

COMPETITION COMMISSION OF INDIA
Ref. Case No. 05 of 2011

February 21, 2013

Re: Reference Case No. 05 of 2011 filed under section 19(1)(b) of the Competition Act, 2002 by Shri B P Khare, Principal Chief Engineer, South Eastern Railway, 11 Garden Reach Road, Kolkata-700043.

Against

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|---|-----------------------------|
| 1. M/s Orissa Concrete and Allied Industries Ltd. | Opposite Party No.1 |
| 2. M/s Rishi Engineering and Construction Pvt. Ltd. | Opposite Party No.2 |
| 3. M/s Mam Kur Poly Machines Pvt. Ltd. | Opposite Party No.3 |
| 4. M/s Vee Kay Industries | Opposite Party No.4 |
| 5. M/s Logwell Forge Ltd. | Opposite Party No.5 |
| 6. M/s Asra Steels Pvt. Ltd. | Opposite Party No.6 |
| 7. M/s Gondwana Enterprises | Opposite Party No.7 |
| 8. M/s Mahabir Metal Co. | Opposite party No.8 |
| 9. M/s Modern Manufactures Pvt. Ltd.
(formerly M/s Modern Ex-Serviceman
Engg. Co. (p) Ltd. | Opposite Party No.9 |
| 10. M/s Ved Kiran Steels Industries
Pvt. Ltd. | Opposite Party No.10 |
| 11. M/s Digvijay Steels Pvt. Ltd. | Opposite Party No.11 |
| 12. M/s Sarbjit Machine Tools | Opposite Party No.12 |
| 13. M/s Vikrant International | Opposite Party No.13 |
| 14. M/s K.D.S. Engineering Pvt. Ltd. | Opposite Party No.14 |
| 15. M/s Bawa H. P. Engg. Products Pvt. Ltd. | Opposite Party No.15 |
| 16. M/s Cosmo Enterprise | Opposite Party No.16 |
| 17. M/s Hardeep Engineers | Opposite Party No.17 |

18. M/s Ram Tek Engg. Works	Opposite Party No.18
19. M/s R.J. Enterprises	Opposite Party No.19
20. M/s Prerna Engineering Works	Opposite Party No.20
21. M/s Surya Alloy Industries Ltd.	Opposite Party No.21
22. M/s Calcutta Springs Ltd.	Opposite Party No.22
23. M/s Fabro Forge	Opposite Party No.23
24. M/s Jekay International Track Pvt. Ltd.	Opposite Party No.24
25. M/s Royal Infraconstru Ltd.	Opposite Party No.25
26. M/s Manish Forgings Pvt. Ltd.	Opposite Party No.26
27. M/s Cemcon Rly. Industries	Opposite Party No.27
28. M/s Tiya Industries	Opposite Party No.28
29. M/s Simtech International	Opposite Party No.29

Coram:

Mr. Ashok Chawla
Chairperson

Mr. HC Gupta
Member

Dr. Geeta Gouri
Member

Mr. R. Prasad
Member

Mr. Anurag Goel
Member

Mr. M. L. Tayal
Member

Mr. Justice (retd.) S.N. Dhingra
Member

Present: Sh. Paritosh Mandal, Office Supdt., South Eastern Railway, Kolkata for the informant

Sh. Shiv Khorana, advocate for the opposite party Nos. 3, 4, 6-20, 28

Sh. Ajay Singh, advocate for the opposite party No. 23

Sh. Biswajeet Dass advocate for the opposite party No. 1

Sh. DD Gulati, Director and Sh. Aditi Gopal Krishnan, advocates for the opposite party No. 5

Sh. Raja Basu Chaudhury and Sh. P. Ramesh Kumar, advocates for the opposite party No. 24

Sh. Boboy Potasangbam and Sh. Suman Dutt, advocates for the opposite party No. 2

Sh. Ashok Kumar Mukherjee, advocate for the opposite party No.25

Sh. B.S. Bhandari, Sr. Executive for the opposite party No.26

Sh. M.L. Fatehpuria and Sh. Mohit Fatehpuria, advocates for the opposite party No. 29

Order under section 27 of the Competition Act, 2002

The present reference has been filed under section 19(1)(b) of the Competition Act, 2002 ('the Act') by Shri B P Khare, Principal Chief Engineer, South Eastern Railway, Kolkata against the above named entities alleging *inter alia* contravention of the provisions of section 3 of the Act.

