

BEFORE
THE COMPETITION COMMISSION OF INDIA
[CASE No. 40/2010]

Dated: 25.04.2012

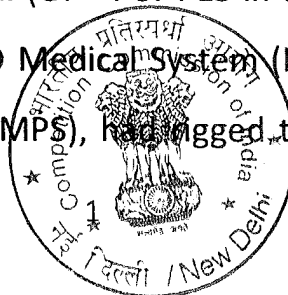
Shri Gulshan Verma

Informant

1. Union of India, through Secretary, Ministry of Health & Family Welfare
2. The Chief, Jai Prakash Narain Apex Trauma Centre, All India Institute of Medical Sciences, Delhi.
3. Assistant Store Officer (TC), Jai Prakash Narain Apex Trauma Centre, All India Institute of Medical Sciences, Delhi.
4. M/s PES Installation Pvt. Ltd. **Opposite Parties**

Order under section 27 of the Competition Act, 2002

The Commission had received two separate information concerning bid rigging and manipulation of the process of tender for the supply of certain medical equipments and medical systems to the government hospitals. In case no. 43 of 2010, the Commission after conducting inquiries has found that M/s PES Installation Pvt. Ltd. (OP- 4 or PES in the instant case) together with two other firms, M/s. MDD Medical System (India) Pvt. Ltd (MDD) and M/s. Medical Product Services (MPS), had rigged the bids and manipulated



the process of tender involving supply of Modular Operation Theatre (MOT) and Medical Gas Manifold System (MGMS) to Sports Injury Centre, Safdarjung Hospital, New Delhi. The Commission has also passed order under section 27 of the Act in that case holding the three firms in contravention of the provisions of section 3(3)(d) of the Act. The present matter relates to information filed by Shri Gulshan Verma, director of Unissi System Private Limited in another case (case no. 40 of 2010) in which bid rigging and cartelization has been alleged in the supply of medical equipments in the tender of Jai Prakash Narain Apex Trauma Centre, All India Institute of Medical Sciences, New Delhi (JPNA).

2. The facts and allegations as per the information in case no. 40 of 2010, in brief, are as follows;

2.1 It has been brought out that on 18.03.2010, the OP-1 published an advertisement in the news papers inviting bids for supply of pre-fabricated Modular Operation Theater (MOT) alongwith preparation, scrub and dirty linen rooms. The date of submission of the said tender was on or before 14.04.2010 and it was to be opened on 15.04.2010.

2.2 Unissi System Private Limited in which the informant is a director submitted its tender on 14.04.2010. The tender was required to be submitted in two parts (i) Techno Commercial Bid in one and (ii) Financial Bid in another sealed cover. Both these covers were to be kept together in a one outer cover. On 15.04.2010, the tender was opened, and the informant's company was informed by the Assistant Store Purchase Officer of JPNA that envelope containing its financial bid was found open. The informant objected



to this stating that it had been done deliberately to oust it from the bidding process. On 11.05.2010, the informant received a letter from OP-1 for making a technical presentation/demonstration of the quoted model on 12.05.2010. On 25.05.2010 the Informant again sent a letter to the Chief of JPNA, AIIMS (OP-2) drawing his attention towards involvement of OP-4 in cartelization and bid rigging. However, the OP-2 ignored the same since he was also a party to the whole act.

2.3 The informant further sent a letter on 14.06.2010 to OP-1 reiterating his prayer to cancel the present bidding process. On 17.06.2010, the JPNA Trauma Center reverted to the informant, and informed that there was a violation of two bid procedure in the informant's offer due to which its bid offer was rejected. It was also informed that only the offer of PES had been accepted by the Committee.

2.4 It has been alleged in the information that the OP- 1 to 3 have favoured the OP-4 (PES) while awarding tender for the supply of pre-fabricated Modular Operation Theatre along with other associated items. Although there were many deficiencies in the technical bid of M/s PES, they were ignored by the technical committee. The informant also wrote a letter dated 02.07.2010 the Chief of Trauma Centre drawing his attention towards favour given to PES Installations.

2.5 The Informant has submitted that while PES offered various items like the wall system, ceiling system, Laminar Air Flow system, wall cabinet system, exhaust ducts, doors, illumination lights, control panel, pass through cabinet, X-Ray viewing screen from multiple sources and not from single



manufacturer/vendor, two other technically qualified bidders in the case had quoted these items from one manufacturer/vendor.

2.6 PES had not offered Laminar Air Flow system as per DIN 1946 Standards and had also not provided any size of the laminar. They were given undue liberty to supply the size of laminar as per their wish.

2.7 According to the informant, bid of PES ought to have been rejected on account of non-compliance with technical requirements of the tender. However, the technical committee overlooked these important deficiencies, deliberately, to favour it. The informant has also alleged that PES has submitted the fabricated/forged Compliance Certificate (CE) for the medical products of SHD Italy in the tender. The technical committee should have conducted an enquiry to check the authenticity of the CE document provided by PES, which was not done.

