

BEFORE THE
COMPETITION COMMISSION OF INDIA

CASE No. 3/2010

Dated: 7.10.2011

Informant:

M/s. Pandrol Rahee Technologies Pvt. Ltd., Kolkata

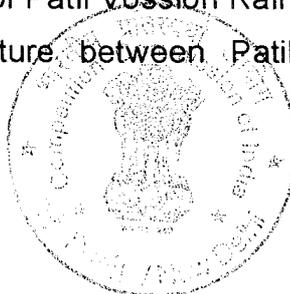
Opposite Parties:

1. Delhi Metro Rail Corporation Ltd.
2. Bangalore Metro Rail Corporation Ltd.
3. Kolkata Metro Rail Corporation Ltd.
4. Ministry of Railways
5. Ministry of Urban Development
6. M/s. Patil Vossloh Rail System Pvt. Ltd.

ORDER

The present information was filed by M/s. Pandrol Rahee Technologies Pvt. Ltd., Kolkata (the Informant) which is a joint venture between Pandrol International Ltd., UK and Rahee Industries Ltd., Kolkata under Section 19 of the Competition Act, 2002 (the Act). The Informant had alleged that the acts of omission and commission on the part of following 5 Opposite Parties in discriminating its rail fastening systems for ballastless track in metro rails in India against fastening systems of Patil Vossloh Rail Systems Pvt. Ltd. (Patil Vossloh) which is a joint venture between Patil Group of Industries,





Hyderabad and Vossloh Rail Systems GmbH, Germany has resulted into exclusive deal with Patil Vossloh and refusal to deal with the Informant:-

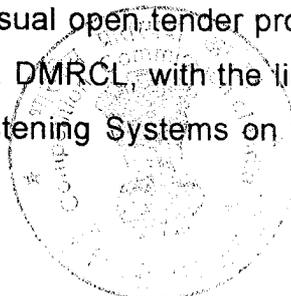
- a. Delhi Metro Rail Corporation Ltd.
- b. Bangalore Metro Rail Corporation Ltd.
- c. Kolkata Metro Rail Corporation Ltd.
- d. Ministry of Railway
- e. Ministry of Urban Development

2. Allegations in the information:

The allegations in the information, in brief, are as under:

- 2.1 As per the Informant, who is a leading designer and manufacturer of rail fastening systems, the fastening systems manufactured by Pandrol International Ltd. (Pandrol) are used comprehensively on regular main line railway, high speed lines, heavy haul freight, mixed passenger and freight lines, light rail and metro track forms throughout the world in More than 100 countries. It has alleged that over the years there has been a consistent effort on the part of the Delhi Metro Rail Corporation Ltd. (DMRCL) to nominate exclusively, the product of Patil Vossloh for ballastless rail track on the metro rail projects to be commissioned in any part of India wherever DMRCL are in a position to make technical recommendation through the *Detailed Project Report* (DPR). As per the Informant, due to aforesaid illegal and impermissible acts the Opposite Parties have caused considerable loss to the Informant.
- 2.2 It was alleged that DMRCL, when it first undertook to build Phase I of Metro in Delhi, did not undertake the usual open tender process for the purpose of purchasing rail fastening system. DMRCL, with the limited experience at that time had used Vossloh Rail Fastening Systems on the DMRCL tracks. The

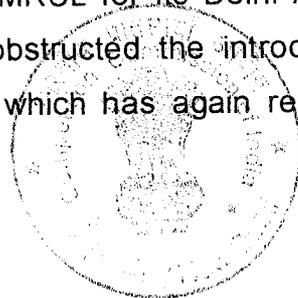
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Informant alleged that DMRCL conducted bidding in such a manner that facilitated the procurement of Vossloh Systems 336 and excluded all other fastening systems including those of Informant.

- 2.3 It was further alleged that DMRCL used to prepare DPR and provide consultancy service to upcoming metro rail projects in other cities and towns in India and in all the DPRs that the DMRCL has submitted it specifically nominated Vossloh fastening system for the use as rail fastening system for ballastless tracks which was followed in tender conditions by other metro rail projects.
- 2.4 It was alleged that due to the concerted effort on the part of the DMRCL, who nominate only one type of proprietary rail fastening system, there is an attempt to foreclose competition into the market of rail fastening systems for ballastless tracks for use in metro rails in India.
- 2.5 The Informant had submitted that Bangalore Metro Rail Corporation Ltd. (BMRCL) invited single tender for a proprietary product based on DPR furnished by the DMRCL as a consultant. But, the Ministry of Urban Development (MoUD), in March 2009, directed BMRCL to modify its tender document and not to go for a proprietary product and also wrote to Ministry of Railways, (MoR) to examine and advise about the use of Pandrol's rail fastening on Bangalore Metro Rail Projects. The Informant had alleged that despite the advice of MoUD the tender was awarded for the Vossloh fastening systems by the BMRCL, which has resulted in exclusive dealing with one enterprise and refusal to deal with others.
- 2.6 It was further alleged that DMRCL for its Delhi Airport Metro Express Line project (DAMEL) has also obstructed the introduction of each and every product offered by Pandrol, which has again resulted in exclusive dealing with one enterprise.

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2.7 It was also alleged that Kolkata Metro Rail Corporation Ltd. (KMRCL) is also involved in discrimination and exclusive dealing with regard to Vossloh 336 fastening systems.

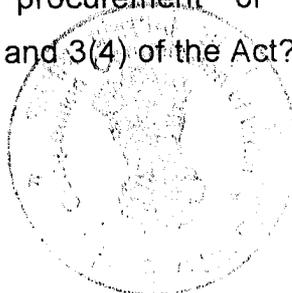
3. The Commission, being of the opinion that there exists a *prima facie* case, vide its order dated 23rd February 2010, directed the Director General (DG) under Section 26(1) of the Act to investigate into the matter.
4. On receipt of the Commission's order DG got the matter investigated and submitted the report dated 21.07.2010 to the Commission.

5. **Issues before DG**

As per the DG report, in the backdrop of the information the main issue for investigation was exclusive dealing arrangement with only one rail fastening system manufacturer for ballastless rail tracks and refusal to deal with other competitors, by the Opposite Parties. It is noted that the DG's investigation has primarily focused on following key questions:

- (i) Whether it is a fact that the DMRCL and other three Metro Rail Corporations, namely, BMRCL, DMRCL and DAMEL had invited and awarded tender on a single source favouring "Vossloh systems" for its rail fastening system in the Metro Rail Projects?
- (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 Act?

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- (iii) Whether the awarding of contract to Vossloh on a single tender basis, in total disregard to the merits of the product of Pandrol systems, 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 DMRCL and others had abused their dominant position by inviting/awarding single tender and also issuing DPR, favoring Vossloh system for its other Metro Rail Projects in contravention to provisions of Section 4(2) of the Act?
- (vi) Does the role of MoR and MoUD in sanctioning of such Metro Projects show any conduct which is anti-competitive in nature?

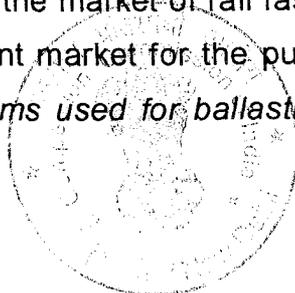
6. DG Report

It is noted from the DG report that DG based his report on the facts gathered out from primary and secondary sources, evidences collected by sending questionnaires to concerned parties. As per the DG report, the DMRCL, BMRCL, MoR and DAMEPL have engaged in practices which caused violation of provisions of Section 3(4), Section 4(2)(a)(i) and 4(2)(c) of the Act.