2. Shorn of details, it is averred in the reference that due to increased theft and sabotage in various parts of rail lines, a tender notice was floated by South Eastern Railway for procurement of Anti-Theft Elastic Rail Clips with Circlips from RDSO approved firms. In response thereto, 29 approved firms submitted offers. The rate quoted by most of the firms was @ 66.50 (all inclusive). The quantity quoted by each of the firms was far less than 50% of the total tender quantity. It is also alleged that the quoted rate was about 10% higher than the neighboring Railways' last purchase rate. Suspecting cartelization by the bidders in fixing the price and distributing the tender quantity of the materials amongst themselves, the instant reference has been filed by Principal Chief Engineer, South Eastern Railway.

3. The reference was considered by the Commission in its ordinary meeting held on 18.10.2011 and *vide* its order of the even date, the Commission noted that the rate quoted by the various bidders was inclusive of excise duty, VAT and freight. It was also observed by the Commission that as the bidders were located across the country, the cost of freight for supplying the product from different parts of the country could not have been the same assuming that all the bidders had the same input costs for the product. The fact that identical rates were quoted by a large number of bidding firms, the same was *prima facie* found to be indicative of some kind of meeting of minds with a purpose to manipulate the tender under reference. Hence, the Commission was of the opinion that *prima facie* a case of contravention of the provisions of section 3(3)(d) read with section 3(1) of the Act was made out. Accordingly, the DG was directed to conduct an investigation into the matter and to submit a report.

4. In terms of the aforesaid order of the Commission, an investigation was conducted by DG and an investigation report was submitted to the Commission on 08.06.2012. The DG report was considered by the Commission in its meeting held on 27.06.2012. On consideration of the report, the Commission decided to forward copies of the report of the DG to the parties for filing their respective replies/ objections thereto, if any.

5. The matter was heard by the Commission in its ordinary meeting held on 18.09.2012 where the appearing parties argued in support of their respective pleas. No replies/ objections, however, were filed by M/s Orissa Concrete & Allied Industries Ltd., M/s Cemcon Rly. Industries and M/s Calcutta Springs Ltd. and accordingly, these parties were set *ex parte* by the Commission *vide* its order dated 25.10.2012.

Findings of the DG

6. It was concluded by the DG that meeting of minds amongst the bidders existed in the form of cartelization which resulted in bid rigging in offering identical price with the intent of allocation of supply in proportion to their production capacity among themselves and elimination of other firms. This concerted action by these firms being in the same

business instead of generating fair and healthy competition caused collusion in contravention of the provisions of section 3(3)(d) read with section 3(1) of the Act.

7. Based on the evidence and competition assessment, it was concluded by the DG that the impugned conduct and practice of the firms clearly established that they had acted in concert to manipulate the bid by fixing the price of the item among themselves which was anti-competitive being in violation of section 3(3)(a) of the Act. The firms rigged the bid by offering the identical price which is anti-competitive in violation of section 3(3)(d) of the Act. As the anti-competitive conduct in the form of bid rigging was established, it was presumed to have an appreciable adverse effect on competition. Nonetheless, the DG also examined the appreciable adverse effect on competition arising out of such conduct/ practices independently in the light of the factors mentioned in section 19(3) of the Act.

8. The Commission has examined the information, the report of the DG and the replies/ objections of the opposite parties thereto besides perusing the material available on record. The following points fall for consideration before the Commission:

Whether the opposite parties have contravened the provisions of section 3 of the Act?

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9. To intercept increased instances of theft and sabotage in various parts of rail lines, the South Eastern Railway floated a tender dated 14.06.2010 for procurement of 45.50 lacs anti-theft elastic rail clips with circlips from RDSO approved vendors. In response thereto, 1 unapproved firm, 4 Part-II approved firms and 28 Part-I approved firms submitted their respective bids. The tender was opened on 21.07.2010. From the minutes of the Tender Committee and the comparative statements filed by the South Eastern Railway, it appears that all 28 Part-I RDSO approved firms and 1 unapproved firm quoted the same rate *i.e.* Rs. 66.49 to 66.51 per piece and offered the quantity ranging from 70,000 pieces to 14,70,475 pieces in their respective bid documents. As noted above, the total tender quantity was for 45,50,000 pieces. These firms combined

together quoted for 46,45,475 pieces and, further, the quantity quoted by each bidder was less than 50% of the tender quantity.

