregoing, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against the OPs and the matter is ordered to be closed in terms of the provisions of Section 26 (2) of the Act.
44. The Commission suggests that the issue raised by the Informant, of the applicability of Public Procurement (Preference to Make in India) Order 2017 dated 15.06.2017 to itself, is beyond the purview of this Commission and the Informant may raise such issue at an appropriate forum.
45. The Secretary is directed to inform the Informant, the Office of Railway Board, CLW, DLW and DMW accordingly.

Sd/-
(Sudhir Mital)
Chairperson

Sd/-
(Augustine Peter)
Member

Sd/-
(U.C.Nahta)
Member

New Delhi

Date: 09/11/2018