7. Summary of DG's findings:

- 7.1 It is noted that DG has analyzed the market of rail fastening system in depth. As per the DG report the relevant market for the purpose of the Act, in this case, is the *rail fastening systems used for ballastless tracks of metro rail*

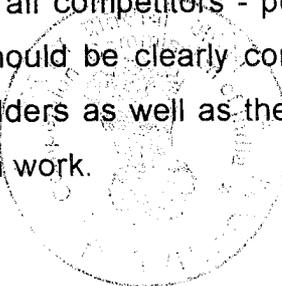
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operation, which is different from the rail fastening system used for ballasted tracks.

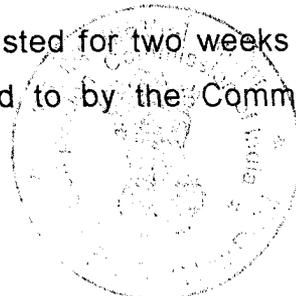
- 7.2 DG has concluded in his report that by procuring and proposing to procure fastening systems from Vossloh on proprietary basis even in the second and third phase, DMRCL has engaged in the practice of dealing with the same agency to which the contract was awarded in the first phase which led to the practice of refusal to deal with other potential suppliers who could have supplied rail fastening systems to Delhi Metro.
- 7.3 DG also concludes that DMRCL refused to entertain products of any other group and instead expressed its preference for Vossloh group products and ultimately also gave its approval for the same for DAMEPL (Delhi Airport Metro Express Private Limited) project. As per the DG report, the time which was lost in exchange of letters and blame game could well have been utilized in coming out with performance standard guidelines and devise of suitable tender enquiries which could have invited more expression of interest and help DMRCL and DAMEPL in taking a reasoned decision in the best interest of the project. Thus, as per the DG report, the conduct of DMRCL gives credence to the allegations that it has engaged in dealing only with Vossloh product systems and has refused to deal with products of other concerns including those of Informant.
- 7.4 DG further states that in case of KMRCL it is felt that RDSO (Research Designs and Standard Organisation) and MoR may take an expeditious view on the representations of the Informant or other concern, if any, so that there is no case for refusal to deal. In case, the performance criterion of May 2010 of MoR allays the concern of all competitors - potential or otherwise, in the relevant market, the same should be clearly conveyed without leaving any scope of ambiguity for the bidders as well as the Metro Corporations or any other agency engaged in such work.

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- 7.5 DG concludes that looking at the facts on record, sequence of events as mentioned in the report and the fact that BMRCL did not follow the clear advice of MoUD given to it vide various letters to revise Request for Proposal (RFP) and not to include only proprietary item in tender, when other fastening systems are available, it gets established that through its actions, BMRCL has engaged itself in the act of refusal to deal in procurement of fastening systems for metro rail tracks of Bangalore.
- 7.6 DG further concludes that allegations against the 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 experimental basis, causing an act of dealing only with Vossloh group and refusal to deal with the products of either the Informant or any other concern.
- 7.7 As per the DG report, MoUD has been against the procurement from single source and in favour of more competition.
8. The Commission considered investigation report submitted by the DG in its meeting held on 18.10.2010 and decided to send a copy of the investigation report to the parties for filing their replies. The Commission also directed the Informant as well as the Opposite Parties to appear for oral hearing, if they so desire, either personally or through their authorized representatives on 16.11.2010.
9. Shri Yoginder Handoo, advocate of the Informant, Shri S.C. Gupta, Deputy Chief Engineer of DMRCL and Shri Sumit Chatterjee of MoUD appeared before the Commission in its meeting held on 15.11.2010. The representatives of DMRCL and MoUD requested for two weeks time to file reply to the DG report which was acceded to by the Commission. The

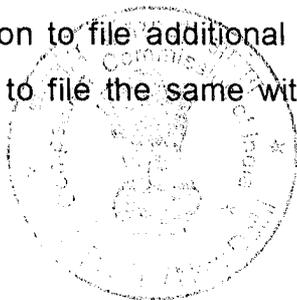
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Commission directed all the parties to appear before the Commission, if they so desire, on 14.12.2010.

10. Patil Vossloh filed an application under Regulation 25 (1) of the Competition Commission of India (General Regulation 2009) for taking part in the proceedings in the case. Shri R.K. Sanghi and Shri V.K. Agarwal, Advocates appeared for Patil Vossloh in the Commission's meeting dated 08.02.2011. The Commission decided to allow Patil Vossloh for taking part in the proceedings of the case and directed them to submit all the relevant material/documents with a copy of the same to all the parties by 22.02.2011.
11. Shri R.K. Handoo, Advocate of the Informant, Shri S.C. Gupta, Deputy Chief Engineer of DMRCL, Shri V.K. Dwarkanath of BMRCL, Shri P.K. Garg, Director, MoR and Shri Ravi Shankar Prasad, Senior Advocate and Shri R.K. Sanghi, Advocate appeared for Patil Vossloh in Commission's meeting dated on 01.03.2011. The Commission directed the authorized representative of MoR to file reply on role of the RDSO and MoR in approving the fastening system for ballastless track used in metro rail projects.
12. The matter was again considered by the Commission in its meeting held on 05.04.2011. Shri R.K. Handoo, Advocate of the Informant, Shri S.C. Gupta, Deputy Chief Engineer, DMRCL, Shri Rajiv Choudhary, Executive Director, MoR, Shri S.K. Lohia, Joint. Secretary, MoUD and Shri Ravi Shankar Prasad, Senior Advocate appeared for Patil Vossloh. The authorized representatives of the Informant and the Opposite Parties argued in support of their respective cases. The authorized representatives of MoUD and Patil Vossloh requested for permission to file additional written submissions and accordingly they were directed to file the same within 2 weeks time with a copy to all the parties.



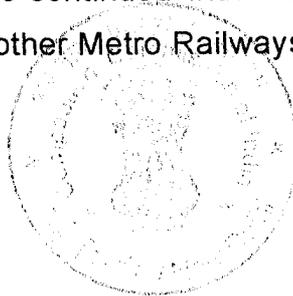


13. Reply to the DG report by DMRCL

The DMRCL filed its reply dated 30.11.2010 to the DG report. The gist of the reply is as under:

- 13.1 The DMRCL submitted that the although Metro Rail Systems are rail based transport systems and city specific, they are being dealt at Nodal level by the MoUD. However, in accordance with the Metro Railway Act and allocation of business rules the technical parameters like the track structure, schedule of dimensions, rolling stock, signaling, electric traction system etc. are required to be approved by the MoR. The Metro lines before being opened for public carriage are inspected by Commissioners of Railway Safety, who certify fitness only when all the structure and systems conform to the parameters approved by MoR.
- 13.2 As per the DMRCL, MoR approves the systems after detailed deliberations and scrutiny by their technical wing, RDSO and ascertaining the worthiness and compatibility of system in Indian conditions which usually takes a considerably longer time in view of technicalities involved.
- 13.3 DMRCL has submitted that in phase-I, while choosing the fastening system, it consulted the General Consultants comprising of the International Agencies of repute namely M/s. PCI-PBI-JARTS-TONICHI & RITES, Design Consultants for track, M/s. SYSTRA, France and also visited the factory/site abroad and selected Vossloh 336 system after appraisal of a number of options.
- 13.4 As per the DMRCL, in view of highly satisfactory performance of Vossloh 336 in phase-I and overriding characteristics over the other contemporary systems, DMRCL in phase-II also continued with the same fastening system and shared the experience with other Metro Railways in the form of DPRs for them.