10. Out of total 33 tenderers, the Tender Committee eliminated the aforesaid 29 tenderers (1 unapproved firm and 28 Part-I) which quoted the same price and discussed the bids of the remaining 4 Part-II RDSO approved tenderers. Out of these 4 Part-II tenderers, 3 tenderers viz. M/s Fairdeal Engineering & Body Building Pvt. Ltd. Kolkata, M/s Kalimata Ispat Pvt. Ltd., Kolkata and M/s Kalimata Vypar Pvt. Ltd. Kolkata quoted for full tendered quantity and the fourth tenderer M/s Orissa Concrete and Allied Industries Ltd., Raipur quoted for very small quantity @ Rs.66.50, all inclusive, which was the same price as was quoted by most of the Part-I tenderers. Accordingly, the Tender Committee was of the view that M/s Orissa Concrete and Allied Industries Ltd., Raipur might also be one of the parties to the cartel and so its offer was also not considered.

11. Resultantly, the Tender Committee discussed the offers of 3 Part-II RDSO approved tenderers viz. M/s Fairdeal Engineering & Body Building Pvt. Ltd. Kolkata, M/s Kalimata Ispat Pvt. Ltd., Kolkata and M/s Kalimata Vypar Pvt. Ltd., Kolkata on various parameters as elaborated in its minutes. The Tender Committee considered the reasonableness of rates on the basis of purchase orders of the years 2009/ 2008 of the Eastern Railways/ East Central Railways/ East Coast Railways and observed that the rate quoted by M/s Fairdeal Engineering & Body Building Pvt. Ltd. was the lowest and which was also lower in comparison to the above noted previous tenders and accordingly, the Tender Committee recommended the tender which was accepted by the Tender Accepting Authority (TAA) for allotment of 6,82,500 pieces of Anti-theft ERC to M/s Fairdeal Engineering & Body Building Co. Ltd. at its own quoted rates and to the other two firms viz. M/s Kalimata Industries Pvt. Ltd., Kolkata and M/s Kalimata Vyapar Pvt. Ltd., Kolkata for a quantity of 2,27,500 pieces (*i.e.* 5% of the tendered quantity) each at counter offered rates. Only M/s Fairdeal Engineering & Body Building Co. Ltd. accepted the Railway's offer and was issued a purchase order dated 29.09.2010. The other two firms regretted to accept the Railway's counter offered rates and hence no purchase orders were issued to them.

12. At the outset, the Commission, from the details furnished in the reference, notes that all the participating opposite parties *i.e.* 28 Part-I firms and 1 Part-II firm quoted an all-inclusive rate of Rs. 66.50 each for the supply of the tendered material. Further, the quantity quoted by the each of the bidders was less than 50% of the total quantity. These facts have not been denied or disputed by any of these opposite parties.

13. The quotation of identical rates by large number of firms is no doubt suggestive of and indicative of formation of a cartel but the same in itself is not conclusive and determinative of the issue.

14. In this regard, a reference may be made to the other corroborative evidences gathered by the DG during the course of the investigations.

15. The DG, after considering the bid documents, report of Evaluation Committee and statement of the opposite parties, found that all the 29 firms have quoted identical bids which were in the range of Rs.66.49 to Rs.66.51. The examination of firms and their statement recorded by the DG did not show any plausible reason for quoting such identical bid price. In fact, most of the firms admitted such identical bid price and were not able to give any satisfactory explanation as to how and why such identical bid price was quoted by them. Some of the opposite parties even admitted that the bid documents were handed over to same person who filled-in the price and quantity before submitting the same to the South Eastern Railways. Similarly, the firms were also not able to explain such identical bid price despite the fact that there was difference in cost of production for each of the firms.

