COMPETITION COMMISSION OF INDIA
Case No. 3 / 2010
ORDER UNDER SECTION 27 OF THE COMPETITION ACT

Date of Order: 07 October, 2011

INFORMANT :- Pandrol Rahee Technologies Private Ltd.

OPPOSITE PARTIES :- 1 – Delhi Metro Rail Corporation Limited
2 - Bangalore Metro Rail Corporation limited
3- Kolkata Metro Rail Corporation limited
4- Ministry of Railways
5- Ministry of Urban Development

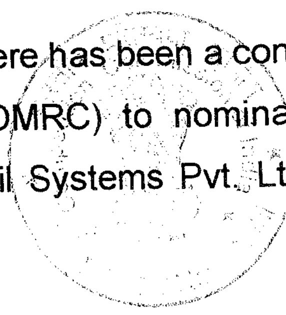
Per R. Prasad, Member (dissenting)

The present information memorandum has been filed by M/s Pandrol Rahee Technologies Private Ltd. (herein after 'informant') under section 19(1) of the Competition Act, 2002 (herein after 'Act') against the opposite parties (OP 1-5) alleging contravention of provisions of Section 3 & 4 of the Act.

2. The facts of the case, in brief, and allegations are as under:-

3. Informant, a joint venture between M/s Pandrol International Ltd. and M/s Rahee Industries Ltd., is a designer and manufacturer of rail fastening systems which are used on regular main line railways, high speed lines, mixed passenger and freight lines, light rail and metro tracks. These fastening systems are essential for the purpose of holding the rail tracks and have a direct bearing and impact on passenger safety and speed of the metro rail cars.

4. The informant has alleged that there has been a consistent effort by the Delhi Metro Rail Corporation (DMRC) to nominate exclusively, the product of M/s Patil Vossloh Rail Systems Pvt. Ltd.) a Joint Venture



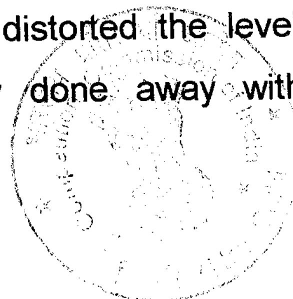
RP

between M/s Patil Group of Industries, Hyderabad and M/s Vossloh Rail System (Gmbh Germany) for ballast less track on the metro rail projects to be commissioned in any part of India wherever DMRC was in a position to make technical recommendations through the Detailed Project Report (DPR).

5. Informant has submitted that the DMRC, when it first undertook to build Phase 1 of the Metro in Delhi, did not undertake the usual open tender process for the purposes of purchasing rail fastening systems among others. DMRC with the limited experience at that time has used Vossloh rail fastening systems on the DMRC rail tracks. DMRC conducted bidding in a manner that facilitated the procurement of the Vossloh system 336 and excluded all other fastening systems. DMRC being the successful operator of the Metro train system in India was approached for preparation of Detailed Project Reports for Metro Rail Projects in other cities and provided consultancy services. In all DPRs prepared by DMRC for Metro Rail Projects of other cities, DMRC recommended the use of "Vossloh 336" rail fastening system which is a proprietary product.

6. The informant has further alleged that there appears to be a concerted effort on the part of DMRC to nominate only one type of proprietary rail fastening system i.e., Vossloh, for the purpose of rail fastening systems on ballast less tracks in metro projects resulting in refusal to deal and denial of market access to other fastening systems.

7. It has been alleged that the tender floated by Bangalore Metro Rail Corporation Ltd. for rail fastening system specify the product manufactured by Vossloh thus distorted the level playing field and neutrality. This has completely done away with competition and



prevents other players to compete and enter into the market. The informant had written to the Sectretary, MoUD and Chairman, BMRCL bringing to his notice that proprietary product was being specified in the tender. MoUD directed the BMRCL to modify its tender documents and not to go in for a proprietary product and also wrote to the Ministry of Railways, Railway Board, to examine and advise about the use of Pandrol's rail fastenings system on the Bangalore Metro Project for which RDSO gave provisional clearance for the purposes of limited field trial.

8. The informant has further submitted that by permitting the use of Vossloh exclusively in the year 2002/2003 without any restriction and prescribing impossible conditions for giving full clearance to informant, two different procedures were followed for two competing parties which was not just and equitable.

9. It has further been alleged that the procurement of Vossloh 336 system for the Chennai metro was on a single bid basis and RDSO did not carry out any observation / monitoring for the same. Clearly, different yardsticks were followed for similarly placed products.

