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Fair Competition  
For Greater Good

## COMPETITION COMMISSION OF INDIA

Ref. Case No. 05 of 2013

### In Re:

Director, Supplies & Disposals, Haryana

Informant

### And

- |                                  |                      |
|----------------------------------|----------------------|
| 1. Shree Cement Limited          | Opposite Party No. 1 |
| 2. UltraTech Cement Limited      | Opposite Party No. 2 |
| 3. Jaiprakash Associates Limited | Opposite Party No. 3 |
| 4. J.K. Cement Limited           | Opposite Party No. 4 |
| 5. Ambuja Cements Limited        | Opposite Party No. 5 |
| 6. ACC Limited                   | Opposite Party No. 6 |
| 7. J.K. Lakshmi Cement Limited   | Opposite Party No. 7 |

### CORAM

Mr. Devender Kumar Sikri  
Chairperson

Mr. S. L. Bunker  
Member

Mr. Sudhir Mital  
Member

Mr. U. C. Nahta  
Member

Mr. Justice G. P. Mittal  
Member



**Appearances:** Shri Vivek Gupta, Advocate for the Informant.

Shri Gopal Jain, Senior Advocate with Shri Manas Kumar Chaudhuri, Shri Gaurav Bansal, Ms. Kriti Awasthi and Shri Pranjal Prateek, Advocates for Shree Cement Limited (OP-1); Shri K. K. Talwar, Joint Vice President-Marketing and Shri Arun Pandita, Additional General Manager- Marketing of OP-1.

Shri Krishnan Venugopal, Senior Advocate with Ms. Nisha Kaur Uberoi, Ms. Neelambra Sandeepan, Shri Bharat Budholia and Shri Kaustan Kundu, Advocates alongwith Shri Paresh Thackar, General Counsel and Shri Subodh Sista, Manager for UltraTech Cement Limited (OP-2) and Shri Sanjay Mathur, CEO & Zonal In-Charge of North Zone (Marketing) of OP-2.

Shri Balbir Singh, Senior Advocate with Shri G. R. Bhatia, Ms. Tripti Malhotra, Ms. Kanika Chaudhary Nayar, Shri Abishek Bashel, Shri Ankit and Ms. Nidhi Singh, Advocates for Jaiprakash Associates Limited (OP-3); Shri Rahul Kumar, Director & CFO; Shri Sharad Agarwal, Sr. Joint President (Marketing) and Shri Atul Sapru, General Manager (Marketing) of OP-3.

Shri P. K. Bhalla, Advocate with Shri R. S. Paliwal, Senior Manager for J. K. Cement Limited (OP-4); Shri R. C. Shukla, President (Marketing); Shri Anoop Kumar Shukla, Vice President (Accounts) and Shri Manoj Kumar Gupta, AVP Marketing of OP-4.



Shri Ramji Srinivasan, Senior Advocate with Shri Harman Singh Sandhu, Shri Tushar, Ms. Nitika Dwivedi and Shri Vardhan Tulsian, Advocates alongwith Shri Kanaiya Thakker, Legal Head for Ambuja Cements Limited (OP-5).

Shri Jayant Mehta, Shri Karan Lahiri, Ms. Gauri Puri and Ms. Suveni Bhagat, Advocates for Shri Sunil Jain, Vice President (Marketing) of OP-5.

Shri Rajshekhar Rao, Shri Vikram Sobti, Ms. Gauri Puri and Shri Mehul Parti, Advocates for Shri Deepak Mehra, Joint President (Marketing) of OP-5.

Shri Jayant Mehta, Shri Vikram Sobti and Shri Mehul Parti, Advocates for Shri J. C. Toshniwal, Business Head (North) of OP-5.

Shri Ramji Srinivasan, Senior Advocate with Shri Harman Singh Sandhu and Ms. Nitika Dwivedi, Advocates alongwith Shri Bankatesh Kumar, DGM-Legal and Shri Raju Mishra, ACC- Head Legal for ACC Limited (OP-6).

Shri Rajshekhar Rao, Shri Varun Mishra and Ms. Meherunissa Anand, Advocates for Shri Sudeep Chatterjee, General Manager (Sales) of OP-6.

Shri Jeevan Prakash, Advocate alongwith Shri Pawan Bhardwaj, DGM (Sales) for J. K. Lakshmi Limited (OP-7) and Shri Sunil Agarwal, Senior Vice President (Marketing) of OP-7.



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## Order under Section 27 of the Competition Act, 2002

1. The present reference has been filed under Section 19(1)(b) of the Competition Act, 2002 ('the Act') by the Director, Supplies & Disposals, Haryana ('the Informant'/ 'DS&D') against Shree Cement Limited ('the Opposite Party No. 1'/ OP-1/ 'Shree Cement'), UltraTech Cement Limited ('the Opposite Party No. 2'/ OP-2/ 'UltraTech'), Jaiprakash Associates Limited ('the Opposite Party No. 3'/ OP-3/ 'JAL'), J.K. Cement Limited ('the Opposite Party No. 4'/ OP-4/ 'JK Cement'), Ambuja Cements Limited ('the Opposite Party No. 5'/ OP-5/ 'ACL'), ACC Limited ('the Opposite Party No. 6'/ OP-6/ 'ACC') and J K Lakshmi Cement Limited ('the Opposite Party No. 7'/ OP-7/ 'J K Lakshmi') (collectively hereinafter to be referred to as 'the Opposite Parties'/ 'OPs') alleging contravention of the provisions of Section 3 of the Act.

### Facts

2. The Informant is the central agency for procuring all stores required by various Government Departments, Boards and Corporations of the Government of Haryana. It issued a Notice Inviting Tender (NIT) for supply of 4 lakh MT of cement (Tender No. 4/HR/RC/E-2/2012-13, August 2012, hereinafter referred to as "impugned tender") in which the OPs, which are cement companies located in and around the State of Haryana, participated.
3. As per the information furnished, it was alleged that all the OPs have colluded with each other and attempted to rig the bid in the impugned tender which was for supply of cement to the Government Departments/ Boards/ Corporations in the State of Haryana. It was alleged that all the OPs had formed a cartel and quoted considerably higher rates than the existing contract rates (of August, 2011) in response to the impugned



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tender. Further, the OPs, acting in concert, collectively and deliberately quoted bids for substantially lower quantities as compared to the quantities they had been quoting in the past. Furthermore, the total tendered quantity quoted by the OPs had eventually been divided amongst them, so that each bidder could get the rate contract for the quoted quantity. The OPs even quoted different basic prices for supply of cement at the same destination for different categories, with or without VAT C3 form. The OPs had also quoted the rates in such a manner that they all acquire the lowest bidder status (L1 status) for supply of cement in at least some of the destinations. Thus, the Informant's allegation was that all the OPs had colluded with each other to rig the bid.

#### Directions to the DG

4. The Commission, after considering the entire material available on record *vide* its order dated 02.01.2014 passed under Section 26(1) of the Act, directed the Director General ('DG') to cause an investigation to be made into the matter.

#### Investigation by the DG

5. The DG, after receiving the directions from the Commission, investigated the matter and after seeking due extensions, submitted the investigation report to the Commission on 08.12.2015. During the course of investigation, the DG examined all the issues raised in the information in detail.
6. The DG concluded that OP-1 to OP-7 have colluded with each other to rig the bid in respect of the impugned tender issued by the Informant in the month of August, 2012, in contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Act.



