BEFORE THE

COMPETITION COMMISSION OF INDIA

Case No. C-145/2008/DGIR

DATE OF DECISION : 06.04.2011

1. DDRS (G)-II, Railway Board, Ministry of Railways *Informant*

1. M/S. RMG Polyvinyl India Ltd, New Delhi
2. M/S. Royal Cushions Vinyl Products Ltd, Mumbai
3. M/S. Premier Polyfilm Ltd, New Delhi
4. M/S. Responsive Industry Ltd, Thane *Opposite Parties*

Final Order

Consequent upon the repeal of Monopolies and Restrictive Trade Practices Act, the present case has been received by the Competition Commission of India (the Commission) from the erstwhile Monopolies and Restrictive Trade Practices Commission (the MRTPC) on transfer under section 66 (6) of the Competition Act, 2002 (the Act). In this case, the complaint was filed by DDRS(G)-2, Railway Board, New Delhi (the informant) against M/s. RMG Polyvinyl India Ltd. (RMG Poly), M/s. Royal Cushion Vinyl Products Ltd. (Royal Cushion), M/s. Premier Polyfilm Ltd., (Premier Poly) and M/s. Responsive Industry Ltd. (Responsive Industry), alleging that they have formed a cartel while bidding for the tender of Poly Vinyl Chloride flooring sheets (PVC sheets) floated by the informant.

2. Facts/allegations of the Case in Brief

2.1 In the present case the opposite parties are Railways Research and Standard Organization (RDSO) approved firms/venders engaged in supply of Poly Vinyl Chloride flooring sheets (PVC sheets) to railways.

2.2 As per the informants, all the RDSO approved firms for supply of PVC sheets have abnormally increased the prices of this item by 80.6% within a period of 6 months. The informant has alleged that there is no justification for such an upward jump in prices and thus appears to be a case of suspected cartel formation.

2.3 It is stated by the informant that the supply of PVC sheets of CK-604 specification for tender No. S/7507/5013/4 for South Eastern Railways opened on 31.12.2007 shows that the rates quoted by all the four RDSO approved vendors were exorbitantly higher (lowest rate quoted was Rs. 4,297.70 per roll). The previous supplies of PVC sheets of C-8515 specification were procured at the rate of Rs. 1508.00 per roll on 15.5.2007.

3. After receiving the complaint the MRTPC sought comments/replies from the said opposite parties as well as from the complainant. In the meantime the MRTP Act was repealed and the case was transferred to the Commission in terms of Section 66 (6) of the Act.

4. The matter was considered by the Commission in its ordinary meeting held on 18.06.2010 and upon forming an opinion that there exists a *prima facie* case, referred the matter to the Director General (DG), CCI for investigation vide its order dated 18.06.2010.

5. The DG, after receiving the direction from the Commission, got the matter investigated through the Joint Director General and submitted the investigation report to the Commission on 29.11.2010.

6. <u>Summary of Findings of DG</u>

For investigation in this case the DG has relied on the information and reply provided by the opposite parties obtained through detailed questionnaire. The DG has also considered the details of price quoted by the opposite parties during

the year 2007, 2008 and 2009 as well as information available on public domain. The findings of the DG are summarized below:

5.1 The price quoted by the opposite parties in the year 2007 was raised at a very high level by their concerted action to maximize the profit.

5.2 The investigation clearly indicates that the opposite parties have raised price of CK-604 to unjustified level of more than 80% of the previous specification from Rs. 110 per sq.mtr. to Rs. 204/- per sq.mtr. and had again raised the price of the product within a short span of 3 to 4 months to a level of Rs. 375/- per sq.mtr.

5.3 None of the opposite parties could justify the increase in the prices. The enquiry conducted reveals that the prices of raw material did not change in proportion to the increase in price quoted by the opposite parties in the tenders floated by the informant.