10. The informant has also stated that in the case of Delhi Airport Metro Express Line Project (DAMEL project), DMRC managed to create a situation of exclusivity for Vossloh by denying the concessionaire his choice and challenging in such an onerous and detailed manner that it became obvious to the concessionaire that DMRC would never accept the Informant's system.

11. Informant has alleged that Kolkata Metro Rail Corporation incroporated such eligibility conditions for rail fastening systems which made only

Vossloh fastening system eligible for the contract. The condition that "the technology, viz. the type of proposed tract structure and fastening system should have already been approved by RDSO / Ministry of Railways, Govt. of India, as on the date of opening of the main TW tender...".

12. The informant prayed for the following reliefs:-
    a) To declare that the practices of the respondents have adversely affected competition;
    b) To direct the respondents not to exclusively deal in Vossloh fastening systems.
    c) To impose penalty on the respondents, and
    d) Any other relief which the commission deems fit in the facts and circumstances of the case.

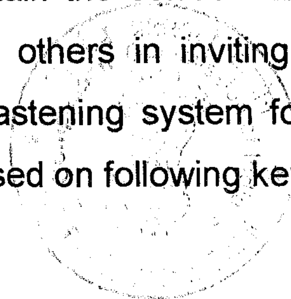
13. Having formed a prima facie opinion, the Commission referred the matter to the Director General for investitation, under section 26(1) of the Act,vide its order dated 23rd Feb 2010.

Findings of the DG

14. On receipt of the Commission's order DG got the matter investigated and submitted the report on 21st July 2010 to the Commission.

15. All the allegations made by the informant were examined in-depth by the DG to verify and ascertain the correct statement of facts and the conduct of the DMRC and others in inviting tenders specifying and favouring a particular rail fastening system for its Metro Rail Project. The DG has primarily focussed on following key questions :

RP



i) Whether is it a fact that the DMRC and other three Metro Rail Corporations, namely, Bangalore Metro Rail Corporation, Kolkatta Metro Rail Corporation and Airport Express Line had invited and awarded tender on a single source favouring "Vossloh systems" for its rail fastening system in the Metro Rail Project?

ii) Whether such conduct of inviting / awarding single tender by the opposite parties had resulted in exclusive supply agreement and refusal to deal with other competitors in the procurement of rail fastening system in contravention to Section 3(1) and 3(4) of the Competition Act, 2002?

iii) Whether the awarding of contract to Vossloh on a single tender basis in total disregard to the merits of the product of Pandrol System was a deliberate and malafide action to kill the competition?

iv) Whether the public procurement system based on a single tender basis is anti-competitive in nature to create appreciable adverse effect on the market, within the provision of Section 3(4) read with Section 19(3) of the Act?

v) Whether the DMRC and others had abused their dominant position by inviting / awarding single tender and also issuing DPR, favouring Vossloh system for it's other Metro Rail Projects in contravention to provisios of Section 4(2) of the Act?

vi) Does the role of Ministry of Railways and Ministry of Urban Development in sanctioning of such Metro Projects show any conduct which is anticompetitive in nature?

16. The DG then determined the relevant Geographic Market as "Areas of Operations of Metros in different parts of India" and relevant product market as "Fastening system for ballastless tracks, different from the fastening systems used in ballasted tracks" as per the provisions of section 19(6) and 19(7) read with section 2 (r) of the Act.

17. The DG thereafter, applied all the factors listed in section 19(4) of the Act and accrodingly came to the conclusion that each of the metro rail corporation / project are dominant in their areas of operations in the relevant market of procurement of fastening system for ballast less tracks. After establishing their dominance, the DG examined and analyzed whether they have abused their dominant position. The findings of the DG have been summarized as under:-

    (i) That in the case of phase 1 of Delhi Metro, there was no prior approval from Ministry of Railways for use of Vossloh System and accordingly the contract was awarded to Vossloh on experimental basis. The reason given by DMRC for awarding the phase I contract on nomination basis was that the track structure was not substantially detailed or conforming to any approved fastening system and it had to go with the project based on proven performance, techno-economic, safety and maintenance criteria. DMRC, therefore, went ahead with Vossloh fastening systems based upon recommendations of consultants, though the recommendations of the consultants have not been submitted by the DMRC stating that they are not available with them now. The contention of DMRC, may be correct for Phase I but in the context of Phase-II, Phase-III and Airport Express line the DMRC could have gone for extensive consultations with Ministry of Railways or other agencies and issue suitable guidlelines in order

RP

to make the process of procurement broad based and transparent.

(ii) That by procuring and proposing to procure the fastening systems from Vossloh on proprietary basis even in the second and third phase, DMRC has been engaged in the practice of exclusive dealing with the same agency i.e Vossloh, to which the contract was awarded in the first phase. This has also resulted in refusal to deal with other potential suppliers who could have supplied rail fastening systems to Delhi Metros.