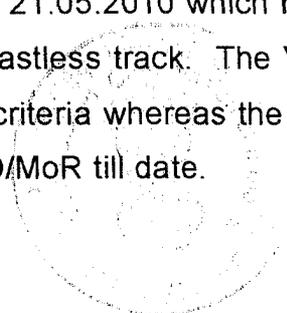




- 13.5 As per the DMRCL, since the cost of fastenings for ballastless track is less than 1% of the project cost hence it is not desirable to again go to MoR for another system and delay the project which may cause huge loss of money apart from inconvenience to the public. Moreover compared to Indian Railways, MRTS (Mass Rapid Transit System) network in Delhi is very small and adopting different type of fastenings, maintaining inventory and training of workmen for each of them is not desirable.
- 13.6 DMRCL submitted that on the high speed Metro Express Lines, the track structure of Rheda 2000 with Vossloh 300 IU system was recommended in the DPR by RITES (a subsidiary wholly owned by MoR) and after exploring a number of options by the concessionaire, Rheda 2000 with Vossloh 300 IU was selected and proposed for approval to MoR and the approval was granted by MoR.
- 13.7 As per DMRCL, one of the overriding characteristic of Vossloh fastening system is that it is capable of holding toe load under varying deflection conditions which is extremely essential for elevated sections of Metro. As per the DMRCL, one of the unique feature available in Vossloh 336 system is that it facilitates the breathing of girders independent of rail fastening. Moreover, the Vossloh 336 fastening system provided on ballastless track of Delhi Metro has given highly satisfactory, trouble free service with negligible maintenance for the last 8 years which clearly indicates that choosing of this system by DMRCL and approval by MoR was appropriate
- 13.8 DMRCL submitted that till date, no other fastening system for ballastless track on main lines other than Vossloh 336 approved by MoR is available. It has also been submitted by DMRCL that MoR has recently brought out a performance criteria vide letter dated 21.05.2010 which have to be complied with by any fastening system for ballastless track. The Vossloh 336 system fully complies with the performance criteria whereas the Informant could not get its products approved from RDSO/MoR till date.



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14. Additional submissions of DMRCL dated 20.01.2011

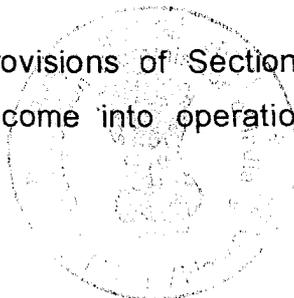
- 14.1 In response to the reply of the Informant, the DMRCL filed further submissions dated 20.01.2011 in which it has submitted that the response of the Informant is totally baseless, unsubstantiated, misleading without facts and made only for the sake of opposition.
- 14.2 The DMRCL submitted that the contention of Informant that Vossloh 336 system and Rheda 2000 with Vossloh 300 1U for DAMEL are not approved by MoR is incorrect as these systems have been approved by MoR vide letters dated 16.07.2002 and 06.07.2010 respectively which are on record of the Commission.
- 14.3 DMRCL further submitted that from the flow of events, it is evident that before selection of Vossloh 336 system, DMRCL/GC/Track Design Consultant evaluated various fastening systems including that of Pandrol and finally selected the best option due to its overriding characteristics and merits.
- 14.4 As per the DMRCL, due to its overwhelming merits, MoR also selected Vossloh 336 system for their Chennai MTP Project and similarly for DAMEL, the Concessionaire/ALC/DMRCL deliberated and evaluated a number of fastening system such as Pandrol's SFC, Delkor and Rheda 2000 with Vossloh 300 IU. Evidently SFC system failed to conform to design basis report and rail structure analysis and the Concessionaire failed to elicit delivery schedule of Delkor Alt-1 fastening system and consequently the Rheda 2000 with Vossloh 300-IU system was selected for DAMEL and has been approved by MoR for speed upto 160 Kmph.

15. Reply to the DG report by BMRCL:

The BMRCL filed its reply dated 27.11.2010 to the DG report. The gist of the reply is as under:-

- 15.1 BMRCL submitted that the provisions of Section 3(4), Section 4(2) and Section 19 of the Act have come into operation only from 20.05.2009

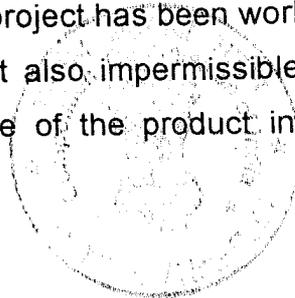
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whereas the DPR prepared by the DMRCL for BMRCL was approved by the Karnataka State Government by its order dated 24.03.2005. and the Government of India conveyed its approval to the project on 11.05.2006. The tenders were floated on 14.02.2009 by BMRCL for the supply, installation, testing and commissioning of the track work specifying Vossloh-336 fastening system and the Board of BMRCL, after deliberating and discussing the issues relating to Vossloh-336 as well as Pandol Systems, took a decision in its meeting held on 25.03.2009 to go ahead with the procurement of Vossloh-336 fastening system. Thus, on the date of approval of DPR, calling for tenders and Board's resolution, the aforesaid provisions of the Act were not in force, and as such no proceedings can be taken under the aforesaid provisions against the BMRCL, and therefore the proceedings are not maintainable.

- 15.2 Successful planning and implementation of Delhi Metro Project encouraged the Government of Karnataka to avail DMRCL's expertise for the planning, investigation and preparation of a DPR for Metro Rail in Bangalore city and accordingly a DPR was prepared and submitted to Government of Karnataka in May 2003 by DMRCL. The Government of Karnataka approved the DPR and permitted to go ahead with the preliminary works like planning and designing etc. As per BMRCL, the DPR contains all technical parameters pertaining to construction and operation of Metro Rail System.
- 15.3 BMRCL submitted that the project is being implemented in accordance with the DPR which deals with ballastless track of main lines and recommendation of use of Vossloh-336 fastening system is on the technical parameters pertaining to construction and operation of the Metro Rail Project. If any other fastening system is to be used in place of Vossloh-336, it would lead to altering or modifying the integrated DPR, which is approved and on the basis of which cost of the project has been worked out. So, at this stage, it is not only impracticable but also impermissible to alter technical parameter, in view of the importance of the product in passenger safety

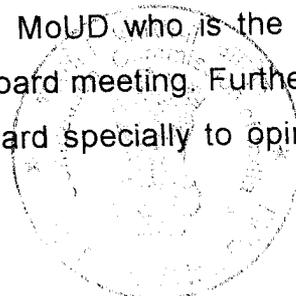
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mechanism of the Metro Railways. Since Vossloh-336 fastening systems have been tested and approved by the Railway Board, the same has been approved for adoption in Bangalore Rail project.

- 15.4 BMRCL has submitted when tenders were floated on 14.02.2009, the Pandrol system was not a proven fastening system and was not tested by RDSO or MoR. Moreover, the recommendations made in DPR cannot be altered at the stage of implementation of the project.
- 15.5 BMRCL concluded that here is no dispute that the product of the Informant is not in use in India. It is neither approved by the Railway Board nor by RDSO, Lucknow.
- 15.6 On 13.3.2009, Shri S.K. Lohia, OSD, MRTS addressed a letter to BMRCL about the use of Vossloh-336 fastening system as per the provisions made in the DPR stating that the issue was examined in consultation with the MoR and they conveyed no objection to the use of rail fastening system, which have been used successfully in other Metros in the world on ballastless tracks. Further, stating that a representation was received from the Informant permitting use of their fastening system for Bangalore Metro the BMRCL was asked for revising the RFP document. Accordingly, a Memorandum was placed before the BMRCL Board for discussion in its Board meeting held on 25.03.2009 and the Board after deliberations and discussions discussed to go ahead with the fastening system of Vossloh-336. So, there was no direction from MoUD to cancel the tender.
- 15.7 BMRCL emphasizes that the finding of the DG that there was direction for revision of tender document from MoUD, which was ignored, is not correct. In the Board meeting held on 25.03.2009 Shri S.K. Lohia, who has addressed the letter dated 13.03.2009 with a copy of the email letter dated 06.03.2009 of Informant was also present. It is after deliberations and discussions in the presence of Shri S.K. Lohia, the decision has been taken. In the Board of BMRCL, the Secretary MoUD who is the Chairman of the Company also participated in the said Board meeting. Further, an expert Shri C.B.K. Rao was also invited to the Board specially to opine on the matter

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who recommended to go ahead with Vossloh-336 fastening as against Pandrol fastenings on technical grounds which the Board, comprising of MoUD nominees also accepted.