5.4 The opposite parties were having close association and tender forms were found to be filled in the same handwriting and similar languages quoting same rates. The pattern of these price quotations over a period of 3 years shows that there is definite direct or indirect concerted effort by the opposite parties in furnishing the price quotations of PVC sheets to not only one Railway Zone but also to other Railway Zones. None of the parties could justify the reason as to why they have reduced the prices to around Rs. 200/- per sq. mtr. from around 375/- per sq. mtr. after initiation of investigation in the matter.

5.5 The procurement procedure and manual tender process of Indian Railways during 2007-08 also helped to foster cartelization by the suppliers. The system of approval of vendors by RDSO has restricted the number of participants and the frequency of tenders by different zones also affected the fair competition among members.

5.6 DG has recommended that the action of opposite parties is in the contravention of the provisions of the Section 3(1) read with Section 3(3)(d) of the Act.

6. The DG report was forwarded to the parties for filing their replies/objections vide Commission's order dated 04.01.2011. The Commission also directed the informant and the opposite parties to appear for oral hearing, if they so desire, either personally or through their authorized representatives.

7. Reply to the DG report by RMG Poly

RMG Poly filed its reply to the DG report dated 11.03.2011 which is summarized below:

7.1 It has been submitted by the RMG Poly that the allegations are related to the period mid 2007 to November, 2008 whereas Section 3 of the Act came into force w.e.f. 20.05.2009. It is further submitted that the dispute, if any, is governed by the provisions of the Monopolies and Trade Practices Act, 1969 (the MRTP Act) and not by the provisions of the Competition Act, 2002.

7.2 RMG Poly submitted that during the relevant period (mid 2007 to November, 2008), RMG Poly was a new entrant in the field of supply of PVC flooring sheets in the Railways and they did not have RDSO approval for supply of C-8515. It has never supplied C-8515 to the Railways at any time except a small trial supply only for the purpose of sampling.

7.3 RMG Poly submitted that the PVC Flooring sheets of the specification C-8515 are different than the specification CK-604. The raw materials for CK-604 are costlier compared to those of C-8515, more particularly during the relevant time, since the prices of crude petroleum in the International Market during the relevant period were sky-rocketing.

7.4 RMG Poly received the RDSO approval for CK-604 PVC flooring on 19.01.2007. RMG Poly did not have sufficient knowledge and experience over the production techniques of the product CK-604. As a result, there used to be high rate of rejection of the item, during production. This understanding of high rate of rejection came to RMG Poly only when it started to manufacture CK-604 at commercial level. RMG Poly could not have come to the said understanding of the high rate of rejection when it was only executing the small 'educational orders' for CK-604 and therefore,

at that stage, RMG Poly quoted a relatively lower rate for CK-604. However, as soon as, it was realized that the supply of CK-604 at the same rate when it was executing the said 'educational orders' was absolutely out of question, RMG Poly showed its inability to supply the same at such rate and sought the impugned increased rate. The new prices were quoted by the RMG Poly in the month of December, 2007, firstly, due to high rate of rejection, secondly, due to increased crude oil prices as compared to January, 2007 prices and thirdly, due to sharp rising trend of crude oil/ raw material prices in the future which could adversely affect the costing of the product-Diesel Power Generation Costs, Road Transport Charges, and also the rate of inflation in the next 12 months.

7.5 It is further submitted by RMG Poly that it has controlled the production wastages by developing a better engineering of the manufacturing of CK-604 which helped to control/reduce the high rate of wastages significantly. And also by the end of the relevant period, the fluctuating prices of crude petroleum also stabilized i.e. from US$148 per barrel to US$ 40 per barrel. Therefore, by the end of the year 2008, the cost of manufacture of CK-604 was significantly brought down from the impugned rate to at a lower rate.

7.6 RMG Poly submitted that there is nothing which will warrant a conclusion that there has been a meeting of mind of RMG Poly with that of the other parties, least to control production, sale and prices of CK-604 to obtain a monopoly as the supply of CK-604 by RMG Poly to the railways is less than 3% of the entire tender amount in dispute.