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7. The DG examined the issue of quoting considerably higher rates than the existing contract rates negotiated in August, 2011, and noted that all the OPs have quoted substantially higher rates in the impugned tender of August, 2012 as compared to the rates quoted by them in August, 2011. During the period August 2011-August 2012, while the Wholesale Price Index (WPI) for grey cement increased by only 13.32% (as per the data of Office of Economic Advisor, Ministry of Commerce and Industry, Government of India), the average L1 price for the four different categories of cement was seen to have increased by 45.38% to 50.69%. Thus, there was a disproportionate price increase in the average L1 price which was about 3.4 to 3.8 times higher than the increase in WPI. In the year 2009 also, when there was an allegation of collusion and cartelisation amongst bidders, it was noticed that there was a sudden jump in the average L1 price as compared to the previous year, which was also disproportionate to the increase in WPI. However, in the years 2010 and 2011, when there were no allegations of collusion amongst bidders, there has been no disproportionate increase in the L1 prices. Based on a comparison between the growth in the average L1 prices across the four different categories of cement for the years 2008 to 2012 and on comparing the same with the growth in WPI of grey cement for the same period, it was noted that the increase in the average L1 price was substantially higher than the increase in WPI for the years 2009 and 2012. The huge increase in the average L1 price was noted by the DG as an aberration in the trend and was found to be indicative of price parallelism and collusive bidding.
8. Next, as compared to the quantity offered in the past years, it was observed that in the impugned tender of August, 2012, all the OPs have offered substantially lower quantities of cement which ranged from 30,000 MT (ACC Ltd.) to 1,05,000 MT (Shree Cement) out of 4,00,000 MT of tendered quantity in comparison with the previous year 2011 where OPs had quoted tendered quantity in a much larger range *i.e.* from 50,000 to



4,00,000 MT. This indicates that quantity quoted by all the OPs as a percentage of tendered quantity dropped drastically in the 2012 tender *vis-à-vis* the 2011 tender. The same trend was also observed in the year 2009 when there was an allegation of collusion. However, in the years 2008, 2010 and 2011 (in which no collusion was alleged), the OPs had offered quantities at much higher percentage of the tendered quantity. Thus, while in the years 2008, 2010 and 2011, the OPs were bidding for the whole or a large portion of the tendered quantity and were competing with each other, in the years 2009 and 2012, it can be seen that they were bidding low quantities and were not competing with each other. The total bid of all the OPs in the year 2012 adds up to 4,20,000 MT of cement, which is approximately equal to the tendered quantity (4,00,000 MT).

9. Further, examining the issue of quoting different basic prices for supply of cement to Government Departments and Boards/ Corporations located at the same destinations, it was noted that all the OPs have indeed quoted separate basic rates for the supply of cement at separate destinations. But they have also quoted separate basic rates for supply of cement at the same destinations. Thus, the basic rate was different at same destination for the supply of cement to the government departments (with VAT C3 form) and to the Boards and Corporations (without VAT C3 form).
10. It was noted by the DG that the OPs have attributed this difference to the back calculation of price from the final tendered price of each destination. However, no rational or logical basis or any computation could be furnished by any of the OPs to establish that there was any business/commercial justification to quote the specific tender price for the various districts.
11. Furthermore, on examination of the pattern of distribution of L1 status in the different tenders floated between 2012 and earlier years, it was found



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by the DG that there was a radical difference in the said pattern of rates quoted for the years 2012 and 2009 (where collusion was alleged) from the pattern of rates quoted in the years 2008, 2010 and 2011 (where no collusion was alleged). In the latter three years, it was observed that invariably two parties had bagged more than 100 destinations out of the 120 possible destinations. While some parties bagged only a few destinations, there were always a few parties who were unable to emerge as L1 in any of the destinations. This was indicative of competitive bidding as the parties with cost advantage or those bidding lower rates were bagging the majority of the tenders, while parties who were quoting uncompetitive rates were bagging no tenders. However, in the years 2009 and 2012, the pattern changed radically as a number of bidders acquired L1 status and there were no bidders (among the OPs) which bagged nil destinations. In 2012, the distribution of destinations among OP-1 to OP-7 was 30:12:26:21:12:6:16 respectively indicating clear distribution of destinations among the OPs. Thus, this was noted by the DG as indicative of the OPs acting in tandem and through meeting of minds.

12. Lastly, the DG examined the evidence from Call Details Records ('CDRs') of the mobile phones of the officials of the OPs. From the CDRs of the officials of OP-1 to OP-7, it was seen that all of them had been frequently communicating with each other through calls and SMSes over the entire period of one month up till the date of submission of bids for the impugned tender (*i.e.* for the period from 16.07.2012 to 16.08.2012) for which the CDRs were requisitioned. All these officials were senior functionaries in Marketing/Sales departments of the respective company and either played a crucial role in the finalisation of rates of the tender, or were themselves responsible as the final authority for deciding the tender rates. Some of them denied contacting each other in their Affidavits/ earlier part of statements on oath but later conceded that their submissions were incorrect when confronted with the CDR evidence. While none of them was able to





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recall the specific discussions made or the reasons for frequent calls (when their statements on oath were recorded), yet they were able to recall the particulars of the tender as is evident from their statements recorded by the DG on oath. All of them merely stated that these must have been social or personal calls. Later, some of them furnished *alibi* such as, 'general problem of industry', 'problem with the employees', 'seeking job opportunity', 'marriage of daughter' *etc.*, as the reasons for such communication.

13. In light of the above facts and findings of the investigation report, it was concluded by the DG that all the OPs were acting in tandem with each other and there was meeting of minds amongst them. The OPs were not competing with each other but rather accommodating each other with an understanding that each shall have a share in the supply of the impugned tender.
14. It was thus concluded by the DG that the evidences indicated that OP-1 to OP-7 had colluded to rig the bid in the impugned tender. This was noted to be violation of the provisions of Section 3(3)(d) read with Section 3(1) of the Act.

#### Consideration of the DG report by the Commission

15. The Commission in its ordinary meeting held on 23.12.2015 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties/ persons, as specified therein, for filing their respective replies/ objections thereto. The Commission heard the arguments of the parties/ persons on various dates and decided to pass an appropriate order in due course after conclusion of the arguments.



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### Replies/ Objections/ Submissions of the Parties

16. The OPs filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions.

### Replies/ objections/ submissions of OP-1/ Shree Cement

17. Shree Cement filed its response to the DG Report whereby a *seriatim* reply has been given to the DG's findings. On the issue as to whether the rates quoted by the OPs in response to the impugned tender (August, 2012) were considerably higher than the existing contract rates (August, 2011) and whether such high rates were justified, it submitted that the prevailing market price in the private institutional category at various destinations was a dominant factor for quoting prices in the impugned tender. The pattern of prevailing prices in the trade and non-trade segments during the one month period immediately preceding the bid submission date against the tender for 2012 (*i.e.* from 12.07.2012 to 10.08.2012) was suggestive of a positive outlook *i.e.* the prices were generally showing an upward trend for most part. Further, referring to the pricing pattern in the trade and non-trade segments for the period immediately prior to the bid submission against the tender for 2011 (*i.e.* 26.06.2011 to 20.07.2011), it was submitted that the same was suggestive of subdued market conditions.
18. While commenting on comparison of WPI with the increase/ decrease in L1 rates, it was contended that WPI is calculated based on grey cement prices on an all-India basis and not for the State of Haryana alone. It was submitted that the DG has merely relied upon the information filed by the Informant without conducting any assessment of the relevance of the WPI data and arrived at an adverse conclusion against Shree Cement.



19. It was further submitted that there was a negative correlation between L1 price and WPI for the years 2010 and 2011. It was submitted that while the L1 price decreased by 20.3% and 8.4% for the years 2010 and 2011 respectively, the WPI during the said years increased by 1.97% and 0.93% respectively. Though, the DG concluded that the trend analysis was indicative of price parallelism, but he failed to provide any assessment of the similarity in the prices quoted by the OPs. Rather, the DG compared the L1 prices with WPI.
20. On the issue of whether the OPs quoted substantially lower quantities as compared to the previous years so as to divide the quantity tendered amongst themselves, it was submitted that the low off-take of quantities by DS&D during the years 2009, 2010 and 2011 (*i.e.* average quantity lifted was 108,438 MT) was considered by Shree Cement to offer lower quantities in the impugned tender. NIT has a long lock-in period and Shree Cement considered the buoyant market conditions in private institutional sales and then took a commercial decision not to lock-in larger quantities for the NIT. It was pointed out that 85% of the total institutional sales comprise of private institutional sale. Further, it was stated that in the tenders for the years 2010 and 2011, Shree Cement experienced that after locking quantity with DS&D, prices generally moved upwards during the tenure of the tender. The DS&D tender prices remained substantially below the prevailing market prices in the private institutional segment and thus, at various points of time, Shree Cement lost the opportunity to supply cement at better and remunerative prices as a result of locking quantities with DS&D. High capacity utilisation in 2012 also led Shree Cement to take a commercial call not to block its quantities for over one year in a government tender. DS&D tender provides the total quantity of cement to be supplied in the State of Haryana but does not provide individual break-up of the quantities to be supplied at each of the locations. Thus, there remained an uncertainty regarding the quantities to be allocated, ordered



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and lifted for the bidders.