16. The DG, on examination of the cost estimation submitted by the firms, found that the cost of raw material was one major cost component which is almost fixed because the raw material is procured from RDSO approved raw material suppliers. It was noted by the DG that in addition to the raw material, there are other components of the costs like manufacturing cost, cost of fuel/ power/ electricity, cost of labour, cost of tooling, cost of circlips, cost of packing, financial expenses and overheads, freight *etc.* other than fixed excise duty and VAT. The investigation revealed that these firms were located at different places in the country and, as such, the freight component was not the same. The component costs other than the raw material cost and freight varied from firm to

firm. The firms indicated different profits in their cost estimates. Thus, despite different locations in the country and different freights/ manufacturing costs, the firms offered the identical rate and thereby rigged the bids. It was further noted that the estimates submitted by the firms indicated the identical total cost of estimation which was arrived at by manipulating various cost components, freight and profit margin in order to arrive at a predetermined identical price. The firms rigged the bid with the motive of getting the orders in proportion to their assessed capacity. After examination of bid document, report of Tender Committee and estimation of cost submitted by various firms, the investigation revealed that all the 29 firms located in different parts of the country had submitted identical bids in a concerted manner by way of some collusive understanding amongst themselves to rig the bids.

17. To support the findings, the DG further noted that not only the firms quoted the same bid price but the handwriting in quoting the rate was also found to be the same. In this connection, it was noted by the DG that scrutiny of the bid documents revealed that the 19 firms had similar handwriting in which the prices were quoted in figures and words in their respective bid documents. Similarly, the bid documents of 4 firms and 2 firms respectively were having the similar handwriting in which the prices were mentioned in their bid documents. Further, the DG noted that during recording of statements of the firms a specific question was posed regarding offering of the identical price in the same handwriting in the bid documents. The firms on being shown their bid documents accepted that the bids were identical with that of other firms and also the handwriting was similar. They did not, in specific, name the person who wrote the price in the tender documents. In respect of other firms, although the handwriting was different in their bid documents, the price quoted by them was identical.

18. From the above, it was gathered by the DG that the bids having the identical price mentioned in figures and words indicated that tender documents were filled by a person who is common to all the firms covered in the three groups, as noted above. Thus, it was deduced by the DG that there was meeting of minds or collusion among the parties for fixing the price of the bids. The existence of similar handwriting was found to be a strong direct evidence to prove that the parties in each group had some prior understanding and agreement to fix the price of the bids and allocate their share of supply of the item as per their respective production capacity. The intention of dividing

the quantity for supply items was also found corroborated by the fact that quantity offered for the supply at the fixed rate of Rs.66.50 per piece totalled to 46,45,475 pieces which was very near to the quantity of 45,50,000 stated in the tender of South Eastern Railways for which the tender was floated.

19. In the absence of any satisfactory explanation given by the firms, it was concluded by the DG that there was collusion between these firms in rigging the bid in this case.

20. The investigation also examined the matter of filing the bids and the contents of covering letters submitted by the firms. It was revealed that the contents of the covering letters were similar to other firms as per groups. Scrutiny of the bids of the firms revealed that 17 firms submitted their bids with their covering letters on their respective letter heads of the firms with similar contents. Similarly, contents of the covering letters of 4 firms (in 2 groups, each group comprising 2 firms) were exactly similar.

21. During the course of investigation, these firms were specifically asked by the DG about the reasons for using the same format. It was noted by the DG that in response to the question regarding using the same format and the contents of the covering letters of the bids, the firms informed typically that they made a standard template of the format on the basis of their past practice by including the various items (S. Nos. 1 to 15 in their covering letters of the bids) which are mentioned in the tender documents of the railways. The firms accepted the fact that the same format was used by them, but took the excuse of using the same format as a practice in which they have been using the same format for other tenders as well. In this regard, it was noted by the DG that there was no such requirement of using the covering letters and giving such details from the South Eastern Railways which required the details to be filled up on the prescribed tender documents. In view of this, the investigation found that the opposite parties were using the same format of the covering letters and the contents thereof were also found to be similar. This was found suggestive of some understanding amongst the parties for participating in the bid process with the motive of rigging the bids.