7.7 RMG Poly submitted that in RTPE No. 31 of 2008, baseless allegations of the cartelization have been leveled against it. It is submitted that the DG has wrongly mixed the allegations of the case No.C-145/2008-DGIR (16/28) and RTPE No. 31 of 2008 and as far as RMG Poly is concerned, the findings in the report of the DG are neither sustainable in law nor in the facts and circumstances of the case rather the findings are based on mere suspicion and speculation and without having any ground.

7.8 It is submitted by the RMG Poly that the 'item' is required to be supplied by the vendor on the ordered rate as per the delivery schedule of the railway

which may even extend upto 12 months. Therefore, bidder has to keep in mind the cost involved over the next 12 months while quoting the prices in the tender. There is no provision in the tender notice for price escalation after the order is issued (except changes in excise duty and sales tax applicable at the time of delivery).

7.9 RMG Poly stated that it is revealed from the examination of records that the ADG of DGI&R of the Hon'ble MRTP Commission had come to the conclusion that there was no case of cartelization.

7.10 RMG Poly has pointed out that the DG has selected only 6 cases out of a total of 12 tenders during that period for CK-604 issued by the Railways (given on page 18,19 and 20 of the DG Report) and the tenders picked up by DG are only such tenders which in isolation can support his thoughts.

7.11 RMG Poly has denied that two distinct groups had been formed for participating in the railway tenders area wise. RMG Poly and Premier Poly are situated in New Delhi and having factories located in district Bulandshahar and district Ghaziabad respectively in the State of UP in a distance of only 30 kms. from each other, while Responsive Industries are having factory in Maharashtra and Royal Cushion product in Gujarat. So, it is natural that the prices of RMG Poly will be more competitive in the tenders coming out from Northern India while tenders coming from the Western India and Southern India the offers of Responsive and Royal Cushion will be more competitive.

7.12 RMG Poly has stated that Mr. Amarnath Goenka, MD of Premier Poly is father of Arvind Goenka, Director of RMG Poly and also RMG Poly is having its operational office in the same complex as that of the Regd. Office of Premier Poly. But RMG Poly is having its full operation from its New Delhi office, Premier Poly is having only a small set up at its New Delhi Office and Premier Poly operational office is situated at its factory at Sahibabad which is nearly 30 kms. away from the New Delhi Office of RMG Poly. These two companies are different independent entities having different management and operations.

7.13 RMG Poly has denied that the hand writing in the tender forms filed by M/s Premier Poly and RMG Poly is identical and filed by the same person. RMG Poly further stated that the documents being so old, it was difficult to identify the person by his handwriting. it is further stated by the RMG Poly that during the period of last 2-3 years several marketing officers and assistants have left the organization and therefore it is difficult to identify the person by seeing his handwriting.

7.14 RMG Poly stated that where large volume of production is involved several economies are derived due to which cost of production is much lower as compared to the small quantity production where the operational costs, wastages and other costs are very high. The quantity of Central Railway Mumbai was 6078.24 sq.mt. which was several times more than the quantity of only 294.84 sq.mt of South Eastern Railway tender.

8. Reply to the DG report by Royal Cushion

Royal Cushion filed its reply dated 19.01.2011 through its General Manager (Legal) & Company Secretary which is summarized below:

8.1 As stated and reported by Joint Director General, Royal Cushion got registration of PVC sheets (vinyl) of 2 mm thickness specification CK 604 during the month of December, 2007 and thereafter their company started applying for tender and supplied PVC sheets (Vinyl) of 2 mm thickness specification CK 604 to Indian Railways and in view of the above, they have never participated for supplying of PVC sheets C 8515 specification and therefore they should be excluded from the cartel definition and from the above investigation.

8.2 Further Royal Cushion emphasized that their qualities are far superior and once its competitors have reduced the prices to around Rs.200/- per sq.mtr. from Rs.375/- per sq. mtr. they have never participated towards supply of PVC sheets (Vinyl) of 2 mm thickness specification CK 604. Vinyl flooring manufacturers cannot produce under any circumstances CK 604 quality and specification at the cost of Rs.200/- per sq.mtr. as per the

standard prescribed under RDSO. This can be verified by rechecking the qualities of supplies made at Rs.200/- per sq.mtr. even as on today.