2.8 The informant has submitted that he had raised objections on the aforesaid issues which were ignored.

2.9 The Informant has also brought out that the bid of PES was accepted in spite of technical deficiencies and the bids of the two other bidders MDD and MPS were rejected on technical grounds. As per the Informant, MDD and MPS were part of the act of cartelization in collusion and connivance with authorities concerned with the process of tender to promote PES.

2.10 The informant in its information has also drawn attention towards the fact that the Hon'ble High Court of Delhi in WP (c) No. 3290 of 2008 had also admitted the fact of existence of cartelization among these companies. The



informant has mentioned that in other projects also relating to government hospitals , PES alongwith MDD and MPS had been found to be involved in bid rigging.

2.11 The informant also prayed for interim relief to stop execution of the tender in question.

Prima facie Opinion

3. On examination of the allegations of the informant and the available materials on record, the Commission after forming an opinion that there exists a *prima facie* case, passed an order under section 26(1) directing the Director General (DG) to investigate into the matter. The Commission also decided not to pass any interim order under section 33 of the Act in the case.

4. Investigation by DG

4.1 The DG submitted his report of investigation dated 10.08.2011 to the Commission.

4.2 In course of investigation, information was called by DG from various concerns who are dealing in various medical equipments and systems including Modular Operation Theatre (MOT) & Medical Manifold Gas System (MGMS). Information from tendering authority and the foreign manufacturers/suppliers was also collected and taken into consideration. Since the allegations in the instant case and another case filed in the Commission (case no. 43 of 2010) related to manipulation of bids and parties

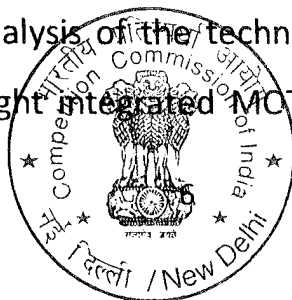


alleged were identical, information collected in case no. 43 of 2010 was also used in course of investigation proceedings in the present matter.

4.3 Additionally, findings of the Central Vigilance Commission (CVC) on the matters of the procurement of medical equipments in government hospitals and performance audit report of Commonwealth Games 2010 undertaken by Comptroller and Auditor General of India (CAG) was also taken into consideration.

4.4 According to DG, JPNA floated the tender for MOT to be integrated with existing facility of MGMS on turnkey basis. The tender was floated as a single package deal project. The purpose of the 'single package deal' was to award the MOT project to one bidder who in turn was free to source various components from multiple vendors. In the instant tender, six firms i.e. M/s Eagle Systems Private Limited (Eagle) , M/s Karl Storz Endoscopy India Pvt. Ltd., M/s PES Installation Pvt. Ltd. (OP- 4 in the instant case), M/s. MDD Medical System (India) Pvt. Ltd (MDD) and M/s. Medical Products Services (MPS), and M/s Unissi Private Limited (Unissi) submitted bids. Bid of Unissi was found open by JPNA and was rejected in violation of two bid system. The bids of MDD and MPS were rejected by JPNA since they were not found to be eligible. Only three out of six bidders i.e. Eagle, Karl Storz and PES were found to be technically eligible. Finally after conducting financial evaluation of the three bidders, PES (OP-4) was awarded the contract, since it had quoted the lowest rate.

4.5 On a comparative analysis of the technical bids of all the bidders, DG found that JPNA had sought integrated MOT for which authorization from



exclusive manufacturer was required to be submitted by the bidders. With regard to integrated MOT, only 3 firms, M/s. PES Installation Pvt. Ltd. (having exclusive authority from Stryker), M/s. Karl Storz Endoscopy India Pvt. Ltd. (having exclusive authority from Karl Storz) and M/s. Eagle Medical Systems Pvt. Ltd (having exclusive authority from Richard Wolf) conformed to the requisite terms & conditions of exclusivity.

4.6 As regards Richard Wolf which has appointed Eagle Medical as its authorized dealer, DG has reported that it does not have the major role in integration of MOT in India. There are only two firms i.e. Stryker India and Karl Storz which are capable of undertaking integration of MOT and are competing with each other. Thus, if JPNA or any other hospital is looking for an integrated MOT project there would be only these two companies who can undertake the execution of such projects.

4.7 Thus, instead of six bidders in JPNA tender actually there were only three competent technically qualified bidders, PES Installation (through Stryker India) Eagle Medical (through Richard Wolf) and Karl Storz. The remaining three entities who had applied in the tender, viz; MDD, MPS and Unissi were not having the exclusive authorization for integration of MOT. The fact related to the lack of integration was well known to MDD and MPS but still they applied in the JPNA tender in order to show that sufficient bidders had quoted and applied in the tender. This was done to help PES in winning the contract.

4.8 According to DG, identical technical deficiencies were noticed in the technical bids of MDD and MPS which reflect meeting of minds and



concerted action on their part. The fact that the three firms had colluded is apparent from the fact that identical typographical errors were also noticed in the price schedule/bid of MDD, PES and PES in the tender of SIC project in case no: 43 of 2010.

4.9 According to DG, there are numerous financial transactions and business transactions among MDD, MPS and PES during 2007-2010 which establish that the three companies are have business dealing.