22. Further, South Eastern Railway, Kolkata was requested by the DG to provide details of the bank drafts submitted by various firms which were not registered with

National Small Industries Corporation Ltd. (NSIC) and, as such, were required to submit the tender document fee of Rs.2,000. From the replies received from South Eastern Railways, Kolkata, it was noted by the DG that the Demand Drafts (DDs) amounting to Rs.2000/- towards payment of tender documents fee of M/s Mam Kaur Poly Machines Pvt. Ltd., New Delhi and M/s Vee Kay Industries, Delhi *vide* Nos.663178 and 663177 respectively both dated 19.07.2010 were in sequence and hence made from the same banker and at the same time. Similarly, DDs amounting to Rs.2000/- of M/s Vikrant International, Faridabad, Haryana and M/s Modern Ex-serviceman Engineering Pvt. Company Pvt. Ltd., Punchkula, Haryana *vide* Nos.036441 and 036440 respectively both dated 17.07.2010 were in sequence and hence made from the same banker and at the same time. Investigation, however, could not ascertain the name and address of banks from where DDs were made because the information in this regard could not be made available by South Eastern Railways, Kolkata which informed *vide* its letter dated 01.05.2012 that since the details *qua* name and branch address of banks issuing DDs towards cost of tender documents were in no way related to the finalization of the tenders, these records were not maintained by the railways. In this connection, it was noted by the DG that out of 29 firms, 14 firms were not registered with NSIC and therefore were required to submit tender fee of Rs. 2000/-. Further, the DG opined that though the South Eastern Railway was not able to give details of such DDs submitted by these parties, considering the similarity of the contents of tender documents, the possibility of DDs having been made from one bank in respect of firms appearing in different groups could not be ruled out. The fact of DDs having been submitted from one bank or set of banks by different banks was corroborative evidence to show some kind of collusion in rigging the bids, noted the DG.

23. In view of the above evidence gathered during the course of the investigation, it was concluded by the DG that the bid documents of the 29 firms under investigation indicated that they all have quoted similar prices which clearly reflected that these firms prepared the offer price together or collectively. The plea of some firms during investigation that it was mere coincidence was found to be not correct by the DG. The bid documents containing the identical price, same handwriting, same format with common omissions and commissions of language were found by the DG to be clearly reflective of meeting of minds or concerted action to establish that the firms have directly or indirectly tried to determine or influence the price of the tender/ project.

24. Based on the above, it was concluded by the DG that meeting of minds amongst the bidders existed in the form of cartelization which resulted in bid rigging by offering identical price and allocation of supply in proportion to their production capacity among themselves and elimination of other firms. This concerted action by these firms being in the same business instead of generating fair and healthy competition, caused collusion which was found by the DG to be in contravention of the provisions of section 3(3)(d) read with section 3(1) of the Act.

25. Further, the DG noted that such agreements by virtue of the presumptions contained in section 3(3) of the Act are presumed to have appreciable adverse effect on competition. Nonetheless, the DG examined the relevant factors of section 19(3) of the Act to determine the appreciable adverse effect on competition arising out of such agreements. In terms of the factors contained in section 19(3) of the Act, the Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors *viz.* creation of barriers to new entrants in the market; driving existing competitors out of the market; foreclosure of competition by hindering entry into the market; accrual of benefits to consumers; improvements in production or distribution of goods or provision of services; promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

26. In this connection, it was noted by the DG that there were about 114 prospective RDSO approved suppliers and out of them 32 and one unapproved RDSO supplier submitted their offers. The concerted actions of these 29 firms with the offer of identical price among themselves and at a higher price resulted in the creation of an entry barrier for the other firms. It was noted that in other cases in the past for the other item (ERC MK-III), some of these firms were offering the same price in the bids to the railways. These firms have thus by their collective efforts created a situation of entry barrier for other firms in the market.

27. Further, it was noted by the DG that all these firms are approved by RDSO for ERC MK-III and are capable of supply of the item of Anti-Theft ERC with circlips. These 29 firms through their tacit understanding have, rather than competing among

themselves, decided to collude in order to eliminate competition by bid rigging. Due to this collusion, the other firms suffered as they were not able to compete against this collective action aimed at eliminating the existing competitors from the market.

28. Referring to foreclosure of competition by hindering entry into the market, it was noted by the DG that the price and quality of the item is paramount in the market because the Anti-Theft ERC with circlip is a crucial and sensitive item on which the safety of the rail line and public at large depend. The concerted and colluded action of bid rigging by these approved firms at an elevated artificial offered price harmed and reduced the competition for supply of this item by the other suppliers. Thus, it has resulted in foreclosure of competition by hindering entry into the market.