8.3 It had discontinued supply to the Railways during mid of 2009 as their competitors are supplying a quality below the standard level and therefore, it never participated in any of the tender floated by Indian Railways.

9. Reply to the DG report by Premier Poly

Premier Poly in its reply to the DG report dated 07.03.2011 which is summarized below:

9.1 The proceedings before the Commission are not maintainable as Section 3 & 4 of the Act came into force from 20th May 2009 whereas the contended tenders were opened during 2007.

9.2 It submitted that out of its total turnover during the financial year 2007-08 and 2008-09, the share of RDSO Specification CK-604 was about 6%.

9.3 It further submitted that it had no experience of commercial production of CK-604 Specification in early of 2007 and therefore it has agreed with the Northern Railway to supply at the rate of Rs. 230.78 per.sq.mtr. during May, 2007. It was the result of error of judgment as no commercial production was made by it prior to that and the said specification was different as compared to the earlier RDSO specification. It submitted that once it got the experience of commercial production of CK-604 in September, 2007;, it started quoting the rates around Rs. 380 per.sq.mt. or more in the tenders floated by the various Indian Railway zones from October, 2007. A very high rate of rejection at manufacturing stage is also one of the causes of enhancing the cost of the tender product.

9.4 The tenders of the Railways generally give the requirements of the flooring after a few months of the opening of the tender which is generally 3-6 months. Besides this, the tender conditions also mentioned that apart from the tender quantity, the Railways may enhance the requirement by further 30% within that or next financial year. Therefore, while submitting the rates in the tenders, the tenderers have to take into account not only the present cost of raw materials, production charges and other cost but also have to

make provisions for the escalation in these costs for supply of the product in future.

9.5 It stated that if the quantity is small the prices are bound to be higher while the prices will be lower if the quantity is large. The price of the product also depends upon the raw material such as PVC Resin and Plasticizer which are direct petroleum product. The prices of the petroleum vary from time to time in international crude oil market. It further stated that the price of the said product also depends upon transportation cost, location of the destination weather conditions.

9.6 The informant is comparing the rates of two commodities of different specifications viz. RDSO C-8515 and RDSO CK-604. The RDSO specification CK-604 is an improved version and manufactured as per the requirement of railways. The cost of raw material used for CK-604 is also higher as compared to the C-8515.

10. Reply to the DG report by Responsive Industry

Responsive Industry's reply to the DG report dated 28.03.2011 which is summarized below:

10.1 The findings by the DG are entirely based upon circumstantial evidence of mere "price parallelism" without any direct or indirect evidence of an "agreement" amongst the suppliers including the Responsive Industry.

10.2 Responsive Industry is an established market leader in the PVC products and having a 100% export oriented unit making multiple varieties of PVC products, mainly for exports, have no economic justification to collude with the other three suppliers. The total sale of Responsive Industry to Indian Railway is less than 6.5% of its total sales worldwide during 2007-08 and reduced to 4.5% in 2008-09 and to 4% in 2009-10. Responsive Industry is hardly dependent on the orders from the Indian Railways and has no economic justification to collude on price bids with the RMG Poly, Premier Poly and Royal Cushion.

10.3 The cause of the rise/fall in price of PVC products was mainly due to the high price fluctuation of the crude oil in the international market during the period October, 2007 to end of 2009.

10.4 It denied that it did not provide the details of raw materials used etc. as DG in Para 6.3.4 has acknowledged the receipt of a detailed reply from Responsive Industry wherein the Responsive Industry has answered each question.

10.5 The conclusion by the DG that Responsive Industry and Royal Cushion have quoted their prices by forming another group to ensure that the tender was awarded to one of the members of the group is based only on price parallelism, which, in an oligopolistic market is quite common.

10.6 The price taken by the DG to determine the price of PVC used for the manufacture of the product CK-604 supplied to Indian Railways cannot be justified as it does not only manufacture flooring for Indian Railways but for many industries using different varieties of PVC.