- 15.8 BMRCL submitted that Keeping in mind the safety of the Metro Rail Projects and the fact that the fastening system of Vossloh-336 had been successfully used in Delhi Metro and in terms of the DPR prescribing that the very fastening system shall be used for Bangalore Metro Rail Project too, in order to avoid any sort of problems and in the interest of safety of users of Metro Rail, in the tender document fastening system Vossloh-336 was specified to be used. This was the only product at that time tested by RDSO, Lucknow and no other fastening system of similar quality had been approved by the Railway Board at that time. So, the allegations of anti-competitiveness and adverse effect on the competition in the relevant market are not correct.

16. BMRCL further response dated 15.12.2010

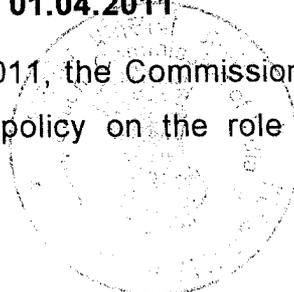
The BMRCL further filed objections dated 15.12.2010 to the DG report and submitted as under:-

- 16.1 The BMRCL reiterated its preliminary objections about maintainability of proceedings on the basis of the date of enforcement of the relevant provisions of the Act and its earlier submissions on the facts, circumstances etc.
- 16.2 BMRCL emphasized that the subsequent acts of BMRCL, after floating the tenders, opening the financial and technical bids and accepting the tender is only the continuation and culmination of the process of the initiation of the tender process which had already begun even prior to the date of the enforcement of Sections 3, 4 & 19 of the Act, as such, there is no violation of any substantial law and much less infringement of the same.

17. Response of BMRCL dated 01.04.2011

In the meeting held on 01.03.2011, the Commission directed the authorized representative of MoR to file policy on the role of RDSO and MoR for

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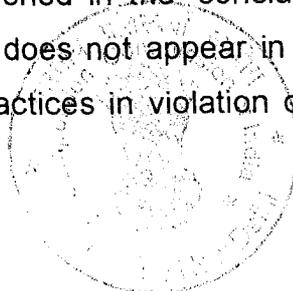


approving the fastening system for ballastless track used in Metro Rail projects within 3 weeks with a copy to all other parties. In response to this direction of the Commission, the MoR had sent their reply with its letter dated 23.03.2011 in which it issued clarification to the points raised by the Commission under several paragraphs specifying the policy and the role of the RDSO and MoR for approving the fastening system for ballastless track used in Metro Rail systems. The said reply also refers to performance criteria dated 21.05.2010 issued by the MoR for ballastless tracks of Metro Railways, which has been issued to facilitate Metro Railways in selecting suitable fastening systems for their ballastless tracks. The BMRCL submitted its response dated 01.04.2011 to the reply of MoR dated 23.03.2011 and stated that the performance criteria of fastening system for ballastless track issued by Railway Board, vide their letter no.98/Proj/MAS/9/2 dated 21.05.2010, were to come into force with immediate effect. As per BMRCL, in their letter dated 17.03.2011 MoUD have advised that in future the fastening system shall be referred to as "Fastening System 336". BMRCL emphasized that in their letter 2009/Proj/MAS/9/2 dated 18.03.2011 addressed to MoUD and forming part of their submission to the Commission, MoR has clarified that these instructions would apply to all Metros in respect of contracts yet to be invited and for contracts for which the tenders were invited before 21.05.2010 and yet to be approved. As such, these instructions are not applicable to BMRCL-Phase I.

18. Reply to the DG report by KMRCL

The KMRCL filed its reply dated 08.11.2010 and with reference to para 8.9 of the DG report and the supposed admission of the Informant itself has contended that it is absolved of all charges of restricting competition. It further emphasized that as mentioned in the 'conclusion' drawn in the DG report also, the name of KMRCL does not appear in the list of entities who are found to have engaged in practices in violation of the provisions of the

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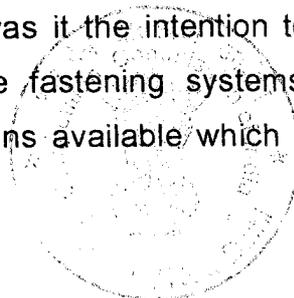
Act. It does not find the need to appear before the Commission for oral hearing fixed on 15.11.2010.

19. Reply to the DG report by MoR

The MoR filed its preliminary reply dated 22.11.2010 to the DG report. The gist of reply is as under:-

- 19.1 MoR submitted that the DG has found the MoR responsible to a limited extent in the case of first phase of the Chennai MRTS, for use of Vossloh 336 system on an experimental basis, for violating the Sections 3 (4)-Refusal to Deal, 4(2)(a)(i)- abuse of dominant position in purchase, and 4(2)(c)- indulging in practices leading to denial of market access, however, it is reiterated in the discussions presented in the report, the MoR has been mostly absolved of the allegation of practices discriminatory to completion, but in the concluding paragraphs of the report, it has been treated on the same platform as other allegedly defaulting agencies which should not be the case and the MoR should not to be bracketed with agencies alleged to be indulging in non competitive practices.
- 19.2 As regards the issue of MoR allowing use of Vossloh 336 fastening system for their Chennai MRTS system, it has been submitted that as has been acknowledged even in the report the same was done by MoR purely on an experimental basis. It has further submitted that the first phase of Chennai MRTS had both, the conventional track as well as the ballastless track and for the conventional track, the conventional track fastenings used elsewhere in the railway system were decided to be used. Since the previous experience gained by MoR on ballastless track from their Kolkata Metro sections was not a happy one, it decided to examine the various options being used in the country for the fastening system for the ballastless section of the project. As there was no time to either do a detailed study of the systems prevalent elsewhere nor was it the intention to make the Chennai MRTS a testing laboratory for the fastening systems, a committee was formed to identify the various options available which had been working in

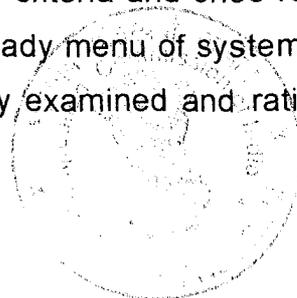
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the Indian conditions. The committee scrutinized the systems being used in the country and after completing their deliberations, the Committee suggested the use of the fastening system termed as Vossloh 336 by DMRCL on a purely experimental basis.