4.10 According to DG, the bid document submission register of JPNA shows that quotations were submitted exactly at 11.20 a.m. by MDD & MPS and just after a gap of 10 minutes at 11.30 a.m. by PES Installations on 15.04.2010.

4.11 DG has concluded based upon findings of investigation in case no. 40 and 43 of 2010 that MDD, MPS and PES had acted in concerted manner while submitting the tender documents in the tender of SIC and JPNA. While in the case of SIC tender, MDD Medical bagged the contract, in tender of JPNA, PES Installation got the contract. According to DG, the concerted action among these entities has resulted in violation of the provisions of section 3(3) (d) of the Act.

4.12 DG has also brought out that PES Installations, MDD and MPS over a period of time have been able to corner most of the MOT and MGPS projects in the various private and govt. hospitals which shows some kind of bid rotation amongst the three bidders. This is also supported by the observations of CVC and CAG in their reports.



4.13 DG has also reported that M/s Stryker has entered into a dealer agreement with PES in December 2008 by virtue of which PES is the only authorized or exclusive dealer appointed by M/s Stryker in India. On examination of dealership agreement between them, DG has noted that Stryker India has entered into agreement with PES with regard to installation of integrated MOT, clause 3.1 (g) of which restricts or binds PES to Stryker in violation of section 3(4) of the Act.

4.14 According to DG, in India there are mainly two companies i.e. Stryker India and Karl Storz which are providing expertise in integrated devices/solutions in MOT. However, it is Stryker India which has better equipment/software, low cost and thus is predominantly more preferred over Karl Storz. On account of exclusive dealership with Stryker, PES is at an advantage as compared to other local dealer agents who wish to bid in various hospitals for MOT. This has resulted in restrictive competition as other dealers who wish to opt for MOT projects cannot apply in tenders of government hospitals.

5. The investigation report of DG was considered by the Commission in its meetings and it was decided to send a copy of the report to the parties for filing their reply/objections, if any. Report of investigation was also forwarded to MDD and MPS, even though they were not named in the information as respondent parties since they were found to be contravening parties by the DG. In addition to the written submissions, oral arguments were also made by different parties before the Commission. In the replies of



PES, MDD and MPS in the instant case, they have also relied upon the submissions made by them in case no. 43 of 2010. Since the Commission has dealt them in detail in case no. 43 of 2010, they are not repeated herein again. Replies of various parties with reference to the instant case, in brief, are as under;

Reply of PES Installations Private Limited

5.1 PES in its replies has submitted that the present information has been filed for settling personal scores and business rivalries. It has submitted that its business rivals are finding it difficult to compete with its meritorious performance and hard work and therefore have resorted to the methods of filing complaints.

5.2 According to PES, the methodology applied for carrying out investigation by the learned DG has serious flaws in it thereby vitiating the entire investigation proceedings. In the instant case, apart from it, five other bidders viz; M/s. Medical Products Services, M/s. MDD Medical System (India) Pvt. Ltd., M/s. Unissi Pvt. Ltd., M/s. Eagle Medical Systems Pvt. Ltd., and M/s. Karl Storz Endoscopy India Pvt. Ltd., were pre-qualified to bid for the tender. However, amongst them, two (M/s. Medical Product Services, and M/s. MDD Medical System (India) Pvt. Ltd.,) failed to meet the technical qualifications, while one (M/s. Unissi Pvt. Ltd., the company of the informant) violated the tender conditions and did not quote. According to PES, out of the three technically qualified bidders bids of Karl Storz and Eagle Systems were higher and since it had quoted the lowest price, it was awarded the contract.



5.3 PES has further submitted that in the Technical Bid of M/s. Unissi (informant's company) it was mentioned that it did not have integration system and was still under R &D. M/s. Unissi till date on its own has executed the work relating to operation theatre only for UPRNN Lucknow which shows that it has limited presence in the market. Even with regard to the said job undertaken by them, there are numerous complaints.

5.4 It has also been submitted by PES that foreign principals of bidding firms are competitors all over the globe. Therefore, there exists no possibility of meeting of mind among them. According to PES, there arises no occasion for any cartelization or bid-rigging or rotation as alleged since it got the contract while actually competing against M/s Eagle Medical Systems Pvt. Ltd. and M/s Karl Storz Endoscopy India Pvt. Ltd. in the tender. Therefore, no benefit would have accrued to it by elimination of M/s Medical Products Services and M/s MDD Medical System (India) Pvt. Ltd., from the tender.

5.5 It is not correct to say that while MDD had sought authorisation from Strykey in SIC project, in JPNA project it did not deliberately do so in order to help it in getting the contract since the condition for sole authorization was not relaxed at JPNA (AIIMS) while it was relaxed due to the fast track nature of SIC project.

5.6 According to PES, merely because, the sealed bids were submitted by the two parties at 11:20 AM and by one at 11:30 AM on the last date of submission of the tender, it cannot be concluded that there was common understanding among the parties with respect to the bid. M/s MDD as well M/s MPS failed to qualify in the tender because of technical deficiencies. If



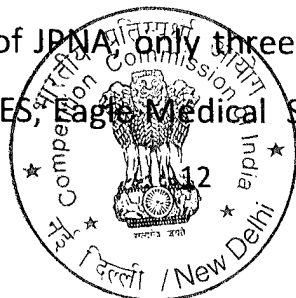
the technical deficiencies are common, then they cannot be held to be part of cartel. No presumption or any conclusion can be drawn on this account.