21. It was further submitted that DS&D may even alter the quantity offered by any bidder either downwards or upwards creating an uncertainty. It was further pointed out that the DG has considered capacity utilisation for the year 2012-13 (including the period after NIT) for the purpose of its analysis. However, analysis of a period after the tender date is not logical as at the time of submission of bid, no one could predict whether there would be any unutilised capacity or not after the period of the tender. The DG has also failed to consider and analyse the declining trend of quantity quoted by the OPs from the year 2010 to 2012.
22. On the issue as to whether the parties had a rational basis for quoting different basic rates for supplying cement at the same destination with VAT-C3 Form and without VAT-C3 Form, it was submitted that the DG had accepted that backward pricing method explained the discrepancy in the basic price. Further, it was submitted that different basic prices at same destinations were also quoted in the previous DS&D tenders for the years 2010 and 2011 which were never questioned by DS&D before the impugned tender. The DG misunderstood that basic price and *ex*-factory price were same. It was pointed out that *ex*-factory price is the price of cement for a customer who wishes to take delivery at the company's factory gate and the subsequent freight is taken care of by the customer. In this case, the company would quote an *ex*-factory price that includes all applicable taxes and its profit margin. On the other hand, 'basic price' as quoted in the tender document is nothing but a back calculated figure. The company first determines the destination-wise FOR price (that it thinks is winnable) and deducts from it the components of estimated freight and taxes to arrive at the basic price. The 'basic price' is thus, the residual derived figure determined by back calculation and is not the same as '*ex*-factory' price. It was submitted that the DG's focus then shifted from basic



price to quoted prices. It was explained that bid prices were determined on the basis of market prices. Mere absence of calculation sheet is not sufficient for the DG to conclude the existence of a cartel. Cement being a dynamic industry, prices change frequently and there is no settled formal pricing mechanism.

23. On the DG's conclusion that the OPs bid/ quoted rates for the tenders in a manner such that all the OPs acquired the lowest bidder status for supply of cement at some destinations, it was submitted that the DG's conclusion for the 2009 tender was completely baseless, since there were 246 L1 status out of 120 price destinations. It was pointed out that Cement Corporation of India (Cement Corp) and Birla Corporation (Birla Corp) also received 38 and 30 locations in the 2009 tender.
24. The data provided by the DG suggested huge variation in L1 status of each OP, Shree Cement receiving the highest number of L1 status *i.e.* 30, ACC receiving the lowest number of L1 status *i.e.* 6 amongst the OPs and Birla Corp receiving the lowest number of L1 status *i.e.* 3 among the bidders. It was submitted that it is difficult to construe incentives for the parties receiving lower number of L1 status and losing out on their business to other parties receiving substantially higher L1 status in a collusive agreement.
25. Further, it was contended that the DG's analysis of dissimilar prices at adjoining destinations based on freight charges is incorrect. Bid prices are based on prevailing market prices. The DG again applied forward pricing mechanism and not backward pricing as done by Shree Cement. It was also stated that freight charge is not a relevant criterion as Shree Cement can choose to supply from any of its plants. The DG has considered that the supplies were made from Khushkhera plant only and has come to a conclusion that Shree Cement has quoted higher prices for Rewari and



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Narnaul which are closer to Khushkhera compared to Sirsa. However, it failed to take into consideration that Sirsa was closer to Suratgarh plant that would be ideal for supplies to Sirsa. It was further pointed out that notwithstanding the DG accepting the discrepancy in basic prices, he still compared basic prices for Chandigarh and Yamunanagar. The DG has propounded his own theory stating that in competitive bidding, one would expect only 2-3 winners and has proceeded on the same. In the impugned tender, there was no equal division since there were 126 L1 destinations out of 120 price destinations.

26. Adverting to the evidence of CDRs produced by the DG with respect to the call made by Shri Talwar of Shree Cement to Shri Sunil Mathur (UltraTech) on 16.08.2012, it was submitted that both Shree Cement and UltraTech had submitted their tenders on 15.08.2012 itself. Shri Talwar has in his written submission to the DG dated 15.09.2015 stated that the said call may have been related to a job opportunity in UltraTech. However, the deposition statement of Shri Mathur has not been recorded by the DG as he was in Dubai at the time.
27. With respect to the call made by Shri Talwar to Shri Sunil Agarwal of J K Lakshmi on 16.08.2012, neither the DG Report nor the Annexures to the DG Report are clear with respect to the date on which the bid was submitted by J K Lakshmi. Further, it was submitted that Shri Talwar in his written submissions made to the DG has stated that the said call was made to Shri Sunil Agarwal (J K Lakshmi) due to some issues with respect to the behaviour of one of the employees of J K Lakshmi. The said statement has been corroborated by Shri Sunil Agarwal during his deposition before that DG.
28. Out of the 92 communications presented by the DG, 43 (*i.e.* approximately 47%) pertain to a period even before the intimation of the impugned tender



in August, 2012. The DG has nowhere produced the contents of the conversations made over the alleged calls and on the basis of which the DG has drawn an adverse inference.

29. The DG has also failed to investigate all the cement companies who participated in the impugned tender *i.e.* Cement Corp and Birla Corp. Prices quoted by Birla Corp were also higher by 49-62% compared to the tender prices quoted by it in tender year 2011. The increase was higher than what has been observed in case of the OPs.
30. It was argued that the DG in the investigation report has drawn an adverse inference on the basis that prices quoted by Shree Cement and the other OPs for supply of cement at the same destination “with VAT C-3 form” and “without VAT C-3 form” could not have been different. However, the DG has nowhere in the investigation report considered the basic prices quoted by Birla Corp and Cement Corp to analyse if their quoted basic prices “with VAT C-3 form” and “without VAT C-3 form” for same destination, were also different or not.
31. The total demand of the Informant in the impugned tender was to the tune of 4,00,000 MT of cement and with the unilateral omission of Birla Corp and Cement Corp from the array of bidders, the offered quantity dropped from 5,00,000 MT to 4,20,000 MT at the discretion of the Informant.
32. In the minutes of the High Powered Purchase Committee (HPPC) meeting held on 05.09.2012, it has been recorded that the representatives of both Birla Corp and Cement Corp also attended the said meeting of HPPC. Therefore, on a careful analysis of the HPPC minutes, it becomes clear that the observations made by the HPPC were made with respect to all the nine bidders and not with respect to only the seven OPs.
33. The DG has cherry-picked only a few submissions made by Shree Cement,



while choosing to ignore their material submissions made during the course of investigation *i.e.* the DG did not rely in his report the reply dated 16.05.2014, result of forensic report, hotel bills, credit card bill *etc.* which supported Shree Cement. The DG has also failed to test the veracity of the minutes of the HPPC meeting. It was submitted that Shree Cement offered to reduce prices by only Rs 4/- per bag and not by Rs. 5/- as alleged. The DG has also used uncorroborated details and minutes of HPPC meeting relating to 2009 tender to draw adverse inferences against the OPs.

*Replies/ objections/ submissions of OP-2/ UltraTech*

34. OP-2 in its reply to the DG Report, submitted that the Commission should set aside the findings of the DG in relation to UltraTech. It was submitted that there is no logic in attempting to coordinate bids by product and destination in the Informant's tenders as the quantities to be allocated are not specified in the NIT and it is impossible to predict based on past experience or otherwise. Further, the winning bids do not reflect a pattern commensurate with the market shares/ power of the respective bidders. In fact, the pattern of the winning bids is not reflective of either the production capacities of the bidders available in the local region or the overall market power and strength of the OPs.
35. Going by the DG's own conclusion that Birla Corp and Cement Corp did not participate in the alleged bid-rigging, the alleged bid-rigging by dividing the market amongst the seven Ops could easily have been defeated by the two bidders who did not participate in the alleged bid-rigging, thus making any such alleged bid-rigging unviable and impracticable.
36. It was further contended that it would be extremely difficult, if not impossible, to co-ordinate upto 120 different quotations among seven





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different bidders. The DG has not found any such evidence of meeting of minds except relying on some alleged telephone calls of a few seconds or minutes and a few text messages that were exchanged amongst the executives of the OPs without any evidence as to what was actually discussed in these telephone calls or text messages.

37. Alternatively, it was contended that assuming that the OPs intended to divide the market amongst themselves, the resulting quantities that could potentially be won by each bidder were so small that it would not make any real difference either to profitability or to maintaining the market share, let alone to the survival of the OPs given their huge production capacities. In UltraTech's case, even assuming that the Informant did lift the entire quantity of 75,000 MT that UltraTech had offered, the total profit of UltraTech by the same could not have exceeded a few crores of rupees (approximately INR 5 to 6 crore) which as compared to its annual revenue of INR 20,023 crore for the financial year ended 31.03.2013 is very less. Therefore, the repercussions of engaging in collusive bidding far exceed any potential profit/ benefit of engaging in the same, thereby leaving no incentive or motivation for UltraTech to collude with any cement company in relation to the impugned tender.
38. It was also pointed out that the DG's reliance on CDRs to support the finding that the OPs co-ordinated filing of their bids is actually contrary to the facts on record. According to the DG, the 20 second call on 16.08.2012 at 12:07:02 was the signal for the alleged bid-rigging cartel to file the bids. However, UltraTech, along with four other OPs had already filed its bid on the day before *i.e.* on 15.08.2012.
39. The DG has also excluded 2 of the bidders (*i.e.* Birla Corp and Cement Corp) on the ground that their conduct in the impugned tender was similar to their earlier conduct without analysing their conduct at all or taking into account that the prices and quantities offered by them in the impugned



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tender were broadly similar to those quoted by the OPs in the same tender.