- 19.3 MoR has further submitted that at the time this committee was conducting its study, there was no product of the Pandrol in use for the ballastless track in India nor was there any attempt from Pandrol to approach this committee or the MoR with a proposal to examine one of their products. It concluded that the Chennai project was not being built in secrecy and was in public domain, the committee's existence would have been known to the interested industry. But, there is no mention of Pandrol having evinced any interest in offering its product, either in the committee's report or information and there can be no case of denial of access to a 'market' in such circumstances.
- 19.4 MoR has further stated that for the subsequent stretch of the Chennai MRTS, now under execution, MoR has already decided, as far back as in April 2009, to have competitive bidding for a suitable fastening system. It has also attached a Copy of the letter written to the Southern Railway which brings out the intent of the MoR to have competition in the matter. Accordingly, the MoR submitted that the decision to go for the proprietary fastening system for the first section of the Chennai MRTS on experimental basis was purely necessitated by the circumstances of the time.
- 19.5 MoR has further emphasized with a view to encourage competition, the MoR has already brought out broad based performance criteria for the fastening systems which allow project developers to choose, from a wide variety of systems in use on the world railways on purely techno-commercial basis. Moreover, to further the possibilities of competition and to widen the scope of competition in this field, RDSO has recently invited a global Expression of Interest to identify the fastening systems in use over the world railways which are compliant to the performance criteria and once response to this is available from interested suppliers, a ready menu of systems suitable for the metro systems would be available, duly examined and ratified by the MoR.

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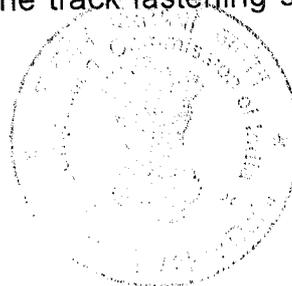
On the basis of above, MoR has emphasized that it has left no stone unturned to usher in competition in this now developing field in the country. The MoR has also attached a copy of the Expression of Interest (EOI) invited by RDSO. The MoR has requested the Commission to kindly consider the matter to absolutely absolve the MoR of the charge of having caused violation of Sections 3(4), 4(2)(a)(i) and 4(2)(c) of the Act as brought out in the report.

20. **MoR submission dated 20.04.2011**

The representative of MoR Shri Rajiv Chaudhury, Executive Director Railway Board, during the meeting dated 05.04.2011 made oral submissions on the DG report and also filed written submissions dated 20.04.2011. The gist of the submissions is as under:-

- 20.1 On the role of MoR, it submitted that the MoR is responsible for technical planning and safety of rail-based urban transit systems and it is imperative for new metro lines to have clearance from the MoR for their technology.
- 20.2 As per MoR, the Commissioner of Railway Safety (CRS) who inspects and certifies a new passenger carrying metro line fit for running of passenger trains, relies on approvals of various technological systems accorded by MoR and before according the approval, the compliance of new line to the approved technology is seen by CRS based on a document called Speed Certificate which is issued by its technical wing, namely RDSO at Lucknow. The said Speed Certificate is issued by RDSO after examining various technical systems of proposed line and the track fastening system is one of such important systems.

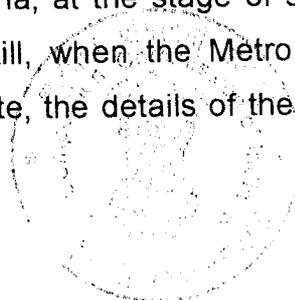




20.3 On the History of approval of fastening systems on ballastless track in Metros MoR has submitted that the experience of RDSO with regards to fastening systems for ballastless track was limited when Delhi Metro came up with their proposals in the year 2001 and when the DMRCL approached MoR for clearance of their track structure, only one fastening system termed by DMRCL as Vossloh 336 was submitted for consideration by DMRCL. RDSO, after examination, cleared the same for use in elevated sections of their tracks subject to certain conditions of installation and maintenance. As per MoR no test results were submitted by DMRCL for this fastening system. In Phase-II, DMRCL proposed fastening system termed by them as Vossloh 336 again for use on their SG (Standard Gauge) tracks and since a different combination of rail and wheel was provided on SG track, RDSO gave provisional approval and the system was to be kept under watch and the same is under the monitoring of RDSO and till date, there is no absolute clearance of any fastening system on SG track. As per the MoR, the approvals after the issue of the performance criterion, dated 21.05.2010, are all on the basis of test results on the system which is clear break from the practice before the issue of performance criteria, where only satisfactory performance was the criterion for approval and no tests were done on systems. Even for Bangalore Metro SG track, the fastening systems are still under evaluation by RDSO based on the performance criterion.

20.4 With reference to performance criteria for fastening systems of ballastless track for Metro Railways issued by MoR in May, 2010, MoR has submitted that this was done to facilitate Metro Railways in selecting a fastening system for their tracks and if it is fully compliant with the said criteria, they need not approach MoR for approval and in case of a non-compliant system, a prior approval of MoR is a must. Though, when the fastening system is compliant to the performance criteria, at the stage of selection, no approval from the MoR is required, but, still, when the Metro Railway approaches RDSO for issue of Speed Certificate, the details of the fastening system are

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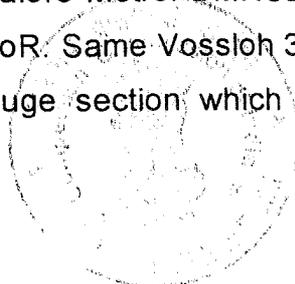
examined by the RDSO. In such a case, if RDSO finds that the chosen system is not fully compliant, then there may be delays in clearance of the Speed Certificate. Accordingly, at present, there is no fastening system which has been approved for full scale use on standard gauge metros so far and the only system being used by Delhi Metro is still under observation. It has submitted that a similar system, reportedly in use in Bangalore Metro, has not been able to obtain approval of the MoR, so far, because of lack of producing sufficient data on test results of the product used.

21. MoR submission dated 02.05.2011

MoR filed further submission dated 02/05/2011. The gist of the submissions is as under:-

- 21.1 BMRCL has averred that they have used the Vossloh Fastening System in their project because this was the one mentioned by DMRCL in the DPR and was the only system approved by Railway Board on 16.07.2002 for DMRCL and on 15.09.2010 for Chennai MTP. With regard to BMRCL's contention that on the basis of the approval of Railway Board, BMRCL used this system in their tender notification, MoR has emphasized that DMRCL was given the approval of system labeled as Vossloh Fastening 336 for their Broad Gauge (BG) network on elevated viaducts only. The same was also allowed on trials on Chennai MTP, which also, is on a BG. Nowhere any approval has been given in 2002-03 for the use of this system on other than BG systems and it is nobody's case that such approvals are not gauge specific. It has been clarified in MoUD's letter dated 19.04.2011 also that all approvals are gauge specific.
- 21.2 As per MoR, the DMRCL has acted on presumption in recommending Vossloh system in the DPR of Bangalore Metro. BMRCL has decided to use this system without consulting the MoR. Same Vossloh 336 was proposed by DMRCL for their own standard gauge section which has been approved

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provisionally *post-facto* and is still under observation. MoR submitted that in this context, term 'Vossloh-336' has been a misnomer and accordingly MoR has clarified that Vossloh 336 is to be read as system 336 and MoUD has in their letter dated 09.06.2010 directed that use of the term Vossloh 336 in DPR's is objectionable and the DPR for Metro Rail projects should only contain the performance criteria as issued by MoR rather than name of any particular fastening system.

21.3 MoR has further submitted that the approvals to DMRCL were given before the issue of performance criteria and accordingly no test were conducted on the fastening and only the satisfactory performance of the fastening system was seen. The approval given on 02.07.2010 was only an extension of the earlier approval of Feb. 2010 for standard gauge. At no point in time, test results of the fastening system Vossloh 336 used by DMRCL were submitted to MoR indicating its compliance to the performance criteria. As per MoR BMRCL has submitted the test results of their system purported to the same as used by DMRCL but the approval to them is still under discussion because of certain doubts having been raised by MoR and accordingly the fastening system 336 is still to demonstrate its acceptability as per the requirements of the performance criteria issued by the MoR on 21.05.2010.