(iii) That even in the case of DAMEPL (Delhi Airport Metro Express Pvt. Ltd.), though DMRC's role was of an advisor, it insisted on the concessionaire to go for the fastening system of Vossloh, thereby engaged in dealing only with Vossloh product systems and also refusal to deal with products of other concerns.

(iv) That in the case of KMRCL, initially tender documents were framed mentioning both Pandrol and Vossloh. However, later on, it was revised to make it more amenable to Vossloh. According to DG, it was within the knowledge of KMRCL that it was only Vossloh that had approval of RDSO in a qualified manner and ensured that only Vossloh would be nominated for the fastening systems in KMRCL.

(v) That in the case of BMRCL the DG has further stated that BMRCL did not follow the advice from MoUD to revise the RFP and not to include any proprietary item in tender when other fastening systems were available. According to DG this action of the BMRCL is in the act of refusal to deal with others in

procurement of fastening systems for metro rail tracks for Bangalore metro project.

(vi) That allegations against Ministry of Railways (MoR) are substantiated to the extent that in the initial phase of Chennai MTP, on a proposal from Southern Railways, MoR recommended Vossloh 336 system even though on experiemental basis, causing an act of dealing only with Vossloh group and refusal to deal with products of either Pandrol group or any other concern.

(vii) That no intention of the central government to promote any proprietory item proposed in the DPR was found in the case of Ministry of Urban Development (MoUD).

18. DG finally concluded that it is a case of refusal to deal with regard to procurement of rail fastening systems for ballastless tracks by DMRC and BMRCL. Ministry of Railways has also indulged in similar practice for a particular stretch on Chennai Metros which is under execution by Southern Railways, although now for Chennai MRT, there has been emphasis on open competition. DAMEPL has also indulged in the practice of refusal to deal with the products of Informant, although at the insistence of its consultants i.e., DMRC. DG has also considered all factors enumerated in section 19(3), and has come to the conclusion that there is an AAEC from the said conduct of the OPs. Thus, according to DG this is a case of violation of provisions of section 3(4) of Competition Act, 2002. According to DG, it is also a case of infringement of the provisions of Section 4(2)(a)(i) and Section 4(2)(c) of the Act, as the OPs have imposed discriminatory condition in purchase of rail fasteninig systems by not following a system of open tender procedure and instead making procurement of only Vossloh

RP

group of products on nomination basis. This led to the denial of market access to products of other concerns.

FINDINGS ON MERIT

Legal position

19. Before going into the facs of the case let us consider the legal issues involved in this case. The contracts to supply the fastening systems for ballast less tracks were awarded more or less on nomination basis by DMRC & others. There have been consistent efforts by the parties concerned to deny other firms to particiapte in the tender process through one means or other as explained in the order. Since this is a case of public procurement, it is against the law as laid down by the Supreme Court and also contravening the provisions of the Competition Law. It is, therefore, absolutely necessary to quote the decision of Supreme Court in Nagar Nigam vs. Al Faheem Meat Exports Pvt. Ltd. & Ors. SLP(Civil) No. 10174 of 2006. The findings of the Suprement Court are as under :-

It is well settled that ordinarily the State or its instrumentalities should not give contracts by private negotiation has been carried out by the High Court itself, which is impermissible. We have no doubt that in rare and exceptional cases, having ragard to the nature of the trade or largesse or for some other good reason, a contract may have to be granted by private negotiation, but normally that should not be done as it shakes the public confidence. The law is well-settled that contracts by the State, its corporation, instrumentalities and agencies must be normally be granted through public auction / public tender by inviting tenders from eligible persons and the notification of the public-auction or inviting tenders should be advertised in well known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject-matter of auction, technical specification,

RP

estimated cost, earnest money Deposit, etc. The award of Government contracts through public-auction / public tender is to ensure transparency in the public procurement , to maximize economy and efficiency in Government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irreguarities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. However, in rare and exception cases, for instance during natural calamities and emergencies declared by the Government. Where the procurement is possible from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists; where the auction was held on several dates but there were no bidders or the bids offered were too low, etc., this normal rule may be departed from and such contracts may be awarded through 'private negotiations'.