10.7 It asserted that price parallelism is not the sole criteria to establish the fact that there is a cartel. Responsive Industry, by giving case law from European Union and United States emphasized that evidence of parallel pricing must be supplemented with plus factors, showing that alleged conduct is conscious and not the result of independent business decisions.

Comments dated 25.02.2010 of South Eastern Railway to the DG report

11.1 The Railway is in complete agreement with the findings of Competition Commission of India.

11.2 It is mandatory for the Zonal Railways as well as the Production units to make procurement from the pre-approved RDSO venders only in accordance with the policy laid down by the Railway Board for RDSO restricted items. Consequently, Zonal Railways cannot entertain any source other than those approve by RDSO. As in the present case and for many other items, the restricted vender base thus gives rise to the opportunity for unscrupulous firms to form cartels and hike up their prices in arbitrary and unjustified manner.

11.3 The Zonal Railways do not have any role to play in the matter of approval or selection of sources for the items which are declared as RDSO-Restricted. At the most what it can do, in the case of unjustified price hike is only to call for negotiation with the very same firms. In case of failure of negotiation, the authorities do not have any other option except to re-tender the purchase. But even in the next round of tender they have to deal with the very same firms since the procurement authorities are bound to procure the item from RDSO approved sources only. All the while, the Zonal Railways carries the primary responsibility to cater to the immediate needs of Divisions and Workshop Units on a day to day basis. Hence the prospect of Stock-out and non availability of critical material imposes a definite time frame on them for making tender decision – either through negotiations or through a re-tender. Consequently, the Zonal Railways, at present, have no potent weapon to deal with such cartels at their own level. It may also be noted that in the Railways, there is no Cost-Estimation-Cells to independently verify the intrinsic worth of an RDSO-restricted item. The competition in the said tenders is restricted to a limited number of RDSO approved sources and therefore, do not represent the optimum price obtainable under unfettered open market competition.

11.4 The Railway does not agree with Commission's report that manual tender processes helped to foster cartelization. The cartel formation is primarily due to reasons stated in above paras as no orders can be placed on firms outside the list of approved sources. The e-procurement is helpful in increasing competition only when such restrictions are not imposed.

Decision

11 The Commission has carefully considered the material submitted by the informant, the report of the DG, the replies filed by the opposite parties as well as the comments dated 25.02.2010 of South Eastern Railways and all other relevant materials and evidence available on record.

12 Considering the facts and circumstances of the case, the basic question for examination before the Commission arises as to whether any information

alleging violation of Section 3 of the Act related to a tender which was opened in 2007 i.e. prior to the date of enforcement of Section 3 of the Act can be entertained by the Commission. The opposite parties have vigorously submitted that application of Section 3 of the Act is prospective and the present information cannot be enquired into by the Commission.

13 It is noted from the DG report that the DG has concluded that the price quoted by the opposite parties in the year 2007 was raised at a very high level by their concerted action to maximize the profit and the said opposite parties were engaged in cartel like behavior in violation of the provision of Section 3(3)(d) of the Act.

14 In this context it is noted that Section 3 and 4 of the Act came into force on 20.05.2009. Since contraventions concluded by the DG are not of continuing in nature and nothing in pursuance to the alleged formation of cartel with respect to the tender in issue is being carried forward on the date of the enforcement of Section 3 of the Act, i.e. 20.05.2009, the effect and operation of the said alleged cartel cannot be said to be in existence on the date of enforcement of Section 3 of the Act.

15 In view of the above discussion, it is clear that application of Section 3 of the Act cannot be made retrospectively and the present information cannot be examined for violation of Section 3 of the Act. Therefore, the matter is liable to be closed on this ground alone.

16 In view of the discussion above, in the present set of facts and circumstances application of Section 3 of the Act is not attracted and the matter relating to this information is hereby closed.

17 Secretary is directed to inform the parties accordingly.

Certified True Copy

19/5/2011

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