40. It was submitted that the rates quoted by the OPs were not higher than the prevalent rates. The prices quoted by UltraTech in the NIT were comparable to the prices prevalent at the time of submission of the bids at various places in Haryana. Given that the NIT was called for settling the annual rate/ contract prices for supply of cement in the future to various destinations in Haryana, the final prices quoted by the bidders also took into consideration the future anticipated prices, based on various factors including future demand and supply, expected cost of raw materials, freight cost, taxes *etc.*
41. It was submitted that while dealing with the State of Haryana, UltraTech charges a price lower than its prices for trade and/or non-trade segment.
42. Objection was also taken to the DG using WPI as a tool to measure prices. It was submitted that the relationship as sought to be drawn between WPI and L1 rates by the DG was completely erroneous and the DG's observation that the increase in WPI was significantly lower than the increase in the average quoted price of cement (from 2011-2012) has no bearing on the matter under investigation. WPI is an imperfect indicator of increase in prices and actually reflects only an increase in demand in the economy. The use of WPI for economic analysis has been heavily criticised by the International Monetary Fund also. To the extent that WPI is an indicator of demand and inflation in the larger economy, it would appear that when the market demand is low, cement prices fall disproportionately. On the other hand, as soon as demand picks up, cement prices rise sharply to make up for the fall in the previous years.
43. It was further argued that reliance on WPI and the conclusion derived therefrom is patently erroneous as WPI is based on current/ historical data



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and does not and cannot take into consideration the factors at play in the future for the purpose of making a long term price commitment.

44. On the issue as to whether the OPs had quoted/ bid substantially lower quantities as compared to past years to divide the quantity tendered, it was submitted that UltraTech's decision to quote lower quantities was based on a sound commercial reasoning linked to its previous experiences in similar tenders. However, without providing any well-reasoned arguments, the DG has dismissed the explanations provided by UltraTech for quoting lower quantities in response to the NIT.
45. Further, the DG has made a fundamental error in determination of UltraTech's actual capacity by taking into account production that had not yet stabilised. UltraTech had added new capacities in 2009, 2010 and 2011 - all of which required time to ramp up to full capacity. By taking into account capacity that had not yet ramped up to full capacity, the DG artificially expanded UltraTech's production capacity to reach the false figure of underutilised capacity of 20,39,000 MT.
46. It was also argued that quoting different basic prices for supply to the same destination does not evidence bid rigging. Basic price is distinct from *ex*-factory price of cement as the calculation of basic price is based on various factors, including the prevailing market price at a particular location for non-trade segment, price in the neighbouring district or the average price in the State of Haryana, and the same must be distinguished from *ex*-factory price. Cash terms, credit terms, period of supply, firm prices for the preceding 12-month period, prevalent discounts, *etc.* are also taken into consideration for the purpose of calculation of basic price at a particular location.
47. It was submitted that the bid document did not ask the bid participants to submit an '*ex*-factory price' and instead asked for a 'basic price', the



elements of which were not defined.

48. On the issue as to whether the OPs have bid/ quoted rates for the tenders in such a manner so that all the OPs acquire lowest bidder status (L1 status) for supply of cement at least at some destinations, it was submitted that there is no incentive for UltraTech to accommodate any of its competitors in any manner by quoting prices in conjunction with them or in order to facilitate their bids. UltraTech competes fiercely with each of the other OPs referred to in the DG Report in both the trade and non-trade segments in the State of Haryana and has submitted competitive bids based on its own market analysis and costing, with a view to maximise market share and profits.
49. In the present case, while the NIT provided a list of districts for which bids were invited and also the total quantity for which tender was sought, there was no demarcation of demand from each district. Therefore, there was no possibility for the OPs to dissect the market and divide it amongst themselves in such a manner that each of them is allocated an identified quantity of cement and guaranteed a good profit. The OPs were not in a position to predict the actual quantity that would have been lifted by the Government of Haryana.
50. Cumulatively responding to as to whether the above facts are indicative of collusive bidding and whether the OPs are guilty of collusive bidding/ bid rigging, it was submitted that the calls referred to by the DG between Shri Sanjay Mathur (UltraTech) and his counterparts in other cement companies were in the nature of social calls and conversations were in relation to industry concerns. Cement industry is an industry where people engaged in higher functions within the organisation have been a part of the industry for many years and accordingly also know their counterparts in other companies (either on account of multiple jobs in their career track or



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socially) and it is certainly not unusual for people in the same industry to know each other and be in touch with each other socially. Therefore, no adverse inference can be drawn based purely on the fact that a few calls were exchanged as there are several different reasons for such calls and the DG must establish an 'agreement' on prices or quantities to be able to conclude that UltraTech had indeed engaged in collusive bidding. As such, the DG has not found any such evidence of meeting of minds except to rely on alleged telephone calls of a few seconds/ minutes and a few text messages among the executives of the seven OPs without any evidence as to what was actually discussed in these telephone calls or text messages.

51. Lastly, it was submitted that the DG has utterly failed to demonstrate that any conclusive evidence exists in this case and instead he has built his case on pure speculations and suppositions.

*Replies/ objections/ submissions of OP-3/ JAL*

52. It was submitted that the DG has wrongly placed reliance on WPI for the purposes of assessing the justifiability of the prices/ bids quoted by JAL for the impugned tender. The DG has grossly erred in employing WPI as a tool for measuring the increase in bid prices. WPI is a tool which monitors the inflation rate of commodities at pan-India level; thus, the DG could not have applied it in analysing prices in a regional market. Such an exercise is bound to produce erroneous results. As a result, the DG should not have considered WPI as the benchmark for assessing unreasonableness of increase in market prices in Haryana. The DG was wrong in suggesting that there should have been a correlation between the WPI and bid prices for the impugned tender. A fall or increase in bid price cannot be related to the WPI. The DG's understanding and application of the WPI data is highly questionable and lacks merit.



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53. It was further submitted that JAL's prices were greatly influenced by the cement prices in the trade segment. It was stated that JAL would only participate in a particular tender if it was able to achieve prices similar to or near to those it can realise from sale in the trade and non-trade segment from its existing customers. JAL would have limited incentive to supply cement at significantly lower prices, in particular in periods of favourable market conditions. JAL's average price for both the segments *i.e.* trade and non-trade, were similar around August, 2012. The similarity in prices for both the segments strongly rebuts the DG's finding that JAL cartelised and quoted higher prices for the 2012 tender.
54. In 2012, JAL increased its overall pricing for all its customers. JAL could be said to have cartelised if it would have charged higher prices only in the 2012 tender while the prices for other customers remained stagnant. However, JAL increased its prices across the board. The decision to increase prices in 2012 was uniformly applied to all segments and for all customers. Hence, JAL cannot be held to have cartelised merely because it increased its prices for the 2012 tender. The DG has not explained as to why the bid prices for the 2012 tender should be significantly lower than the prices prevalent in the trade and non-trade sector or for that matter in North India as a whole. It was submitted that while making its price bid, JAL took into consideration the rate at which purchase orders were procured from the Industrial/Institutional buyers. Based on the above, and various other factors including availability of raw material, incremental cost, cost of production, market conditions *etc.*, JAL quoted its bid prices for the 2012 tender. It was also pointed out that as per DG's own analysis, JAL emerged at LI position for as many as 26 times and became the second lowest bidder for the 2012 tender, after Shree Cement. The fact that JAL has been the LI bidder 26 times depicts its competitiveness and that the prices quoted by it were not at all excessive. If the prices quoted by JAL were excessive as alleged by the DG, JAL would not have been the LI



bidder at so many destinations.