20. In the second case ie., Sachidanand Pandey vs. State of West Bengal 2SCR223, Justice O. Chinnappa Reddy after considering various decisions of the apex court summaried the legal propositions in the following terms :-

On a consideration of the relevant cases cited at the bar the following propositions may be taken as well established : State owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest when it is considered necessary to dispose of a property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but

RP

then the reasons for the departure must be rational and should not be suggestive or discrimination. Appearance of public justice is as important as doing justice. Noting should be done which gives an appearance of bias, jobbery or nepotism. The public property owned by the State or by an instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. They should undoubtedly act fairly. Their actions should be legitimate. Their dealings should be above board. Their transactions should be without aversion or affection. Nothing should be suggestive of discrimination. Nothing should be done by them which gives an impression of bias, favouritism or nepotism. Ordinarily, these factors would be absent if the matter is brought to public auction or sale by tenders. That is why the Court repeatedly stated and reiterated that the State owned properties are required to be disposed of publicly.

21. The law laid down the Supreme Court is the law of the land and has got to be followed in all government contracts and procurement. An argument may be raised that though it may be the law of the land, unless it is violative of the competition Act, no notice can be taken by the Commission. In this connection it is necessary to examine the preamble to the Competition Act which reads as under :-

An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by other4 participants in market, in India, and for matters connected therewith or incidential thereto.

RP

22. In India, public procurement by Central and State governments, corporations and other instrumentalities account for 30% of the GDP of India. As India's GDP is around 2 trillion dollars, the expenditure on public procurement is very high. This large public procurement leads to competition effects. The procurement by the Govt. and its instrumentalities leads to economic development and creation of jobs. The public sector can promote competition by sourcing requirements from a range of suppliers. It can also restrict competition by restricting participation in tenders and it can also discriminate against particular types of firms. The public sector can also contribute towards an improvement of competitive conditions. In fact, public sector enjoys buyers power. Buyer power is related to the size of demand relative to total demand in a relevant market. It also enjoys power because it is strategically important customer for its suppliers. There are differences betweeen public procurment and private procurement. There are legal and regulatory requirements for public procurement which do not exist for private procurement. Transparency and non discrimination are necessary for public procurement. Decision to purchase is different for a public section as compared to private procurement. Public Sector is more risk averse and therefore failure is normally avoided. Public Sector purchases are not with a desire to maximise profits. There are other policy objectives which binds a public sector such as employee"" welfare, govt. Policies etc.

23. When tendering process is adopted in public procurement it leads to breaking entry barriers. It results in lower prices and better quality and savings which leads to surplus for investment. It also increases competition in the market and more contracts can be given to large number of firms/persons. Public procurement can lead to significant effects on investment and innovation. In fact large public sector

RP

demand leads to increase in productive capacity and employment. In fact, public sector demand can create a market. For these reason, the Supreme Court came up with the decisions as reproduced above.

24. Incidentally, the Competition Act has constitutional sanction. This is evident from the Preamble of the Constitution which is reproduced as under :

The PEOPLE of India, having solemnly resolved to constitute India into a {SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC) and to secure to all its citizens ;
Justice, sociak, economic and political;
LIBERTY of though, expression, belief, faith and worship'
EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the (unity and integrity of the Nation)
IN OUR CONSTITUTENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

25. The Preamble talks about about economic justice and the equality of opportunity. In accordance with equality of opportunity and economic justice in the market, there is a necessity to prevent practices resulting in an adverse effect on competition and to protect the interest of consumers and also to ensure freedom of trade carried out by participants in the market. For this purpose, if someone entyers into an agreeement which would have adverse effect on competition then such an agreement is a void agreement. Similiarly the effort to fix prices, limit or control production, supply development and provision of services or allocating markets is presumed to have appreciable adverse effect on competition. Even exclusive distribution agreement

RP

etc. Or the discriminatory practices in sale or purchase of goods or even having conditions in purchase or sale of goods, denial or market access infringe on the economic freedom and equality before law. Therefore, any public procurement which has anti competitive elements is hit by the provisions of Competition Act.

26. The next significant point in this case is that under Section 16 of the Act, it is the duty of the Director General to assist the Commission to fulfill its obligation under Section 18 of the Act. It is not for the Commission to sit on judgement over the findings of the DG. If the DG has not carried out proper investigation, the Commission can direct the DG to investigate the case on the issues to be directed by the DG. It can inquire itself also. This is the scheme under Section 26(7) of the Act.