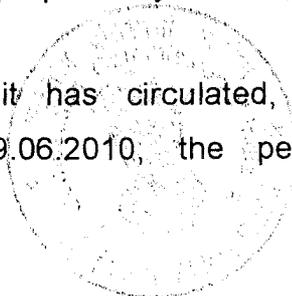
22. Reply to the DG report by MoUD

MoUD filed preliminary reply dated 29/11/2010. The gist of the submissions is as under:-

22.1 The MoUD submitted that it has already clarified its stand on Rail Fastening System for Metro Rail projects vide letter of dated 20.05.2010, which is adequately reflected in the report prepared by the DG, CCI.

22.2 MoUD further submitted that it has circulated, vide letter no. K-14011/21/2009-MRTS dated 09.06.2010, the performance criteria of

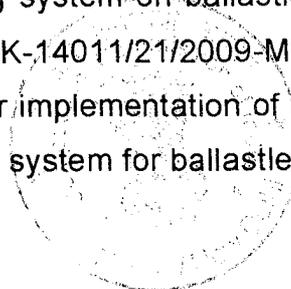
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fastening system for ballastless track on Metro Railways/MRTS systems (Provisional) issued by the MoR in May, 2010 to all Metro Rail Authorities (copy enclosed) in the country for their information and guidance. MoUD contended that Metro Railways are free to choose any fastening system for ballastless track so long as it complies with those performance criterion. Accordingly, Metro Rail Authorities are not required to take any prior approval from MoR, however, the Metro Rail Authorities should report the details of the fastening system adopted by them to the MoR and only in case any Metro Railway wishes to deviate from this performance criterion, prior approval of the MoR will be necessary. Moreover, in the DPR for Metro Rail projects, these performance criterion has to be referred to rather than the name of any particular fastening system.

23. MoUD further filed a letter dated 19.04.2011 in which it submitted that MoUD is the administrative Ministry for all metro rail projects in the country and is working towards promoting healthy competition in various procurements. In the said letter MoUD reiterated that it has issued circular to all the Metro Rail Corporations, vide letter No.K-14011/21/2009-MRTS on 9 June 2010 that the DPRs for Metro Rail projects should only contain the performance criteria for track fastening system for ballastless track as issued by MoR rather than name of any particular fastening system. The said letter of MoUD accepts the fact that the approvals given by MoR, so far, for the track fastening system have been leading to some lack of clarity which ultimately resulted into procurement of only a particular type of fastening system. This issue was taken up with the MoR and accordingly MoUD, in consultation with MoR, have recently issued a detailed circular to provide a uniform basis for selection of a fastening system on ballastless track on all the Metro Railways vide office letter no.K-14011/21/2009-MRTS dated 19th April 2011, in the interest of the smoother implementation of the requirement of performance criteria for track fastening system for ballastless track.

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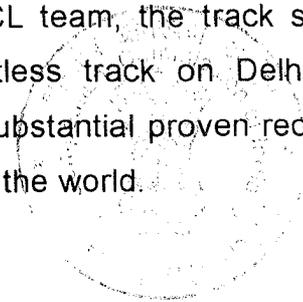


24. Submissions on behalf of M/s. Patil Vossloh Rail Systems Pvt. Ltd.

Patil Vossloh filed its submissions dated 21.02.2011. The gist of submissions is as under:-

- 24.1 Patil Vossloh contended that the alleged acts/ omissions/ refusal to deal with the fastening system of the Informant are in the tenders and prior to 20.05.2009 when the Act came into force and the Act being prospective legislation, the acts and omissions, even if any, committed prior to 20.05.2009 are not attracted by the Act in so far as Sections 3, 4, 19 and 27 of the Act are concerned.
- 24.2 Patil Vossloh further submitted that the issue raised by the Informant in the information stands adjudicated by the Hon'ble High Court of Karnataka at Bangalore in Writ Petition No.16187/2009 entitled *Logwell Forge Ltd. Vs. Bangalore Metro Rail Corporation & Ors.* and the same cannot be adjudicated in the present proceedings.
- 24.3 Patil Vossloh narrated the history of ballastless track in India and has submitted that for the first time installation of ballastless track structure together with fastening system, DMRCL had consultations with an international agency M/s. Systra, France and General Consultants in the selection of design and system for ballastless track including fastening system. As per Patil Vossloh, the selection of design/ system of track structure for ballastless track including fastening system has been made based on proven performance, techno-economic and safety criteria. Further, it was done after examination and appraisal of a number of system, both by consultants i.e. M/s. Systra and technical team of Delhi Metro. After extensive study of consultants and DMRCL team, the track structure with Vossloh-336 fastening system for ballastless track on Delhi Metro was recommended as Vossloh336 which has substantial proven record and is in use by many established Metros all around the world.

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24.4 Patil Vossloh submitted that the product of the Informant is not ever used in India as the same is not approved by the highest technical expert body/ competent authority i.e. RDSO. It has further submitted that as per the information the Informant was not even meeting the requirements as on date as set up by the MoR in performance criteria of fastening systems for ballastless Track.

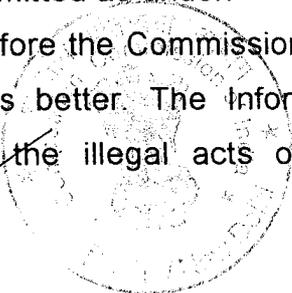
24.5 Patil Vossloh further submitted its submission on 23.04.2011 and contended that the cause of action arises once and for all on floating the each of tenders by respondents and that process was complete then and there and has no continuing effect. It has referred to the judgment of the Hon'ble Supreme Court in the matter of Balakrishna Vs. Shri D.M. Sansthan reported at AIR 1959 SC 798 (807) in which Hon'ble Supreme Court has observed that if the wrongful act causes an injury which is complete, there is no continuing tort even though the damage resulting from the act may continue and thus the continuance of the effect of a wrong is itself not a continuing wrong and in view of the above, there is no violation of the Act. With respect to the queries raised during arguments in the Commission's meeting on the point that no approval has been granted to the Vossloh for standard gauge it has submitted that it has an approval for standard gauge also. It has also filed the copies of the relevant communications dated 11.01.2010 and 22.01.2010 from the MoR to DMRCL. It has further submitted that the performance criteria is not gauge specific and the issue is irrelevant for the determination of the case.

25. Rejoinder to the reply of the DMRCL by Informant:

The Informant submitted its rejoinder to the reply of DMRCL to the DG report on 12.01.2011 and submitted as under:-

25.1 It contended that the case before the Commission is not for the adjudication of which fastening system is better. The Informant has approached the Commission on account of the illegal acts of the Opposite Parties in

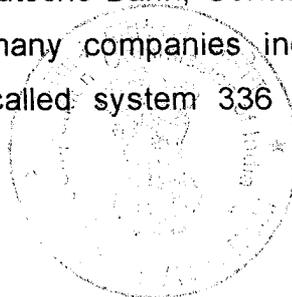
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selecting and nominating the only proprietary fastening system in disregard of other equally competitive and better fastening systems including that of the Informant.