29. Dealing with the factor relating to accrual of benefits to consumers, it was noted by the DG that in the instant case, the railway is the ultimate consumer. Railways has created a network of these firms for supply of these items with the approval of RDSO so that it can get the quality product as per specifications and at right time and in right quantity with satisfaction at competitive price. These firms colluded among themselves at a platform and controlled the price of the item in proportionate quantity of supply as per their assessed capacity and quoted identical rate in spite of the fact that these firms are located at different locations in the country and hence formed the cartel in order to manipulate the aforesaid tender. The concerted bid rigging by these firms harmed the railways because it could not allocate the tendered quantity among these suppliers because of their cartel formation. The Railways also suffered in the exercise because it could not ascertain the right competitive price with quality from the suppliers because these 29 firms restricted the competition by manipulating the bidding. It resulted in the wastage of its resources at the cost of public money. By implication, the conclusion of the DG is that this action by these units had none of the beneficial effects mentioned in section 19(3) of the Act.

30. The Commission notes that in terms of the provisions contained in section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act

declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be *void*. Further, by virtue of the presumption contained in sub-section (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-(a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

31. In the present case, indisputably all the participating opposite parties *i.e.* 28 Part-I firms and 1 Part-II firm quoted an all-inclusive rate of Rs. 66.50 each for the supply of the tendered material. Further, the quantity quoted by the each of the bidders was less than 50% of the total quantity. These facts have not been denied or disputed by any of these opposite parties. Coupled with the facts that the bid documents containing same handwriting, same format with common omissions and commissions of language, past conduct *etc.*, it is safe to infer that such conduct is reflective of meeting of minds or concerted action to establish that the firms have directly or indirectly tried to determine or influence the price of the tender/ project.

32. The definition of 'agreement' as given in section 2(b) of the Act requires *inter alia* any arrangement or understanding or action in concert whether or not formal or in writing or is intended to be enforceable by legal proceedings. The definition, inclusive and not exhaustive, is a wide one. The understanding may be tacit, and the definition covers situations where the parties act on the basis of a nod or a wink. There is rarely direct evidence of action in concert and the Commission has to determine whether those involved in any dealings have some form of understanding and are acting in co-operation with each other. In the light of the definition of the term 'agreement', as noted *supra*, the Commission has to find sufficiency of evidence on the basis of benchmark of 'preponderance of probabilities'.

33. In view of the above and further considering the fact that since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of the existence of an agreement.

34. In the instant case, the opposite parties neither before the DG nor before the Commission have disputed the above noted evidence against them. In the result, it is safe to infer from a number of coincidences and indicia (identical rates, division of quantity, similar handwriting, format of covering letter, tender fee payment, past conduct *etc.*) that the opposite party bidders entered into an agreement to directly or indirectly determine the prices as also to rig the bid in question.

35. By virtue of the presumption as incorporated in section 3(3) of the Act, any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which directly or indirectly determines purchase or sale prices; limits or controls production, supply, markets, technical development, investment or provision of services; shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

36. Thus, in case of horizontal agreements as listed in section 3(3) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut the presumption would lie upon the opposite parties.

37. In the present case, the opposite parties in their respective replies instead of denying or disputing the findings of the DG, have virtually accepted the findings and gave the replies which have little bearing for the purpose of rebutting the existence of understanding or presumption of appreciable adverse effect on competition. The typical replies of the opposite parties may be summarized as under: factory is closed and employees left; undertakings not to quote the same rates as given by other participants in future; micro and small sizes of the firm; bland denial without any plausible explanation; violation of principles of natural justice; non inviting of hand writing expert; creation of no entry barrier or for closure of competition by hindering entry into the market *etc.*

38. On the contrary, the DG despite availability of presumption of appreciable adverse effect on competition as incorporated in section 3(3) of the Act went on to independently examine the appreciable adverse effect on competition arising out of anti-competitive agreements in the light of the factors given in section 19(3) of the Act. The opposite parties having not rebutted the presumption, through their replies, which are in the nature of admissions and undertakings for future conduct, have only strengthened such presumption.