27. The procedure for inquiry has been laid down in Section 26 of the Competition Act. On the basis of own information or from any other source, the Commission can form an opinion that prima facie case exists and it can direct the DG to carry out an investigation under the Competition Act {Section 26 (1) of the Act}. If on the basis of information, the Commission forms a prima facie opinion that no case exists, it can close the case {Section 26(2)}. An appeal to the COMPAT lies against the order of the Commission u/s 26(2). Under Section 26(3) of the Act, the DG is required to submit his report to the Commission within the period specified. Under Section 26(4), the report of the DG is required to be forwarded to the parties concerned. Section 26(5) envisages a situation where the DG has not found a contravention of the Act. In such a case, the Commission is required to give a notice to all the parties and hear them. Under Section 26(6) of the Act, if the Commission agrees with the findings of the DG, it can

RP

close the case by passing an order. This order under Section 26(6) is appealable. Section 26(8) talks of a situation where DG has found a contravention of the Act but the Commission finds that more enquiries are needed, it can carry out enquiries. No order dropping the case or penalizing the concerned parties can be passed under Section 26(8) of the Act because the section does not talk of an order as has been mentioned in sections 26(2) and 26(6) of the Act. It is impled in the Act when the Commission has formed a prima facie opinion under Section 26(1) of the Act and the DG has confirmed this prima facie view by investigation, the Commission cannot drop the proceedings. If it drops the proceedings it amounts to a recall of its order passed under Section 26(1) of the Act. Further the legislative intent is clear. As discussed earlier no order under Section 26(8) can be passed. If the intention of the legislature was to drop proceedings under Section 26(8) then it should have mentioned that an order was required to be passed and the said order would have been appealable. In such a case, the Commission has to accept the recommendations of the DG though it has discretion to levy penalty of different types under Section 27 of the Act.

28. It will also not out of place to mention the international practice adopted by other competition agencies with respect to the public procurement case. In the OECD doucument on "Public Procurement 2007", Irish Competition authority said it uses the advocacy tool on the complaints relating to the tendering procedures wherein allegations are levelled like eligibility criteria for participating in the tendering process or for short listing are too restrictive and the tender was designed with one company in mind. According to authority, it highlights in all such cases the broader policy issue to the procurer:

RP

"as a matter of policy, tendering bodies should be mindful of proportionality in setting the minimum requirements for tendering. When minimum requirements unnecessarily reduce competition, value for money for the contracting authority is reduced".

29. In the light of above, it would have been appropriate for the enterprises engaged in execution of metro rail networks in India to opt for open competitive procedure and then select the most suitable rail fastening system.

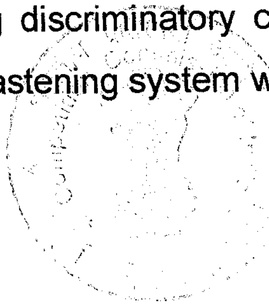
Factual position

30. Now, coming to the facts of the case, I have carefully considered the allegations made in the Information, the Investigation Report submitted by the DG and the submissions made by the OPs during the entire proceedings. It is found that basically there are three issues involved in this case:-

    1) Whether by nominating Vossloh fastening system for ballast less tracks of their their Metro Project, DMRC, KMRCL, BMRCL, Ministry of Railways and DAMEPL have entered into exclusive supply agreement with Vossloh and refused to deal with Pandrol Rahee in contravention of the provisions of section 3(4) of Competition Act, 2002.

    2) Whether DMRC and other OPs have abused their dominant position by putting discriminatory conditions in the purchase of ballast less track fastening system which denied market access to the others?

RP



3) Whether DMRC has indulged into a practice of proposing the Vossloh fastening systems to other Metro projects while working as their consultant which resulted in denial of market access to other suppliers?

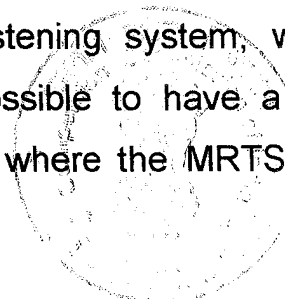
31. In order to examine whether DMRC and other OPs have abused their dominant position, it is necessary to define the relevant market. When the relevant market as determined by the DG was examined, it is found that the relevant market determined by the DG is alright. I agree with the the relevant Geographic Market as "Areas of Operations of Metros in different parts of India" and relevant product market as "Fastening system for ballastless tracks, different from the fastening systems used in ballasted tracks" I also concur with the DG's conclusion that each of the OPs is dominant in their respective areas of operations. None of the OPs has objected to the DG's determination of relevant market as well as their dominance in that market.

32. On the issue of abuse of dominance, the DMRC in its submissions has explained the reasons for the selection of Vossloh system on nomination basis. It has been stated that for Phase I of Delhi Metro Project, the consultants engaged by DMRC recommended the Vossloh-336 fastening system for its ballast less tracks. Further, the proposal for adoption of Vossloh-336 fastening system for ballast less track structure was sent to Ministry of Railway (MoR)/RDSO for their approval and they didn't object to it. Moreover, the funding authority for the track structure i.e. JICA (Japan International Corporation Agency) also concurred with the proposal of procuremnt of Vossloh system. It has also been stated that after the award of contract there was no representation from any party on the selection of Vossloh.