Reply of MDD Medical Systems India Private Limited

5.7 MDD in its replies has also refuted that it was part of any cartelization stating that the inquiry and findings of the CVC on the issue of award of government contracts and the allegation of cartelization leveled in the information cannot be looked into or relied upon by the DG since the report of the CVC was prepared in violation of the principles of Natural Justice.

5.8 One major fact which was totally ignored by the DG is that its bid had already been rejected at the stage of opening of the Technical Bid and hence the question of it being a part of the alleged cartelization or being involved in bid rigging, cannot arise. The said finding shows non-application of mind by the DG. Once having been rejected in the technical bid, it could not have been part of any bid rigging or collusive bidding or even bid rotation. Admittedly, no allegation of any sub-contract having been awarded to it by PES Installations Pvt. Ltd. (Successful Tenderer) has been made by the DG in the entire report. Hence, the purpose, if any for it to have submitted a losing bid or a non-responsive bid has not been stated by the DG in his report.

5.9 MDD has contended that the report, therefore, is liable to be rejected on this ground only that it could not have been a member of the alleged cartel, as made out by the DG under the circumstances brought out above. It has been stated by the DG that at the time of opening of the financial/ price bids in relation to the tender of JPNA, only three bidders/ participants had been short listed, which were PES, Eagle Medical Systems and Karl Storz India Pvt.



Ltd.. However the entire report of the DG proceeds on the basis that MDD, PES, and MPS had indulged in the collusive bidding and price rigging, when neither MDD nor MPS could participate in the price bid on account of being technically disqualified.

5.10 According to MDD, it could not have been a part of the alleged cartel when its price bid was not opened at all and when the final competition was among PES, Eagle and Karl Storz. It has questioned as to how could it have manipulated the price or rigged the price, when Eagle and Karl Storz were the only competitors, in the fray for the award of the tender of JPNA alongwith PES. Consequently, finding of MDD, PES and MPS having violated the provisions of section 3 (3)(d) of the Competition Act, 2002 is flawed, unsubstantiated, uncorroborated and is based entirely on conjectures and surmises.

5.11 MDD has submitted that the facts of the present case do not point out, establish or even remotely suggest that there was any tacit oral understanding among MDD, PES and MPS in respect of the alleged price rigging and collusive bidding, as has been sought to be made by the DG, in the tender of JPNA. No precise or coherent proof has been brought forth or established by the DG to establish that there was any such understanding, which has led to cartelization and consequently led to control of the prices of the products in the market.

5.12 According to MDD, it had given the technical specifications in respect of the products and makes, in which it was dealing in. If for some reason the technical specifications/ deficiencies existed in the items quoted by it and

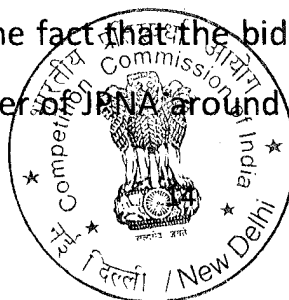


MPS, which were common to a large extent, only for that reason there cannot be any inference of cartelization. Similarly, on account of the fact that no authorization from manufacturer was submitted by it and MPS in respect of certain items, there cannot be any inference of agreement with PES to deliberately not qualify for the tender. In the present tender, since there were specific and specialized products / items which were being manufactured by Stryker, therefore, no authorization was given by it unlike in the SIC tender.

5.13 In the present case, Stryker through its exclusive distributor, PES participated in the tender as MOT was a specialized area in which Stryker deals with. Hence, in this situation Stryker did not give any other person its authority letter to participate in the tender of JPNA. The only option thereafter left with it was to approach Karl Storz. However, since Karl Storz itself participated in JPNA tender, therefore, it also refused to give authorization for its products.

5.14 MDD has submitted that the last date of submission of tender bids was 14.04.2010, which was extended to 15.04.2010 till 12.30PM. As the final submission time was 12:30PM, apparently the bids were submitted by it, at around the same time when MPS and PES also submitted their bids. It is normal that tenders are usually submitted at the 11th hour and the mere fact that the tenders were submitted around the same time, does not reflect or indicate or even suggest cartelization.

5.15 According to MDD, the fact that the bid documents were submitted by the three firms in the tender of JPNA around the same time, does not in any



manner imply or indicate any concerted action among the three companies.

In any case, submissions of tender bids at almost the same time does not lead to the conclusion that the price bids as submitted by the three companies were rigged or were planned in advance. The report does not even remotely indicate or suggest the fact that the price bids of the three companies were near to each other, thus warranting an inference that the same was a concerted action and the three firms had indulged in price rigging and collusive bidding.

5.16 MDD has brought out that there was no understanding between it and PES to the effect that since the tender of JPNA had been awarded to the latter it would submit a losing bid in the tender of SIC. The tender of two hospitals were different; while the tender of JPNA was specific to the Modular Operation Theatre (MOT) , the tender of SIC was a turnkey project.