39. Reliance was made by the opposite parties on the decision of Hon'ble Supreme Court of India in the case of *Union of India v. Hindustan Development Corporation*, (1993) 3 SCC 499 to contend that even pure conscious price parallelism is not unlawful. The ruling is of no assistance as in the facts of the present case, apart from conscious price parallelism. There is overwhelming circumstantial evidence, as discussed in earlier paras, to infer the anti-competitive nature of the impugned actions.

40. At this stage, another plea advanced by the opposite parties in their defence may be dealt with. It has been contended that there was no power with the opposite parties even with remote possibility to control the distribution of supply by these small firms

having 22% capacity to manufacture of the total requirement. The plea is misconceived. Admittedly, the quantity offered for the supply at the fixed rate of Rs.66.50 per piece by the opposite parties totalled to 46,45,475 pieces which was very near to the quantity of 45,50,000 stated in the tender of South Eastern Railways for which the tender was floated. Thus, in the face of the quantity tendered by the opposite parties, it does not lie in their mouth to contend that the opposite parties having 22% of the total capacity were not able to control the distribution of supplies. It may be further noted that there were about 114 prospective RDSO approved suppliers and out of them 32 and one unapproved RDSO supplier submitted their offers. To invoke such a plea, it was incumbent upon the opposite parties to have rebutted the statutory presumption of appreciable adverse effect on competition in the light of the factors mentioned in section 19(3) of the Act. Having not done that, it is futile to press such plea by arguing in abstract without submitting concrete data and without even explaining the functionality or otherwise of the remaining RDSO approved suppliers.

41. Before parting with this case, it may be noted that in the *Instruction to Tenderer and General Conditions of Tender*, it was provided in clause 27 that wherever all or most of the approved firms quote equal rates and cartel formation is suspected, Railways reserve the right to place order on one or more firms to the exclusion of the rest without assigning any reasons thereof. Further, it was provided therein that firms were expected to quote for a quantity not less than 50% of tendered quantity. Offers for less than 50% quantity were to be considered unresponsive and liable to be rejected in case cartel formation was suspected. Railways, however, reserved the right to order on one or more firm any quantity. It is no doubt quite sagacious of the Railways to have put such a competition compliant clause in the instructions.

42. In the result, the Commission is of the view that conduct of the opposite parties amounts to bid rigging within the meaning of the said expression as given in explanation to section 3(3) of the Act as the impugned agreement being an agreement between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, had the effect of eliminating or reducing competition for bids/ adversely affecting or manipulating the process for bidding. Thus, the opposite parties have contravened the provisions contained in section 3(3)(d) read with section 3(1) of the Act.

Order

43. In view of the above discussion, the Commission directs the opposite parties to cease and desist from indulging in such anti-competitive conduct in future which resulted in bid rigging.

44. As regards penalty under section 27 of the Act, the Commission notes that there are circumstances in this case which require the issue of penalty to be looked into somewhat differently. The facts as projected in the present reference reveal a complete lack of awareness by the opposite parties which are small and micro enterprises. The replies of many of these parties are effectively incriminating in nature. Further, none of these parties quoted for more than 50% quantity which was a requirement under the tender. Thus, right in the beginning the offers made by these parties were not in accordance with the requirement of the tender and hence they could not have got supplies as per the tender conditions. Moreover, the bid given by these parties was not the lowest and so they could not have been awarded the contract.

45. In view of the above facts and the circumstances of the case, the Commission is of the considered opinion that this is a fit case where imposition of penalty is not warranted and ends of justice would be met if a cease and desist order is issued under section 27(a) of the Act against the parties, as noted above.

46. The parties, however, are warned that if any person, without reasonable clause, fails to comply with the orders or directions of the Commission issued under sections 27 of the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine, as per the provisions contained in section 42 of the Act.

47. The directions in para 43 above, should be complied with immediate effect and the opposite parties are also directed to file an undertaking to this effect within a period of 30 days from the date of receipt of this order.

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

**Sd/-
Member (G)**

**Sd/-
Member (GG)**

**Sd/-
Member (R)**

**Sd/-
Member (AG)**

**Sd/-
Member (T)**

**Sd/-
Member (D)**

**Sd/-
Chairperson**