RP

33. I do not agree with the averment made by DMRC stated as above. In the case of Phase I of Delhi Metro, it was found that there was no prior approval from Ministry of Railways for the use of Vossloh System and the contract was awarded only on experimental basis. So, if Vossloh was allowed on experimental basis why not same yardstick was applied to others? The contention of DMRC that it went ahead with Vossloh fastening systems on the recommendations of its consultants but the veracity of this statement could not be proved as recommendations of the consultants have not been submitted by them on the ground that they were not available with them now. Moreover, the letter written to consultants indicate that DMRC had proposed the name of Vossloh to the consultants. Further, the argument of DMRC that Vossloh was awarded the contract on nomination basis as the track structure was not substantially detailed or conforming to any approved fastening system and they applied the criterion of proven performance, techno-economic viability, safety and maintenance for selecting them, does not hold good as the same criterion were not followed in the case of other fastening systems. Finally, if no representation from any party has been received, it does not mean that the conduct of the DMRC does not not raise any competition concerns.

34. Regarding its Phase II project, DMRC has stated that phase II project was to be completed in a short period of five years before Common Wealth Games and in such a short period it was not possible to venture out for other fastening systems which were required to be tested and approved by RDSO/MoR. The approval of another system by Ministry of Railways/RDSO might have taken a lot of time as is evident from the approval of Vossloh 336 fastening system, which took nearly 20 months. It was also not possible to have a number of fastening systems and track structures where the MRTS route lengths are so

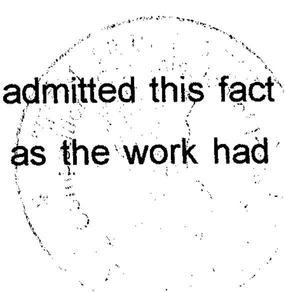


RP

small as compared to the main Railways Network. Moreover, to have inventory of different fastening system for maintenance and renewals was also not practical. The Metro Rail, before being opened to public, was to be approved by Commissioner of Metro Railways Safety and approval could not be granted to a track structure which is not approved by Ministry of Railway.

35. The reasons stated as above are far from satisfactory. The conduct of DMRC to go for a proprietory product on single nomination basis can not be justified from any angle. DMRC made no efforts to provide opportunity to other suppliers who could have supplied the product at cheaper price with better quality. The reasoning that it was not practicable to have a number of fastening system from maintenance point of view, could not be substantiated by citing any such experience from domestic or international level. Another justification that the performance of the existing fastening system was highly satisfactory does not mean that all other fastening systems were of inferior quality. Another reason that the approval of RDSO/MoR for other fastening system might have taken lots of time as it took nearly 20 months in the case of Vossloh 336 system, can not be a justification to deny opportunities to other competitors. It is interesting to note that time taken for testing Vossloh system was about 20 months, whereas the informant's product was not approved even after the lapse of more than eight years. It is also interesting to note that the Vossloh fastening systems which was installed in Phase I was kept under observation of MoR for 3 years and DMRC was required to send detailed information about the performance of that system but DMRC failed to send such information for more than eight years.

36. On the other hand, MoR has admitted this fact that it had to approve the Vossloh fastening system as the work had already commissioned



and reached the point of no return and that is why permission was given to the Vossloh system only on experimental basis for the elevated and underground portions of the project. The DMRC, however, used this system in all its projects.

37. In the case of DAMEPL, the concessionnaire was resposible for installation of rail fastening systems. But here also DMRC favoured the use of Vossloh's fastening system which was ultimately installed by DAMEPL. This can be observed from the sequence of events and correspondence between DMRC and DAMEPL. DMRC in its submissions has stated that various fastening systems were evaluated / deliberated upon by DAMEPL and it was found that another system including the Informant's one either did not conform to the basis design report or were not deliverable as per the time frame required for commissoning of Air port Metro Express Line. The MoR / RDSO, however, while giving their approval for the Vossloh system had clearly stated that "the proposal of DMRC to install RHEDA-2000 system for ballastless track with Vossloh 300-IU fastening system for the High Speed Airport Metro Express Line at Delhi was examined and since this was the only proposal from DMRC, it was examined for its technical suitability for the Air Port Metro Express Line." Now, the question is why DMRC sent only one proposal i.e. for Vossloh's fastening system. It could also have sent the proposal for Pandrol's fastening system along with others for technical suitability and should have left every thing to the MoR / RDSO for selection. Though, MoR, later on conveyed its approval for the Pandrol's fastening system stating that "This system prima facie meets the requirement of the Performance Criteria for fastening systems for ballastless track advised by this Ministry vide letter of even No. Dated 21-05-2010, except for the provenness of 5 years as required in this Performance Criteria". So, if

RP

MoR can approve the Informant's product, there was no justifications in not proposing informant's system to RDSO on the grounds of technical unsuitability. Had the system of informant been sent to the MoR / RDSO earlier, there would have been at least two options available to the Metro Corporations.