55. Furthermore, it was pointed out that Birla Corp won only 3 bids out of 126, which would not have been possible if it was not a part of the alleged cartel. As per the DG's own findings, each of the OPs had quoted excessive prices as a result of the alleged cartel between them. Since Birla Corp was not a cartel participant as per the DG, it was expected to have quoted the lowest prices, given that all the other cartel members had quoted extremely excessive prices. If Birla Corp was not a part of the alleged cartel, it would have ended up quoting the lowest. Despite not being a cartel member, Birla Corp ended up quoting more than the other manufacturers, which proves that the prices quoted by the OPs were lower and more competitive.
56. It was also averred that unless the quantities quoted by Birla Corp and Cement Corp are considered, the data remains flawed which renders the same unreliable and leads to erroneous conclusions. It is relevant to consider that the DG has stated that as a result of cartelisation, the OPs have quoted lower quantities in the tender. The DG, however, failed to take into consideration the quantities quoted by Birla Corp and Cement Corp. As evident from the data available, Birla Corp has quoted as much as JAL has quoted. For that matter, Cement Corp has quoted even a lower quantity than JAL. Hence, if JAL has been said to have colluded for under-quoting, Cement Corp and Birla Corp ought to have been painted with the same brush as well. The DG cannot apply different set of rules for similarly placed bidders. If JAL has been held liable for colluding when it quoted as much as 50000 MT, Birla Corp which quoted 50000 MT or Cement Corp which quoted 30000 MT ought to have been considered with the same yardstick also. Either they should have also been held liable for colluding or the benefit of doubt extended to them should have also been extended to JAL and the other OPs.



57. A drop from 240000 MT to 120000 MT to 50000 MT cannot be termed as 'sharp' or 'sudden reduction' in quantities. This, in fact, proves that the present tender business was not lucrative for JAL and hence, it was reducing the quantity quoted by it.
58. Further, as per the DG's own analysis, Birla Corp was not a part of the alleged cartel. It is, however, relevant to consider that Birla Corp won only 3 bids, which would not have been possible if it was not a part of the alleged cartel. Therefore, the DG has wrongly noted the ratios in which L1 bids have been won by the OPs. He has omitted to take into account the 3 L1 positions won by Birla Corp and the said fact demolishes the DG's entire finding. The DG has failed to address that if the OPs have acquired L1 status at some district or the other, how they missed out on acquiring L1 status at 3 destinations.
59. It is also difficult to comprehend the DG's logic behind noting that given the L1 trends, a cartel allegedly existed in the years 2009 and 2012, but not in the years 2010 and 2011. It is impossible to even fathom that a cartel existed for a particular year, then it was discontinued for the next two years and then it continued again. The present analysis goes against the very logic behind the existence of a cartel.
60. Next, it was argued that JAL, as submitted earlier, was the L1 bidder for as many as 26 times, depicting its competitiveness. It was submitted that JAL bagged the L1 position for as many as 26 times and became the second most successful contender/ lowest bidder in the 2012 tender after Shree Cement. In this regard, it was pointed out that while J K Cement, JAL and Shree Cement had bagged the L1 status for 21, 26 and 30 times respectively, ACC was awarded the L1 status only 6 times. Similarly, UltraTech and ACL were awarded the L1 status merely 12 times. As against the allegations levied by the DG, the present data clearly depicts





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that L1 status were neither divided amongst the bidders/ the OPs nor pre-decided amongst them. The current distribution of L1 status is rather depictive of cut-throat competition between the bidders. Looking at the available data, the DG could not have possibly concluded that the OPs had colluded and fixed the number of L1 places. For a cartel to function, there has to be equivalent incentive for each member and going by the current distribution of the L1 status, there is no equivalent distribution of L1 positions.

61. In any circumstance, it was submitted that it was inconceivable that a single bidder would obtain L1 status at all the 30 destinations covered in the tender when there were 126 bids spread over nine bidders. It seems to be a far-fetched conclusion that all 126 bids were rigged and based on collusive pricing by the OPs. The bids submitted by JAL were on the basis of prevailing market rates for industrial/institutional buyers and other market conditions.
62. It was further submitted that even if it is assumed that JAL quoted its rates in such a manner that all the bidders acquire L1 status for the supply of cement at some destinations covered in the tender, even then there was no certainty of the quantity JAL would have got, against the bid quantity, on the basis of L1 status. In view of this, there was no reason for JAL to collude with the other OPs in quoting rates for the impugned tender. Hence, the allegation that JAL quoted its prices in such a manner that each cement manufacturer acquires some L1 status is patently incorrect, baseless and devoid of merit.
63. Furthermore, the fact that all the OPs acquired L1 status at some destination or the other does not go on to substantiate that the parties had colluded. With a tender inviting over 126 bids, it cannot be expected that a single bidder becomes the L1 bidder for all the bids. But for a cartel to



exist, a uniform distribution of L1 status ought to have been there. An inconsistent and varying distribution of L1 positions is rather depictive of perfect competition. It was submitted that the present segment is less lucrative for any cement manufacturer for various reasons including high countervailing buyer power, subsequent negotiations done by the institutional buyers, risk of lower off-take by it *etc.* Like any other prudent manufacturer, JAL prefers to earmark its production capacity for the trade segment buyers rather than offering higher quantities to institutional buyers.

64. Further, it was contended that the main reason behind the decrease in the quantity tendered in the past years relates to the fact that JAL has been awarded lower quantities as compared to the quantities offered in all these years (except in the year 2011 wherein additional quantity was awarded as the Informant had reserved with itself the right to increase the quantity at any stage). Further, the quantities indented by the Government departments and board/ corporations are always lesser than the quantities awarded.
65. It was also explained that JAL took an independent decision to quote less quantity for the 2012 tender and the DG cannot use this against JAL to arrive at a conclusion that it colluded with other cement manufactures. If this would have been the case, JAL would not have taken an independent decision in October, 2012 of not participating in the re-tender. This decision also proves the fact that JAL has been quoting independently for the tenders. This holds JAL in complete contradistinction from other OPs and confirms the fact that it did not act in concert with any other manufacturer.
66. The fact that JAL did not bid for the subsequent re-tendering proves that the present tender business was not lucrative for JAL and it was not colluding with any other cement manufacturer.



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67. It was submitted that not only the present tender business is less lucrative for JAL, but also the terms and conditions of the tender were highly onerous and one-sided. Under Clause 9 of the tender, the Informant reserved a right to forfeit the earnest money in case offers are withdrawn. Under Clause 6 of the 'General Instructions', the Informant reserved the right to forfeit the money if the bidders failed to deposit the requisite amount of security within 10 days from the date of issuance of letter of acceptance or if they withdraw the offer of acceptance. Under Clause 1 of the 'General Instructions' issued by the Informant, the Informant reserved the right to increase or decrease the quantity at any stage.
68. It was therefore, argued that such conditions give the Informant unguarded power to vary the quantity awarded at any stage and expose the bidders to high risk for loss as any increase in quantity awarded has to be supplied at the cost of trade sale and industrial/institutional sale where the prices are more remunerative than the prices awarded by the Haryana Government. Similarly, in case of decrease in quantity awarded, the production capacity remains idle or inventory level goes up. Further, Clause 17 (the fall clause) of the 'General Instructions' imposes a price uniformity condition on JAL all throughout the tender year (2012 - 2013) *i.e.* the bidders are bound to maintain the lowest price that they have offered to the Informant for all the subsequent orders. Furthermore, the Informant is at liberty to alter the quantities at any point which can effectively expose the manufacturer to great loss if it has quoted higher quantities that remain unindented at the conclusion of the tender year. Therefore, JAL deemed it most appropriate and financially viable to quote the stipulated quantities so as to avoid any loss that it might incur in case the Informant does not lift the reserved quantity.
69. On price similarity, it was submitted that the cement industry is oligopolistic in nature and no player can be said to be dominant in India as



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per the prevailing market structure. The nature of product being homogeneous facilitates oligopolistic pricing which cannot be termed as conscious price parallelism. The cement industry is characterised by 12 cement manufacturers having about 75% of the total capacity in India and about 21 cement manufacturers controlling about 90% market share in terms of capacity. The DG has simply chosen to ignore the fact that there are a large number of oligopolies around the world which are not cartels. The cement market is in reality highly competitive in nature given the degree of inter-firm rivalry, variation in prices and production between firms, large number of dealers, new entrants and expansion by existing producers. Cement, being a commodity of uniform quality, is sold in a narrow price band. The records produced would disclose that prices of cement at times have risen and have also come down from time to time.

70. It was further submitted that the present case is of an oligopolistic market wherein the products supplied are identical in nature and are perfect substitutes for each other. Therefore, price parallelism can occur between firms even though they have not colluded with each other. This is because in any oligopolistic market, competitors tend to follow each other and each would be having an eye on the other to see what its behaviour will be. Mere price parallelism cannot indicate collusion as it might be a consequence of interdependence in a market that is oligopolistic in nature.
71. It was further submitted that an oligopolistic market cannot *per se* be concluded to be a cartelised market. The DG failed to understand that 'oligopoly' is a market structure and is an indispensable precursor to the 'perfectly competitive market'. It is a well accepted fact in economic theory and practice that oligopolies will factor into their pricing decisions, the probable decisions of their competitors and as a result, similarity in pricing will be observed.