- 25.2 The Informant emphasized that the abuse of the dominant position by the DMRCL is clearly established in its DPR, which are used as Bibles in other upcoming Metros in country, wherein the proprietary product Vossloh-336 is stated and blindly accepted by the other Metros in the country. The Informant has reiterated that the effort on the part of the DMRCL was to exclude all other products including that of Informant and nominate only Vossloh systems without going for competitive bidding. The same is exposed clearly and candidly in the various communications and documents with regard to DAMEPL where the DMRCL ensured that the concessionaire was not allowed to use any product other than Vossloh system.
- 25.3 The Informant further denied the claim of DMRCL that only Vossloh-336 system has been approved by the RDSO. In this regard it emphasized that Vossloh 300-IU fastening system on DAMEL was allowed to be used by the DMRCL in disregard of the concessionaires preference of Pandrol project, even though Vossloh 300-IU was not approved by the RDSO. It further submitted that DAMEPL was inclined for SFC, a Pandrol project, and later on for VIPA, again a Pandrol project, or alternatively for Delkor Alt-1 system with Pandrol's fit and forget clips but DMRCL pushed DAMEPL to agree and accept Vossloh products. The subsequent sequence of communications with MoR/RDSO establishes that DMRCL wanted only Vossloh products to be tried for the high speed line so that they may have advantage of canvassing for the same through their DPRs for future high speed Metro lines.
- 25.4 The Informant further emphasized that the DMRCL has mischievously included the issue of fastening system in Indian conditions as Indian conditions are unique in the world. In this regard the Informant submitted that the system 336 is a design of Deutsche Bahn, German Railways, and such systems are manufactured by many companies including Vossloh. This design of fastening system is called system 336 whereas DMRCL has

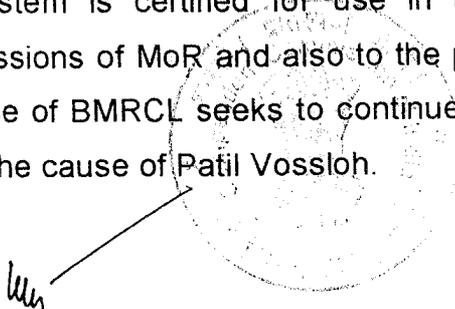
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preferred to promote this product as Vossloh 336, thus impairing competition.

26. The Informant filed its submissions dated 01.03.2011 in reply to the submissions of Patil Vossloh and with regard to the issue that the matter has already been adjudicated by the Hon'ble High Court of Karnataka and submitted that the Patil Vossloh is misleading the Commission as the judgment of Hon'ble High Court is not at all relevant for the purposes of the present proceedings. The issues raised and forming part of the report of the DG have not been dealt with by the Hon'ble High Court. With regard to RDSO approval, the Informant emphasizes that the RDSO has considered evaluation/scrutiny of fastening system as per documents submitted by DMRCL only, without any testing and even MoR has admitted that no testing was performed on the product by the RDSO. DMRCL never offered or applied for the Pandrol's products for approval and only Vossloh products were applied and even when the Railway Board, vide letter dated 31.12.2010, that no such system by the nomenclature "Vossloh 336" exists, the DMRCL continues to promote the proprietary product of Vossloh, thus *per se* acting in an anticompetitive manner.

27. The Informant filed its reply to the further submissions of Patil Vossloh, DMRCL and BMRCL and reiterated its earlier submissions with regard to the relevance of the judgement of Hon'ble High Court of Karnataka in the matter, preference of Vossloh product by DMRCL in its DPRs for various Metro projects and RDSO approval. It also submitted that the DMRCL and BMRCL in their reply have taken a complete contrary stand against that of MoR and MoUD which establishes the submissions of the Informant that the Metros have acted in an anticompetitive manner. With regard to BMRCL's contention that no fastening system is certified for use in underground section is contrary to the submissions of MoR and also to the performance criteria laid by MoR. The response of BMRCL seeks to continue with its anticompetitive activities, espousing the cause of Patil Vossloh.

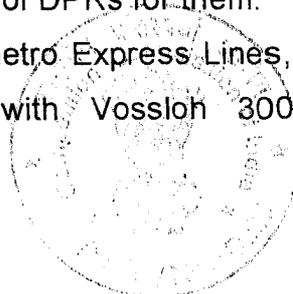


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Decision

28. The Commission has considered the material submitted by the Informant, the report of the DG, the replies filed by the Opposite Parties as well as the rejoinders and submissions of the Informant to the replies filed by the Opposite Parties, the arguments of the parties and all other relevant materials and evidence available on record.
29. It is noted that although the Metro Rail Systems are rail based transport system and are city specific, they are being dealt at nodal level by the MoUD. However, in accordance with the Metro Railway Act and allocation of business rules, the technical parameters are required to be approved by the MoR. The Metro lines before being opened for public carriage are inspected by Commissioners of Railway Safety (CRS), who certify fitness based on approvals of various technological systems accorded by MoR and before according the approval, the compliance of new line to the approved technology is seen by CRS based on a document called Speed Certificate which is issued by MoR's technical wing, RDSO.
30. For the first phase of Delhi Metro, it is evident from the submissions that while choosing the fastening system, DMRCL consulted the General Consultants comprising the International Agencies of repute namely M/s. PCI-PBI-JARTS-TONICHI & RITES, Design Consultants for track, M/s. SYSTRA, France and also visited the factory/site abroad and selected Vossloh 336 system after appraisal of a number of options. Further, in view of highly satisfactory performance of Vossloh 336 in phase-I and overriding characteristics over the other contemporary systems, DMRCL in phase-II also continued with the same fastening system and shared the experience with other Metro Railways in the form of DPRs for them.
31. With respect to the high speed Metro Express Lines, it is noted that the track structure of Rheda 2000 with Vossloh 300 IU system was

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recommended in the DPR by RITES (a subsidiary wholly owned by MoR) and had been proposed for approval to MoR which stands approved by MoR.

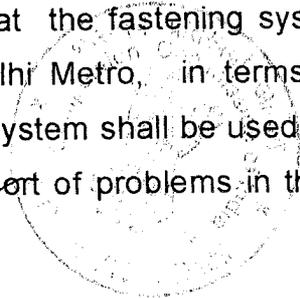
32. Therefore, it can be seen that the DMRCL's decision in choosing the fastening system for the first phase of Delhi Metro was a conscious decision of a procurer, complying with the other statutory requirements. It is a matter of record that DMRCL, before choosing the system, had consulted the relevant international agencies and had also visited the factories/ sites for appraisal of the options and based on the same had gone for the Vossloh system. Considering the satisfactory performance of the system, it was repeated in DMRCL's other projects also. There is also the fact that many of these decisions were taken even before the sections 3 and 4 were notified.

33. Further, it will not be correct to say that in other Metro projects this decision was taken by DMRCL. In other Metro projects like that of Bangalore DMRCL had only prepared the project report. Actual decision was taken by the concerned Metro organization. Hence DMRCL cannot be held responsible for abuse of dominance in those Metro projects. Similar is the case with MoR and MoUD also. Only because they have certain roles in the process, they cannot be said to be the players relevant for testing their dominance in the different Metro projects going on in the country.

34. Regarding Bangalore Metro Project, BMRCL had contended that on the date of approval of DPR, calling for tenders and BMRCL's Board resolution, the provisions of Section 3, 4 and 19 of the Act were not in force, and as such no proceedings can be taken under the aforesaid provisions against it and therefore the proceedings are not maintainable as far as BMRCL is concerned. The Commission finds force in this argument of the BMRCL.