38. In the case of KMRCL, the sequence of events show that initially tender documents were framed mentioning both Pandrol and Vossloh. However, the KMRCL revised its tender conditions on two occasions and the final condition required that the technology on the proposed track structure and fastening system should have already been approved by RDSO / MoR on the date of opening of the main tender. It has been stated by the informant that track work for the project is far from cirtical path for execution and therefore till such time RDSO disposes the representation of the Pandrol, the main tender for the track work should be postponed. I agree with the DG that RDSO/MoR may take a expeditious view on the representations of Pandrol or any other concern, if any, so that there is no case for refusal to deal in the future metro rail projects. Here again DMRC, being consultant of the project, did not give its approval to Pandrol's fastening system and stated that KMRC can not be allowed to adopt this fastening system and testing will have to be done based on scheme finalised in consultation with the RDSO. Whereas, DMRC went for its own projects in phase I with the Vossloh system without having prior approval of the RDSO. This clearly indicates towards the discriminatory approach adopted by the DMRC to keep the other fastening system out of the market. The act of the DMRC, therefore, distorted the level playing field and might have compromised with the quality and cost in the absence of fair competition. However, in the case of KMRCL, it is found from the facts available on record, that it tried to give opportunity to every

potential supplier of fastenning system including informant in the tender though, subsequently the tender was amemended to be more favourable to Vossloh. Later on, this criteria was again modified to make it possible for any enterprise to bid. Thus, it can be inferred that KMRCL tried to bring competition right from the begining and no discriminatory condition was ever put up.

39. In the case of BMRCL, the tender document explicitely stated that 'The fastening system Vossloh 336 shall be used for all plain line ballast less tracks'. BMRCL, in its submissions before the Commission, has stated that MoR has not cleared the proposal of BMRCL to try any other fastening system. If that was the condition, then same would have been reflected in the tender document. But this was not done by BMRC. Here also, it appears that the intention of BMRC was not to make the process competitive. It is also clear from the fact that BMRCL did not follow the advice of MoUD to revise the RFP and not to include any proprietary item in the tender document when other fastening systems were available in the market. In view of above, it gets established that through its actions, BMRCL has also been engagd in the act of adopting discriminatory condition in the purchase of product of the Informant by denying market access to the Informant. Here again DMRC, in the capacity of consultant, recommended the the Vossloh fastening system only. DMRC's contention that other Metro Corporations were free to choose their own fastening system and DMRC's recommendations were not binding on them is not correct. DMRC knew that the only approved product available was of Vossloh and due to the paucity of the time, no other corporation would ever give a try to the other systems. So the statement that other Metros were free to choose any other system does not hold good. DMRC could have

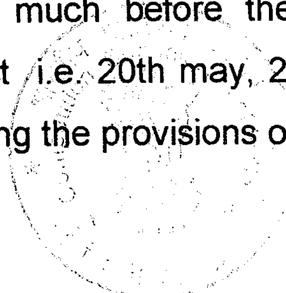
RP

given a clear cut statement in the DPR itself that the other metro corporations were free to choose any other fastening system.

40. So far the conduct of the Ministry of Urban development is concerned, it appears that there was no intention on part of the ministry to promote any proprietroy item proposed in the DPR. This is evidenced from the fact that Ministry in its reply to BMRCL, suggested to revise the RFP document and not to go for a proprietary item when alternatives were available. Ministry seems to have taken every possible steps to usher in comeptition for the tendering process of BMRCL. Thus, I concur with the findings of DG that the MoUD has not contravened any provisions of the Act. However, during the proceedings before the Commission BMRCL has taken a plea that the provisions of Competition Law will not apply in its case as the provisions were notified on 20 th May, 2009. This argument of BMRCL will not hold good as the tendering process for the procurement of fastening system for ballast less track though intiated in Feb'2009 i.e. before the notification of the Competition Act, the effect of the conduct of BMRCL continued even after 20.05.2009 and therefore, it clearly falls under the ambit of Competition Act.