5.17 The entire finding as recorded by the DG in its report is flawed, unreasoned and not supported by cogent evidence. There is no indication of any agreement in existence among the three firms, which has led to any appreciable adverse effect on competition.

5.18 MDD has submitted that it is relevant to point out that the findings of the CVC mentioned in the report of DG fail to take into consideration the fact that only limited number of firms are in the market for the supply of MOT and MGMS. Only on the basis of participation of limited number of firms in the market, adverse conclusion against them in terms of cartelization cannot be drawn.



5.19 Further, wherever companies / firms other than MDD, PES, MPS have participated, tenders have also been awarded to the said companies / firms. Where no other firms could participate besides the four companies mentioned by the CVC in its report on account of lack of eligibility criteria, the tender had to be awarded to the firms whose bids were responsive. However, this cannot be taken as proof of cartelization among them.

Reply of Medical Product Services

5.20 MPS in its replies has submitted that it is not clear why for not having authorization and still competing in the tender, while it has been looked upon with suspicion by the DG, Unissi has been left out from the purview even when its bid was also suffering from same deficiency. Further, it is also not clear while proximity of timing of 3 companies for submission of tender has been considered as evidence of cartelization, proximity of submission of timings between Karl Storz and Eagle Medical, two other firms have not been considered as of any relevance.

5.21 According to MPS, the allegations contained in the report of DG fail to address the issue of its involvement into alleged acts of cartelization/bid rigging, more so in view of the fact that it could not even succeed in the two tenders. i.e. SIC and JPNA.

5.22 DG in its report failed to take into consideration the existence of numerous players that exist in the market who are competing against each other. Even the foreign principal suppliers of MOT and MGMS are directly competing against the dealers and have bagged various contracts.



5.23 MPS has further submitted that no benefit has accrued to it in both cases i.e. JPNA Tender (Case 40/2010) & SIC tender (43/2010). It is discernable that the JPNA Tender as well as SIC tender have been made by agencies on which it does not hold control. The tender specifications have not been drafted by it but by a team of different specialized agencies. As regards other work contracts, if it has been able to secure some of them by competing against other firms, by no stretch of imagination it may be termed as a part of cartel.

5.24 According to MPS, in JPNA tender (case 40/2010), five other companies participated in the tender apart from it. The allegations of any tailor made conditions/favoritism are totally ruled out in view of the number of participants in the tender. Any allegation of cartel/bid-rigging and rotation by a group also does not hold good in view of the existence of other companies, Karl Storz and Eagle Medical System, against whom not even an allegation of cartelization has been made.

5.25 MPS has also submitted that it could not qualify on the technical grounds and was ousted from the tender process. Had it been a case of any cartel with PES or MDD, there would have been no occasion for it to not even qualify at the technical bid stage. Only three bidders, PES, Eagle and Karl Storz qualified to quote prices and tender was finally awarded to PES, being the lowest bidder. It is beyond comprehension to even think of cartel, least to conclude, when only one of the respondents, PES amongst the three alleged cartel parties qualified for the JPNA tender and PES was found L1 in competition with two parties who have not been found part of the alleged



cartelization. If the cartel was to be established, all the five bidders should have been made the party & investigation should have been done against all the firms.

5.26 The instant case has been investigated merely on the basis of report of CVC as is also apparent from the information in the case. However, the investigation only has named 3 parties out of 4 named in the report of CVC. No case has been made out against M/s Benson even when it has been indicted by the CVC. It seems that either the investigation is supported by rivals including Benson and is maliciously motivated or the DG himself did not rely upon the findings of CVC. In either case the entire reliance upon report of the CVC is fallacious.

5.27 According to MPS, the entire investigation was done aimed to nail it somehow as is also apparent from the various illogical conclusions reached against it despite the fact that it could not even technically qualify for the tender either in JPNA, i.e. case no. 40 of 2010 or SIC, i.e. case No. 43 of 2010.

5.28 MPS has further submitted that the tenders have been scrutinized to only trace signs of similarity among the alleged cartel companies. However, other parties or their tender documents have not been scrutinized which would also have so many similarities. DG has concluded evidence of cartelization from proximity of time of filing of bid documents in JPNA. However, the proximity of timings in submission of bids of Eagle Medicos and Karl Storz, within a gap of 5 minutes, was overlooked.



5.29 According to MPS, Unissi after being disqualified from the tender has resorted to malicious, ill motivated complaints which are nothing but defamatory tactics.

5.30 MPS has further submitted that in the instant case, one of the alleged party to cartelization – PES participated and competed with two parties who are totally oblivious to any allegations of cartel.

5.31 The fact, that the tender qualifications required authorization which could not be managed by it or MDD or any other player except PES, Karl Storz and Eagle Medical, goes on to show that tender conditions were not tailor made to suit the alleged cartel parties. While its participation in the tender without technical qualification/authorization has been viewed as cartelization, the fact that Unissi (the informant) also could not qualify, has not been looked upon with suspicion.