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72. In light of the above submissions, it was submitted that given the facts and circumstances of the present matter, no penalty ought to be levied on JAL. It was reiterated that JAL cannot be held liable for excessive pricing or price parallelism or quantity under-quoting. JAL did not collude with the other OPs in order to secure L1 status. However, without prejudice to the submissions made, assuming *arguendo* that a violation has occurred, it was submitted that if penalty is levied by the Commission, then the same ought to be calculated on the basis of 'relevant turnover/ profits' of the particular tender in question or in the alternative, at the broadest level, on the profit/ turnover of the cement division of JAL only. JAL's business practices and policies are in conformity with the provisions of the Act. JAL, therefore, submitted that the DG Report merits an outright rejection.

*Replies/ objections/ submissions of OP-4/ J.K. Cement*

73. At the outset, it was submitted that J K Cement is a multi-product public limited company engaged in the business of manufacturing and marketing various varieties of cement and other building solution materials at its manufacturing facilities located in the States of Rajasthan and Karnataka. The sale and supply of grey cement in North Indian market including the State of Haryana is met from its manufacturing facilities located at Nimbahera and Mangrol in Chittorgarh district of Rajasthan.

74. Alluding to the findings of the DG, it was submitted that the findings of the DG in his report are flawed, misleading and erroneous. There is complete disregard in the Report for well settled principles of competition law and economics and the findings of the DG are contrary to the jurisprudence evolved by the Commission so far. It was submitted that the Informant is under no obligation at all to take supply or lift the quantity of cement, in full or part, for which an order may have been awarded to a successful bidder; however, the bidder cement company is obligated to



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supply cement against the order awarded to it and therefore, expected to keep such quantities of cement bounded for the entire period of contract. There is thus, always an uncertainty as to whether the Informant would lift or take supply of the quantity of cement for which order has been awarded or not. The bidder therefore, runs the risk of losing market share during the one-year period if the Informant does not lift the quantity of cement for which it has been awarded the order.

75. J K Cement has been a regular supplier of cement to the Informant for the last many years. However, the experience of J K Cement has been that notwithstanding the offer of higher quantities for supply of cement, the Informant has never lifted the entire quantity of cement for which it had awarded the order. The record of supply orders for lifting against the awarded quantity has not only been erratic but has also been significantly lower than the quantities offered by the answering OP and the orders awarded by the Informant.
76. It was submitted that the subject tender was issued in August, 2012 for supply of 4 Lac MT of cement at thirty (30) different locations. In response to the said tender, as per the Informant, nine bidders submitted their bids. It is an admitted fact that nine cement companies had made the bid in response to the subject tender to supply an aggregate quantity of 500,000 MT of cement which was 25% (twenty five percent) higher than the requisitioned quantity. However, for some inexplicable reasons and without any intelligible criterion, the Informant and the DG decided to select only seven of such bidders as the OPs for the purposes of present inquiry.
77. J K Cement made its bid for 30 locations but was declared L1 only in five locations viz. Jind, Bhiwani, Mahindergarh, Narnaul and Charkhi Dadri. As per the terms of the impugned tender and the practice followed by the



Informant, all the successful L1 bidders were invited for negotiations on 05.09.2012 before HPPC. In the said meeting, the Chairman of the HPCC meeting required the successful L1 bidders to further reduce the prices. However, the bidders present at the meeting tried to reason out their inability to further reduce the prices given the prevailing market conditions. However, as a sign of respect for the Chairman, they offered to reduce the price by Rs. 5/- per bag. This appeared to have annoyed the Chairman who told the bidders present that if they do not agree to reduce the price as demanded by him, he would make a complaint to the Competition Commission of India against the cement companies alleging that these cement companies were acting like a cartel and demand an investigation.

78. It was further submitted that the alleged parallel behaviour by the OPs being examined by the DG has been explained by the DG itself in the Report. However, to establish concerted action, additional tangible evidence should exist besides mere parallel behaviour. The element of meeting of minds or coordinated action is *sine qua non* for existence of an agreement as defined in Section 2(b) of the Act.
79. The parallel behaviour of the OPs needs to be substantiated with additional evidence or plus factors. Unless such behaviour is conscious, deliberate and concerted, it cannot and shall not be categorised as tacit arrangement. However, even in the case of a tacit agreement, meeting of minds or concerted approach has to be present. Tacit agreement is to be proved by circumstantial evidence which should point out to higher preponderance of probability. There is nothing in the DG Report to indicate that any agreement or a tacit arrangement has been arrived at by and between the OPs.



80. For any concerted action, there has to be more than one person and more importantly, there has to be a platform. The platform could be either an association or a joint meeting where such persons could meet and strategise their concerted action. The DG has not been able to give any indication of existence of any such platform in his entire Report but has relied upon completely irrelevant material to support his findings.
81. It was further submitted that in a coordinated or concerted action falling under the mischief of the Act, a nod or wink is given by the market/geographical leader by increasing the price or controlling the supply or by indicating sharing of the market space which is then followed by the other players. However, this phenomenon has to be proved by a number of instances to mitigate the possibility of any different inference. That phenomenon is absent in the present case as the DG has not identified any market leader and any coordinated action by the other players in his Report. There is absolutely no material on record like any agreement or statement of any person or any other kind of evidence to suggest that there is any tacit understanding between the OPs which is anti-competitive in nature. The DG has placed heavy reliance on the CDRs collected from various mobile telephone companies in an effort to substantiate the alleged concerted action by the OPs. It is pertinent to point out that none of the officers or employees of J K Cement is reported in the DG's Report to have made any telephone call or sent any text message (SMS) to any of the other OPs or any of their officers or employees. However, Shri R.C. Shukla, the then President (Marketing) of the answering OP received only three calls and four messages over the entire period of two months for which the CDRs have been placed on record by the DG. None of the calls received by Shri R.C. Shukla lasted for more than 52 seconds and it is therefore, difficult to fathom as to what could have been discussed by Shri Shukla regarding the impugned tender within such short period of 52 seconds. There is no detail or any information placed on record by the DG regarding





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the four text messages received by Shri Shukla from the persons listed in the CDR record and therefore no reliance can be placed on these text messages. None of the persons examined by the DG has claimed that they ever discussed any matter relating to the impugned tender with Shri Shukla or any other officer or employee of the answering OP. It is, therefore, submitted that in view of all these factors, no adverse inference can be drawn against the answering OP that it was involved in any activity which is violative of the provisions of the Act.

82. The DG has also failed to establish, in unambiguous terms, any agreement between the OPs, duration of such agreement, when and how commercially sensitive information was exchanged between the OPs, what were the terms and conditions of the agreement/ arrangement between the OPs and whether there was any element of mutuality between the OPs. The CDRs heavily relied upon by the DG have hopelessly failed him as they do not even remotely suggest any understanding between the parties and mere few seconds talk occasionally between one person and another does not lead to the inference sought to be drawn by the DG in his Report that the OPs were engaged in anti-competitive activities as alleged or at all. There is absolutely no data placed on record by the DG to support the conclusion as regards the appreciable adverse effect on competition arising out of the alleged impugned conduct.

83. On the allegation that all the OPs had colluded with each other and attempted to rig the bid in the impugned tender, it was submitted that the conclusion arrived at by the DG is completely unwarranted, which is very general and vague without any material on record to support such a conclusion. Besides, the same is also tentative. There is no definitive finding of bid rigging by the DG but only the possibility of bid rigging which might or might not have happened. The DG has found no evidence of collusion between the OPs and there is absolutely no material placed on



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record like any agreement or statement of any person or any other kind of evidence to suggest that there was any tacit understanding between the OPs which is anti-competitive in nature.

84. Responding to the allegation that the OPs formed a cartel and quoted considerably higher rates than the existing contract rates (of August 2011), it was submitted that the allegation has been made by the DG on the basis of purported parallel behaviour of the OPs. The DG has erroneously found cartelisation by the seven OPs while there were nine participants in the subject tender. There is absolutely no justifiable criterion for cherry-picking these seven OPs only. The DG has erroneously concluded that the rates quoted by the OPs were considerably higher than that for the previous year. It is not the case of the DG that any of the OP consulted with any other OP to quote any particular rate which goes to prove that each of the OPs had independently quoted its own rate. The answering OP had particularly explained to the DG during the course of inquiry that it had decided the rates to be quoted for the subject tender on the basis of its own costing, the prevailing market prices, the demand and supply position, the logistic and local labour conditions and, last but not least, the fact that the price to be quoted now is going to remain static for one year irrespective of what might take place in the market place during that period. Such quoted price is usually lower than the prevailing market price particularly in view of the 'Fall Clause' in the terms and conditions of the tender which require that the tenderer shall not supply cement to any other person in the market at a price lower than the price quoted in the tender and failure to comply with this condition entails penal consequences. It is emphasised that the decision of the answering OP was totally independent without reference to any other person or party. There is absolutely no material on record like any agreement or statement of any person or any other kind of evidence to suggest that there was any tacit understanding between the OPs which is anti-competitive in nature.