41. Ministry of railway has dissociated itself from the whole process of selection of a particular fastening system i.e., Vossloh on proprietary basis, the facts available on record show that Ministry of Railway (MoR) in the case of Chennai MTP, on a proposal from Southern Railway, recommended Vossloh 336 system, though on experimental basis, without considering other players available in the market including the Informant. Though, the conduct of MoR is anti-competitive but this conduct has taken place much before the notification of relevant sections of Competition Act i.e. 20th may, 2009. Thus, MoR, can not be held guilty of contravening the provisions of the Competition Act.

RP



42. Now, in order to find out whether there was an "Apreciable Adverse Effect on Competition" due to said agreement between Vossloh system and OPs Metro corporations as discussed above, section 19(3) of the Act prescribes that while determining whether an agreement has an appriciable effect on competition the Commission shall have due regard to all or any of the following factors.

(a) creation of barriers to new entrants in the market;
(b) driving existing competitors out of the market;
(c) foreclosure of competition by hindering entry into the market;
(d) accrual of benefits to consumers;
(e) improvements in production or distribution of goods or provision of services;
(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

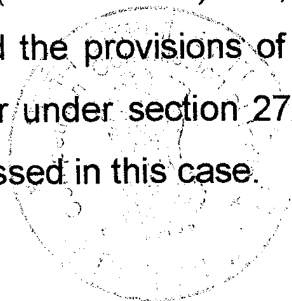
43. It is found that the agreements between OPs and Vossloh led to the foreclosure of competition in the market of fastening system for ballast less tracks being used in Metro railway. Further, due to this agreement, there was no occasion or opportunity for other suppliers/vendors to submit their bids which had the effect of creating barrier to any new entrant in the market of rail fastening systems for metro rail projects in Delhi, Chennai and Bangalore. The procurement of Vossloh systems on single source basis by the OPs has practically killed competition and has driven the existing competitors out of the market. Had the OPs adopted the competitive bidding system the competition in this market would have increased. Needless to say the benefits of the competition, i.e., the better quality, price and the choice were denied to the consumers. Thus, it is clear that the said agreement has resulted into appreciable adverse effect on competition and therefore, the OPs are

RP

held responsible for contravening the provisions of section 3(4) of the Act read with section 19(3) of the Act.

44. The dominance of DMRC, BMRC, KMRC has already been established by the DG and no objection to this was raised by any of the parties. The DG has also considered all factors enumerated in section 19(4) of the Act and I agree with that and make no further elaboration on this. So, after analysing and examining the acts and conducts of the DMRC, BMRCL and DAMEPL, it is clear that they have imposed discriminatory conditions in purchase of rail fastening systems and denied market access to the Informant. The above actions and conduct has caused violation of the provisions of the Section 4(2)(a)(i) of the Act. By not following a system of open tender procedure and instead making procurment of only Vossloh group of products on nomination basis, the enterprises have denied market access to the products of other concerns. This has lead to the violation of Section 4(2)(c) of the Act.

45. After duly considering the facts of the case, the submissions made by OPs, the DG Report and the provisions of law, I find that the DMRC, BMRC, DAMEPL have indulged into anti-competitive practices by entering into exclusive supply agreement with Vossloh system and thereby affecting competition in the market of fastening system for ballast less tracks in Metro track projects. Thus, they have contravened the provisions of section 3 of the Competition Act, 2003 as amended by the Competition (Amendment) Act, 2007. They were also found to have contravened the provisions of section 4(2) (a) (i) and 4 (2)(c) of the Act. An Order under section 27 of the Competition Act, therefore, required to be passed in this case.



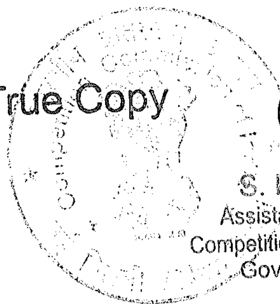
46. Since, the Competition Act is a recent Act, many enterprises operating in India are not aware of the anti-competitive practices being adopted by them which, otherwise, cause infringement of the Act. However, it is also imperative on the part of the Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets and to protect the interests of consumers as a part of its mandate. In view of the above, I am inclined to pass following order:

1. The DMRC, BMRC, DAMEPL are directed to cease and desist from the practice of exclusive dealing with one party on nomination basis and to adopt selection process through competitive bidding.

2. A penalty of Rs. 1 crore which is much less than 10% of the turnover of the three preceding financial years is also imposed on DMRC for abusing its dominance and entering into exclusive supply agreement with M/s Vossloh fastening system which is in the contravention of the provisions of Competition Act.

Member (R.)

Certified True Copy



S. P. GAHLAUT
Assistant Director (Sectt.)
Competition Commission of India
Government of India
New Delhi