5.32 MPS has brought out that in case of tender in JPNA, if PES would have allowed the authorization of Stryker to MPS or MDD, the two would have competed, but the PES did not allow the two parties to get the authorization which shows that the three firms actually compete and do not collude as alleged.

5.33 According to MPS, conclusions drawn by the DG are erroneous and devoid of reasonable consideration of various facts and circumstances. There is no evidence of bid rigging and farfetched conclusions have been drawn to establish existence of cartelization



Reply to the DG Report by JPNA

5.34 JPNA in its response filed through its Assistant Store Officer has submitted that all the Pre-qualification Criteria incorporated in this tender were duly vetted and approved by a competent Specification Committee (including technical experts, external experts, nominee of DGHS, etc.) and are strictly confirming to the prevailing guidelines of CVC, General Financial Rules (GFRs) etc.

5.35 The authenticity of the Manufacturer's Authorization/Certifications provided by the bidders/successful bidders was verified by the Technical Evaluation Committee during the technical evaluation/presentation made by the bidders. There was a clear-cut two-bid violation in the offer of M/s. Unissi (India) Pvt Ltd. (violation of tender condition No. 4) as also accepted in its letter No. UIPL/3147 52/10-11, dated 14th June 2010. Further it has also been stated in the said letter that it was allowed to attend the tender opening with the condition that the acceptance/rejection of its bid on the above cited violation will be decided by the Committee.

5.36 Moreover, all the tenders were opened by a Committee in the presence of the representatives of all the bidders (except M/s.-Medical Product Services). It is also noteworthy to point out that Mr. Gulshan Verma (the informant) , Director of M/s.Unissi (India) Pvt. Ltd. himself attended the tender opening and signed on the attendance sheet alongwith other representatives. The representatives of the other bidders signed the opened



envelope of the Financial Bid of the informant in confirmation of the fact that envelope was found in open condition.

5.37 According to JPNA, it was a precondition stipulated in the tender specifications that the bidders should provide complete modular theatre on turnkey basis including design, factory fabrication, installation, testing, commissioning and training of all items mentioned in the Bidding document as a 'Single Package' deal. Due care has been taken while framing the specifications and they were framed after having been vetted and approved by a competent committee (including technical experts, external expert, nominee of DGHS, etc.) An Open tender was advertised giving sufficient time for submission of bids, for more competition and better competitive price. Six firms participated in the tender and three firms who were meeting the tender specifications, were technically approved and their financial bids were finally opened.

5.38 According to JPNA, the lowest bidder (M/s PES Installations Pvt. Ltd.) amongst the three technically approved offers was awarded the contract after negotiation. Moreover, the tender has been floated under two bid system by obtaining the technical bids and price bids simultaneously. The rates obtained through open tender system following the above procedure have to be competitive.

5.39 It has also been submitted by JPNA that the complaint of M/s Unissi (India) Pvt. Ltd. is totally false and baseless since the requisite tender norms/procedure had been followed in the case and the approval of the



competent committees/authorities had been taken, at appropriate stages, while awarding the tender.

5.40 It is also noteworthy that the false declaration made by M/s. Unissi (India) Pvt. Ltd. in the tender floated by JPNA to the effect that they had not been blacklisted/debarred by any organization has become clearly evident during the course of investigation as M/s Unissi had been blacklisted/debarred by PGI, Chandigarh in one of the matter related to medical equipments. It is significant that the concluding part of the investigation report of DG reveals the cartelization/bid rigging among the three companies, namely, MDD, MPS and PES purely based on the findings of CVC, CAG and investigation in case No.43 of 2010. It has no mention of the case pertaining to JPNA, AIIMS (i.e. Case 40/2010), which makes it clear that the requisite tender norms/procedure had been properly followed in the instant tender.

Reply by the Ministry of Health and Family Welfare

5.41 The Ministry of Health and Family Welfare in its replies has enclosed the submissions of JPNA stating that the same may be treated as its reply in the case.

Reply by the Informant

5.42 The Informant also submitted its replies in which allegations filed in its information have been reiterated.



Decision of the Commission

6. The Commission has carefully considered the information, the report of the DG, replies of various parties and all other relevant materials on record. The Commission on the basis of the findings of DG and records of investigation notes that the following issues arise for determination in the case.

Issue 1 Whether the Opposite Parties have contravened the provisions of section 3(3)(d) read with section 3(1) by indulging in the process of bid-rigging in the tender floated by JPNA, AIIMS, New Delhi?

Issue 2: Whether dealership agreement between Stryker India Pvt. Limited and PES is violative of the provisions of section 3(4)(c) read with section 3(1) of the Act?

Determination

Issue 1: Whether the Opposite Parties have contravened the provisions of section 3(3)(d) read with section 3(1) by indulging in the process of bid-rigging in the tender floated by JPNA, AIIMS, New Delhi ?