35. Even otherwise, it can be seen that keeping in mind the safety of the Metro Rail Projects and the fact that the fastening system of Vossloh-336 had been successfully used in Delhi Metro, in terms of the DPR which proposed that the same fastening system shall be used for Bangalore Metro Rail Project in order to avoid any sort of problems in the tender document,

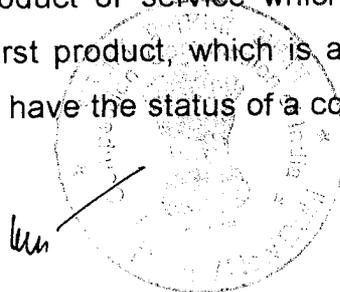
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fastening system Vossloh-336 was specified to be used. Safety and reliability is always a critical issue in such mega projects. This was the only product at that time tested by RDSO and no other fastening system of similar quality had been approved by the Railway Board at that time. So, it can be seen that BMRCL was left with no option but to go for the Vossloh system and thus, the allegations of anticompetitive behavior cannot be decided in positive.

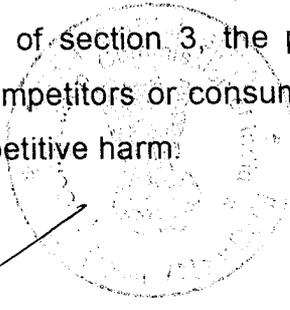
36. However, it is a fact arising from the circumstances of the case that approvals given by MoR, for the track fastening system had been leading to a situation which ultimately resulted in procurement of only a particular type of fastening system. To overcome the same, MoUD in consultation with MoR have issued a detailed circular to provide a uniform basis for selection of a fastening system on ballastless track on all the Metro Railways known as performance criteria.

37. Competition concerns arise only in a particular market and for any market to exist, there has to be at least one producer / seller and one consumer / buyer who exchange a product or service for a price. Further, the market exists because the product or service has certain embedded utility and hence value. Competition laws are meant to ensure that competing producers / sellers do not destroy free and fair competition that should exist amongst them or do not exploit their consumers or competitors due to market power. This principle applies to all entities within any production chain. For any given product or service, the production chain can be said to end where the last transaction takes place and after which point the utility of the product or service is consumed by the person who buys it. The buyer may itself be producing some other product or service which is not part of the specific production chain of the first product, which is a consumable for the buyer. But here, the buyer would have the status of a consumer.



38. A consumer must be allowed to exercise its consumer choice and freely select between competing products or services. This right of consumer's choice must be sacrosanct in a market economy because it is expected that a consumer would decide what is best for it and free exercise of consumer choice would maximize the utility of the product or service for the consumer. For an individual, that consumer's choice is based on personal assessment of competing products or services, their relative prices or personal preferences. For any other type of consumer, this process of decision making in exercise of consumer's choice is more structured and reflected in procurement procedures. Such a consumer may use experts or consultants to advise, do its own technical assessment, take advice of others it may trust or even purchase from known and reliable sources. The process of such decision making may result in purchase by nomination or limited tender or open tender. Normally, open tenders without a brand bias are desirable as it may give the best value for money. However, each of the purchase process is acceptable and valid as a process of decision making. The consumer is the best judge. In case of public entities, the entity is a representative consumer on behalf of the public. There are administrative mechanisms in place for carrying on the due process of exercising consumer's choice on behalf of the public. Of course, there could be competition concerns in rare cases where a monopoly buyer exercises the option in an anticompetitive manner but the present case is not in that category. Here the exercise of the option by various Metro projects has been done in the interest of reliability and safety.

39. It is also noteworthy that for determining appreciable adverse effect on competition for the purpose of section 3, the parameters given in section 19(3) all indicate harm to competitors or consumers. It is not envisaged that a consumer can cause competitive harm.



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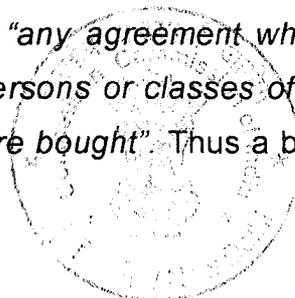
40. Section 3 (3) concerns agreements between persons etc. *“engaged in identical or similar trade ...”* The word “trade” has been defined in section 2(x) as *“any trade, business industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes provision of any services”*. The word, “acquisition” mentioned in definition of an “enterprise” in section 2 (h) is not included here. As can be seen, purchasing activity of a consumer does not qualify as “trade”. Therefore, section 3 (3) is not applicable to a consumer.

41. In the instant case, the activity in question is the procuring or purchasing activity of OPs. Through this act of procurement, the OPs are neither fixing price of metro operation service, nor limiting its output nor sharing market. Besides, the decision making process of a consumer or exercise of consumer’s choice in purchasing activity of a consumer is not a matter of section 3 as discussed above. Therefore, there is no contravention of section 3 (3).

42. In section 3 (4), the enterprises have to be “at different stages or levels of the production chain” and in “different market”. Furthermore, the “agreement” covered in section 3 (4) should be “in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services”. Again, it can be seen that the word “acquisition” that is included to define an “enterprise” in section 2 (h) is not mentioned in section 3 (4). Thus, agreements relating to suppliers’ activities are covered under section 3 (4). Also a consumer in any market cannot be said to be in any production chain. Therefore, section 3 (4) does not apply to such a consumer.

43. The only place where purchase of goods could be looked at is under clause (d) to section 3 (4), “refusal to deal”. The term is explained in Explanation “d” to the sub section as *“any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought”*. Thus a buyer, who may be

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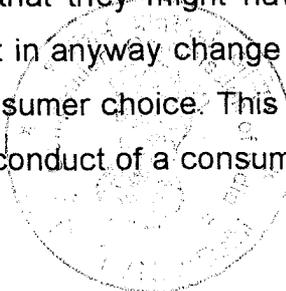


also covered as a consumer under the definition given in section 2 (f) but happens to be part of a production chain may be examined. In other words, if a buyer purchases a good or service and further trades in it or uses it to produce another good or service would fall under the scanner of section 3 (4) (d). However, in such a case, it would have to be seen whether such a buyer is imposing a refusal to deal condition on the enterprise from whom it is purchasing the good or service, such as imposing a condition that the supplier cannot supply to any other competitor of the buyer enterprise.

44. In the instant case the OPs are buying enterprises. They are providing services of rail metro operation and buying *rail fastening systems used for ballastless tracks of metro rail operation*. For operability of section 3(4)(d), it has to be seen whether they are restraining the supplier, namely M/s Patil Vossloh Rail System Pvt. Ltd. from operating freely in any manner. This is not the case. Therefore, under the facts and circumstances of the case, there is no contravention of section 3(4) of the Act.

45. The facts of the case indicate that in the instant case, the Opposite Parties are "consumers" within the definition given under section 2 (f) of the Competition Act, 2002 in context of the relevant market *rail fastening systems used for ballastless tracks of metro rail operation*. They also indicate that the Opposite Parties have gone through a process of decision making by consulting experts, deliberating on proposals and options in Board meetings etc. Thus, the selection of the fastening system was done as an exercise of consumer choice. Even in case of OPs other than DMRC, who have taken into account the DPR prepared by DMRC, the decision / choice has been made by these OPs and the fact that they might have relied on DMRC's advice given as consultant does not in anyway change the situation in terms of their independent exercise of consumer choice. This exercise of consumer choice cannot be taken as abusive conduct of a consumer.

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46. In view of the above, the Commission comes to the conclusion that no violation of either Section 3 or Section 4 of the Act is established against the Opposite Parties and the matter relating to the said information is disposed off accordingly. The proceedings are closed forthwith.

47. The Secretary is directed to inform the parties accordingly.

Sd/-
Member (GG)

Sd/-
Member (AG)

Sd/-
Member (T)

Sd/-
Chairperson

Certified True Copy



S. P. Gahlau
25/X/2011
S. P. GAHLAU
Assistant Director (Secy.)
Competition Commission of India
Government of India
New Delhi