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85. On the finding of the DG that the OPs acting in concert, collectively and deliberately quoted bids for substantially lower quantities as compared to the quantities quoted by them in the past, it was submitted that J K Cement has been a regular supplier of cement to the State Government of Haryana. The Informant floats tender every year for supply of cement for which bids are invited. After receipt of the bids, the Informant invites the bidders for negotiations of the price quoted and after successful negotiations, the orders are awarded for quantities which could be higher or lower than what has been offered by the bidder/bidders. Hence, there is always an element of uncertainty as to what quantity of cement would be finally awarded to a bidder. It is pertinent to note that even after the award of a certain order to a bidder, the Informant is under no obligation to lift even one single bag of cement despite having awarded an order for a certain quantity. But on the other hand, the bidder is obligated to tie down the awarded order quantity of cement for supply to the Informant. In this factual background, ground experience of J K Cement had been that notwithstanding the fact that it had offered to supply large quantities of cement and had been awarded orders for such large quantities in the past, the Informant had seldom lifted the entire quantity of cement for which it had awarded the contract to J K Cement. The past track record of the supply orders for lifting of cement by the Informant against the awarded contract had not only been erratic but had also been significantly lower than the quantities offered.

86. So far as the finding of the DG to the effect that the total tendered quantity quoted by the OPs had eventually been divided amongst the OPs so that each bidder would get contract for the quoted quantity, it was submitted that this allegation by the DG is contrary to the admitted facts on record. It is an admitted fact that the total quantity of cement requisitioned by the Informant pursuant to the subject tender was 400,000 MT. It is also an admitted fact by the DG in his Report that there were a total of nine cement companies which had submitted their bids in response to the said tender. It



is also an admitted fact on record that the total quantity for which the bids were offered by the various cement companies was 500,000 MT which was 25% more than the requisition quantity. It is thus, clear that at the time of submission of their respective bids, none of the OPs would have known as to what is the quantity that the other is offering, otherwise the total offered quantity would not have been 500,000 MT but only 400,000 MT divided amongst all the OPs as alleged. The DG has conveniently ignored the quantity offered by Cement Corp and Birla Corp while reaching the above conclusion.

87. Adverting to the finding that the OPs quoted different basic price for supply of cement at the same destination for different categories, it was submitted that it is a well-established industry practice that for determining a quote price against any bulk supply, the prevailing market prices are first ascertained before making any quotation for supply of cement. Based on the then prevailing market price, which obviously is driven by competition, a quote price is decided by doing a backward calculation for quotation. Because the quote price as determined remains constant due to various factors, the backward calculation for quotation results into different basic price. The basic price therefore in such calculation is only a derived price but otherwise the basic price at the factory gate irrespective of any destination is the same. It is a time tested business practice in various businesses and industries and no *mala fide* can be attributed on this account. For each of the location, the price to be quoted by the answering OP is determined on the basis of various factors like current prevailing market price at that particular destination, market trend and forecast for the tender period, logistic and local labour conditions in the said destination and stock holding cost and opportunity loss. Thereafter a conscious decision is taken to quote prices which are usually lower than the ruling market price. The DG has failed to appreciate that there is only one basic price for each variety (OPC and PPC) of cement. For a normal straight



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calculation of the price for a tender quote, the basic price is taken and other elements like freight, taxes and other charges *etc.* are added to arrive at the total price per bag and there is no backward calculation. The basic price in the present case was also the same; however, it could appear to be different for different locations and sometimes for the same location. The reason for this is that the tender document contained a 'Fall Clause' according to which J K Cement was required to undertake that it shall not supply the subject material to any other party at a price lower than what was being quoted in the tender and failure to abide with this undertaking entailed penal consequences. Therefore, it was the understanding of J K Cement that the total price quoted to the Informant in the tender had to be treated as the starting point and then reverse calculation was done to arrive at the basic price after deducting the freight, applicable taxes and other charges *etc.* Depending upon the point of supply (the answering OP had different dumps and supply depots from where cement could be supplied to one destination and one supply point for different destinations), freight and other elements would differ for each location which would get reflected in the different basic price. Such basic price was only a derived price as a result of the back calculation and was thus, the notional basic price in each case whereas the real basic price always remained constant in all cases.

88. Coming to the allegation that the rates had been quoted by the OPs in such a manner that all the OPs acquired lowest bidder status (L1 status) for supply of cement at least at some destinations, it was submitted that the findings of the DG in his Report in this regard are flawed, misleading and erroneous. There is absolutely no material on record for the DG to have come to such an inference and the inference is therefore based on pure conjectures and surmises. It was submitted that given the uncertainty surrounding each order placed, it was impossible to fathom as to whether J K Cement would win any order at all, especially when all the OPs are fiercely competing with each other in the market and spending huge



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amounts of money on advertisement and publicity to promote their products and it is unthinkable that any party would yield its potential space and market share to the other. There is no evidence at all that J K Cement colluded with any of the OPs in any manner as alleged or evidence that it had quoted in a manner that would make it L1 only in areas of its choice. It is quite possible that when there are as many as thirty locations for supply, each of the OP ends up being L1 at some destination or the other but the important consideration which could remotely suggest some planning is, whether such party got L1 status at the place where it quoted the highest quantity. However, the DG has not been able to point out even one single such case in support of his finding.

89. In view of the foregoing, it was submitted that there is no evidence for adverse finding against J K Cement in the Report of the DG and the DG has completely failed to make out any case against J K Cement on any count or violation of any provisions of the Act.

*Replies/ objections/ submissions of OP-5/ ACL*

90. At the outset, ACL denied that it has or is engaged in any anti-competitive behaviour in contravention of the provisions of the Act. It was specifically denied that it has entered into any agreement or concerted practice, anti-competitive or otherwise, with any other cement producer regarding the 2012 tender floated by the DS&D, Haryana.
91. It was submitted that the DG has simply ignored the justifications and rationale provided by ACL. Specifically, the DG has failed to even consider the Internal Business Proposal dated 09.08.2012 which approved ACL's participation in the impugned tender. The Internal Business Proposal contains the basis for quoting bid prices, quantity and locations for bidding in the tender. It was averred that the Internal Business Proposal



of ACL remains uncontroverted till date.

92. The DG, without any reason, did not consider the data in relation to increase in cost of inputs faced by ACL which justified higher prices for cement. It was submitted that there had been cost increases several times between 2011 tender and 2012 tender.
93. ACL also pointed out to the DG its pricing methodology. A reasonable profit is added to the cost incurred by ACL for the Northern Region, to arrive at an estimated price for the following month. This price, along with the prevailing market conditions, is used as a basis for quoting FOR price for supply of cement to customers in the non-trade segment. The DG has failed to appreciate that this cost was very close to the overall price quoted by ACL.
94. ACL explained to the DG that the prevailing trade price is one of the considered factors while deciding the price to be quoted. It was stated that this prevailing price was used as a guidance to quote for the DS&D tender.
95. The DG has failed to consider the fact that the price of cement is based on various demand factors (including demand & consumption levels for various sectors such as housing, public infrastructure, impact of seasonality, festivals *etc.*) and supply factors (various components of cost of production such as fuel, coal, power and limestone) as well as freight and marketing *etc.* prevailing at that particular point in time.
96. It was submitted that it was an admitted position that nine bidders participated in the impugned tender. However, the DG excluded Cement Corp and Birla Corp from the purview of his investigation without assigning any reason. The DG failed to appreciate the fact that for bid rigging to be successful, all participants must be aligned in their strategy. Failing to align strategy would create uncertainty which would deem



rigging impossible. The DG has failed to appreciate the fact that without the participation of Cement Corp and Birla Corp (against whom the Informant does not allege cartelisation), there could be no certainty in the outcome of the bidding process.