6.1 On the aforesaid issue, the Commission notes that two informations relating to allegations of manipulation of bids and bid rigging in case of procurement of medical systems by two Government Hospitals, Sports Injury Centre, Safdarjung Hospital, Delhi and Jai Prakash Narain Apex Trauma Centre, All India Institute of Medical Sciences, Delhi have been filed before it. While in case no. 43 of 2010, the allegations were related to rigging of bids in



the tender for procurement of MOT and MGMS by Sports injury Centre, Safdarjung Hospital, Delhi, in the instant case it has been alleged that bids were rigged in procurement of MOT by JPNA, AIIMS, Delhi. DG has found three firms PES, MDD and MPS to be part of an understanding to manipulate the process of bidding in the tenders of these two hospitals.

6.2 On consideration of the investigation reports of DG, the Commission has already passed order in case no. 43 of 2010 in which the aforesaid three firms have been found to have contravened the provision of 3(3) (d) of the Act due to their act of manipulating the process of tender. The Commission in that case had found that there was significant number of common typographical errors in the bid documents of these firms. Further, PES and MPS had submitted 'complementary', 'cover' or 'courtesy' bids so that MDD might get the contract for SIC project.

6.3 The Commission had also found that MDD after winning the contract had sub-contracted the work to PES both for supply and also for installation of certain items in SIC hospital. Business dealings among PES, MDD and MPS also revealed evidences of subcontracting of the work among them. The acts and conduct of the three firms were found to be a part of overall agreement under which they had agreed to bid in a manner that they rotate bids amongst themselves in different hospitals.

6.4 The Commission observes that the two tenders (SIC in case no. 43 of 2010 and JPNA in case no. 40 of 2010) were processed in a gap of few months. In the instant case, as per technical specifications, MPS and MDD were not eligible to bid since they did not have authorization from the manufacturers

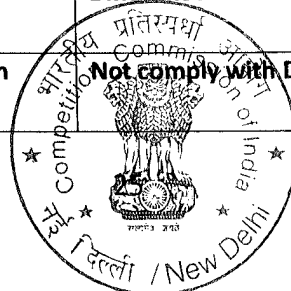


to quote for MOT for which the tender was issued. Tender of JPNA prescribed that each bidder should submit the exclusive authorization for the integration of MOT from the principal/manufacturer. It was only the PES out of the three who was eligible and competent to quote for integration of MOT. The other two bidders MPS and MDD were well aware that they were not having any authorization for MOT from the principals. However, they still applied in the tender knowing fully well that they would not be found technically qualified. This seems to have been done to give comfort to the authorities that enough competition exists in the tender.

6.5 The fact that MDD and MPS had submitted 'complementary' bids or 'courtesy' bids is also evident from the fact that most of the technical deficiencies in the bids of the two firms were identical as is brought out in the table below. This shows that two firms had an understanding among them while preparing the bids.

Comparative Chart of Technical Bids of MPS and MDD

S. No.	Specification	M/s. MDD Med. Systems (I) Pvt. Ltd.	M/s. Medical Products Service
1.	Technical Specifications Wall Ceiling System	No, HPL/galvanized steel quoted.	No, HPL quoted
2.	Sub frame	No, HPL/galvanized steel quoted.	No, HPL quoted
3.	Wall Panels	Yes	Yes
4.	Sealing gaskets	Different material	Different material
5.	Laminar Air Flow Ceiling System	Not comply with DIN1946	Not comply with DIN1946



6.	Door and frames Automatic Sliding Door System	Different material	Different material
7.	Hinged Door System	Different material	Different material
8.	Operation theatre control panel	Not touch screen type	Not touch screen type
9.	Camera System	No model quoted	No model quoted
10.	Flat Panel Monitor	No detail	No detail
11.	Adjustable Movable Room arm system	No detail	No detail
12.	Equipment Boom System with boom suspension for Progressive Scan Flat Panel	No detail	No detail
13.	Service Points/Outlets:	No detail	No detail
14.	Boom Suspension for 26" HD Progressive Scan Flat Panel Monitor	No detail	No detail
15.	Anesthesia Boom System	No detail	No detail
16.	Video & Audio Engineering	No authorization letter from manufacture	No authorization letter from manufacture
17.	Video Conferencing	No authorization letter from manufacture	No authorization letter from manufacture
18.	Full High Definition Digital documentation system	No authorization letter from manufacture	No authorization letter from manufacture
19.	Network integration	No authorization letter from manufacture	No authorization letter from manufacture
20.	Integration device control system	No authorization letter from manufacture	No authorization letter from manufacture
21.	Monitoring Room camera system	No authorization letter	No authorization letter from



		from manufacture	manufacture
22.	High Definition 3-Chip Endovision System	No authorization letter from manufacture	No authorization letter from manufacture
23.	Technical specifications of Camera System	Yes, no model quoted	Yes, no model quoted
24.	Technical Specifications for Electrocautery Machine	Not meeting specification ACE cut not present	No, catalogue attached no details mentioned

6.6 Although, altogether six firms had participated in the tender, these two firms, MDD and MPS by submitting their bids provided 'cover' for PES in order to give an impression that there was enough competition. Although, three other firms Karl Storz, Eagle Systems and Unissi (the company of the Informant) also participated, MDD and MPS acted in agreement with PES to submit technically deficient bids in order to reduce overall competition in the tender.

6.7 MPS and MDD seem to have submitted bids even when they were not eligible to submit bids so that the tendering authority gets comfort that there was enough competition to enable PES to win the contract by virtue of being only eligible bidder. Had Karl Storz, Eagle Systems and Informant not submitted their bids, PES would have faced no competition. In that case, the tendering authority also would not have the comfort of at least three bids to justify the entire tendering process.

6.8 The Commission observes that the aforesaid clearly brings out that there was manipulation of entire bid process in contravention of the provisions of section 3(3) (d) which reads as under,



(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding."

6.9 The parties named in the information have manipulated the process of bidding by reaching an understanding among themselves not to compete. MDD and MPS submitted 'complementary' bids to avoid any question being raised on lack of competition in the tender process. These two entities were not to compete with MDD but they were only filing 'cover' or 'courtesy' bids so that the procurement process did not get stalled due to the lack of enough competition. MPS and MDD have sought to reduce the competition in the bidding process by entering into an understanding with PES to submit



technical deficient bids and cover the bid of PES in order to manipulate the process of bidding.

6.10 The fact that the two firms, MDD and MPS submitted bids together at 11:20 AM and third bidder, PES (which got the contract finally) submitted bid at 11:30 AM i.e. within a gap of 10 minutes further shows that there was some kind of understanding among the bidders.

6.11 The evidence collected in case no. 43 of 2010 together with case no. 40 of 2010 shows that the three firms had agreed to rotate bids among themselves. Therefore, in case no. 43 of 2010, while MPS and PES submitted 'complementary' bids in favour of MDD, in the instant case, in order to ensure that PES gets the contract, MDD and MPS submitted technically deficient bids. DG has also brought out rotation of bids among PES and MPS in earlier years on the basis of the findings of CVC. In order to successfully rotate bids, these two had quoted different rates for the same item(s) against different tenders issued at around the same time. For instance, for oxygen manifold, while M/s. PES Installations had quoted Rs. 95,000 in the tender of CNBC hospital and Rs. 50,000 in the tender of AIIMS, M/s. MPS had quoted Rs. 85,000/- and Rs. 54,500/- respectively for the similar items at these two hospitals. Similar pattern can be seen in respect of other items like oxygen outlet and Nitrous oxide emergency manifold as per information in the table below:



S. N.	Item	Rate quoted by M/s PES (in Rs.)		Rate quoted by M/s. MPS (in Rs.)	
		CNBC(20.6.06) L2	AIIMS(12.7.06) L1	CNBC (20.6.06) L1	AIIMS (12.7.06) L2
1.	Oxygen manifold	95,000/-	50,000/-	85,000/-	54,500/-
2.	Oxygen outlet	6,400/-	3,600/-	4,800/-	4,180/-
3.	Nitrous Oxide	35000	10000	25000	12000

6.12 The Commission on the basis of aforesaid observes that M/s PES, MDD and MPS have been taking the contracts in turn and rotating bids amongst themselves under an understanding.

6.13 The Commission on the basis of foregoing and findings in case no. 43 of 2010 holds that on the patterns of case no. 43 of 2010 relating to the supply of items in SIC project, the three firms had agreed to manipulate the process of bidding in the instant case also by submitting complementary bids and by rotating bids amongst themselves in contravention of Section 3(3) (d) of the Act.



Issue 2: Whether dealership agreement between Stryker India Pvt. Limited and PES is violative of the provisions of section 3(4) of the Act?

6.14 The Commission has already decided this issue in case no. 43 of 2010 and has come to a conclusion that there is no contravention in terms of section 3(4) of the Act. Since the parties concerned and issue remain the same, the Commission does not find necessary to decide this issue again in this order.

6.15 The Commission finds that adequate vigilance on part of procuring authorities is must to keep a check on such firms who enter into agreements and understanding to manipulate the tender process in their favour. On account of the evidences of manipulation of the process of bidding, the Ministry of Health and Family Welfare must also review the methodology of tender design and tender specifications in order to widen participation and generate more competition in matter of procurement in government hospitals.

Order under Section 27 of the Act

7.1 The Commission has found MDD, MPS and PES in contravention of provisions of section 3 (3) (d) of the Act for manipulating process of bidding in the instant matter.

7.2 The Commission observes that in case no. 43 of 2010, the Commission has already passed order under section 27 and also imposed penalty for the said act of violation on these three firms. Tenders in case no. 43 of 2010 and the instant case were floated within a gap of few months and the inquiry



proceedings in ~~the~~ both the cases had also proceeded simultaneously. The project cost involved in case no. 43 was much more than the instant case. The penalty has been imposed in case no. 43 of 2010 on the three firms at a rate of 5% on their three years average turnover, considering and looking into the gravity of offence, their act and conduct in totality.

7.3 In view of foregoing, the Commission does not deem it fit to impose penalty again on them in this case.

8. The Commission decides accordingly.

9. Secretary is directed to communicate this order to all the parties as per regulations.

Sd/-
Member (R)

Sd/-
Member (GG)

Sd/-
Member (G)

Sd/-
Member (AG)

Sd/-
Member (T)

Sd/-
Member (D)

Sd/-
Chairperson

Certified True Copy