97. The DG has employed a pick-and-choose approach to draw a parallel between the tenders of 2009 and 2012 and limited his investigation to the named OPs. Further, the DG has failed to consider the fact that one or the other OPs did not participate in the tenders floated by the Informant since 2008.
98. On CDRs, it was submitted that the DG has examined the CDRs of certain individuals of the OPs and has arrived at a conclusion that these individuals were in contact with each other to collude for the 2012 tender. However, it was submitted that the CDRs relied on by the DG are not supported by a certificate under Section 65B of the Indian Evidence Act, 1872 in terms of the guidance set out by the Hon'ble Supreme Court and are admittedly incomplete. As such, they cannot be relied upon as evidence.
99. Further, the DG has limited the examination of alleged call records for a period between 16.07.2012 and 16.08.2012. The DG has failed to examine whether the contact was only during one month prior to the tender or whether it was throughout the year, especially given the fact that some of the people have been in this industry for over decades and have established social relations.
100. The Informant has arbitrarily proceeded against only seven of the total nine bidders in the 2012 tender. Further, the Informant has coloured the mind of the DG by providing selective data. The sole intention of the Informant is to force the OPs to offer lower (below market) prices. In the present matter, lack of good faith on part of the Informant is palpably clear, as such, the DG ought to have ascertained complete facts, failing which the





DG Report ought to be rejected.

101. The Informant has also failed to disclose that a few months after the 2012 tender was withdrawn, in October 2012, a fresh tender was issued and awarded. It is pertinent to note that ACL did not participate in the 2012 re-tender. It is also pertinent to note that there are no allegations of anti-competitive practices in the 2012 re-tender. In light of the 2012 re-tender, the DG ought to have investigated the prices discovered and the quantities quoted which would have been relevant to appreciate the material aspects surrounding the 2012 tender.

102. Contrary to the submissions made by the Informant and the findings of the DG, each bidder was individually called in for price discussion with HPPC. At this meeting, ACL did not offer any discount. Therefore, the alleged minutes of HPPC do not bear an accurate reflection of the events that transpired on 05.09.2012 and cannot be relied upon.

103. It was submitted that there is violation of the principles of natural justice in as much as despite being specifically requested, the DG failed to share complete CDRs pertaining to a former ACL employee *i.e.* Shri Deepak Mehra during the course of the investigation.

104. It was further submitted that given that the consequences of a finding of violation are very serious, the evidence to prove the same must also be commensurate. There must be precise and consistent evidence to prove that an agreement existed. The DG has failed to demonstrate any evidence of an agreement or a concerted practice to rig the 2012 tender. In the absence of any direct evidence to establish the existence of an agreement, the DG has even failed to discharge the standard of proof required to be met in respect of reliance on circumstantial evidence. Circumstantial evidence must support a finding or lead to the conclusion that the conduct of the



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parties cannot be explained other than as a result of an agreement or concerted practice.

105. The DG has vaguely analysed the price quotations, destinations bagged by various cement companies in the past tenders, quantities bid previously and call records of various individuals employed (in 2012) with the OPs and noted that the said individuals had called and messaged each other. On this basis, the DG presumed the existence of an agreement. However, the DG's investigation does not actually establish either an agreement or a concerted practice and therefore, even the presumption under Section 3(3) is not attracted.

106. It is apparent that the DG Report is based on conjectures and surmises, demonstrating a weak assessment of economic realities with a view to support a pre-determined hypothesis. The DG has failed to consider the actual increase in the cost of production, which was a material factor.

107. It is an established principle of appreciating evidence that statutory presumption can only be drawn after the elements provided for in the statute are established. It was submitted that the DG has failed to discharge his obligation. A mere perusal of the DG Report brings out the lack of evidence to support the arbitrary conclusions drawn by the DG.

108. It was averred that a perusal of the bids submitted by the OPs clearly establishes that they have inserted certain terms and conditions which suited them. For instance, ACL specifically added terms in its bid that it would restrict its quantity escalation to *"not more than +1- 10% against quantity initially allotted."* Evidently, this is on account of its 2011 experience where it was allotted 272.67% more quantity as compared to the quantity that it was allocated originally. This in itself indicates that the bids placed by the OPs were independent and not a result of collusion. It is submitted that competitors indulging in bid rigging would not want to



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risk invalidation of their bid on account of change in terms and conditions of the tender.

109. Issue wise objections were also filed to the DG Report. On conclusion of the DG that the rates quoted by the OPs were considerably higher than the existing rates/ contract rates finalised by the HPPC in August 2011, it was submitted that the DG has attempted to prove collusion by illustrating the increase in the price bids in 2012 tender by comparing it with previous tenders. The DG's finding that the prices quoted for 2012 tender being substantially higher than 2011 tender indicates that the finding of price parallelism is not only without any substance but also the DG's lack of understanding of how business and wholesale price indicators work. Merely stating that the prices quoted by various cement companies in the 2012 tender were higher when compared with the previous tenders is not an evidence of price parallelism. Such simplistic statements by the DG indicates lack of appreciation of the concept of price parallelism.

110. The DG has also failed to consider the participation of Cement Corp and Birla Corp. The DG failed to analyse the fact that Birla Corp secured L1 position in only 3 destinations, while Cement Corp in none, indicating that the prices quoted by them were higher than those quoted by the OPs and correspondingly much higher than the prices quoted in the 2011 tenders. In light of this very fact, the DG ought to have investigated Birla Corp and Cement Corp as well. In the absence of such analysis, the investigation by the DG is not only incomplete but also indicates non-application of mind and therefore, ought to be rejected.

111. It is an established fact that prices of commodities depend on the conditions of competition and demand and supply scenario at that particular time. Year 2011 was a bad year for ACL as the demand was very poor and the conditions in the market were depressed. In fact, the demand conditions



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for cement were negatively affected by the unavailability of sand and aggregates in Punjab and Haryana because of the ban imposed on sand/aggregate mining in various parts of Punjab and Haryana. The slump in demand in the trade segment saw lower prices of cement for the 2011 tender.

112. It is noted that VAT C3 form is a Concessional Sales Tax Form issued by the Civil Supplies Department, Government of Haryana for procurement of cement or any other goods. As such, bids (whether OPC or PPC) without VAT C3 form imply that the total VAT on the bid price would be approximately 13% of the basic price; and with VAT C3 form would imply a total VAT of approximately 4%, resulting in lower final prices for goods where VAT C3 form is applicable. It is this difference in with VAT C3 and without VAT C3 form that accounts for the difference of INR 20 in the total final price between the two rates quoted for the 2012 tender.

113. It was submitted that ACL's decision on the price to be offered to DS&D, Haryana was also influenced by the prevailing pricing conditions in Haryana for the trade and non-trade segment.

114. The DG has incorrectly relied on WPI. The DG has failed to acknowledge the fact that WPI for cement is an all India figure, while tender price has been quoted for a specific State - Haryana. Given the variations in competitive conditions in each State, there can be no comparison between all India WPI and average price in a particular State. Further, WPI is the *ex-factory* gate price which excludes taxes, rebates and transportation charges and freight, while L1 price includes these additional costs (freight, logistics and taxes).

115. The DG's analysis focuses on change in L1 price that may not be appropriate as it could result in comparison of prices quoted by different



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players over the years. For instance, in case of Bahadurgarh, Grasim was the L1 bidder in 2008, but in 2009, it was J K Lakshmi. Further, the change in L1 bidders from one year to another would also be driven by company-specific factors such as cost structures, business strategy, difference in the state of competition and other market factors.

116. The DG has also erred in relying on “*average L-1 price for all 30 destinations*”. Given the fact that competition conditions vary from place to place and are dependent on several local factors such as connectivity by road or rail, demand and supply in the region *etc.*, it is grossly incorrect to take an overall average. Further, taking an average of 30 destinations overlooks the fact that some companies may not have participated for all the destinations. These instances demonstrate the mechanical nature of the DG's assessment.

117. It was averred that the DG has failed to discharge his obligation of proving collusive conduct on the basis of higher prices quoted in the 2012 tender, and as such, on this ground alone, the DG Report ought to be set aside. The inference of collusive bidding by the DG based merely on alleged high prices when compared with WPI demonstrating alleged parallel behaviour is patently wrong and *de hors* the provisions of the Act and evidentiary requirements under competition law. There is no evidence of any agreement.

118. On the issue of substantially lower quantities quoted by the OPs so as to divide the tendered quantity amongst themselves, it was submitted that the DG has failed to appreciate that Cement Corp and Birla Corp together bid for 80,000 MT of cement. Therefore, the total quantum of bid quantity was 25% higher than the quantity invited in the tender. Further, at the time of submitting the bids, the OPs were not aware of both the participation of and the quantities to be quoted by Cement Corp and Birla Corp; therefore, there was no certainty in the quantity allocation between the OPs.



119. The DG also failed to appreciate ACL's detailed justifications for participating in the DS&D tenders. ACL had not always bid for the entire tender quantity. In fact, it has always bid around 15-20% of the total tender quantity, except in 2010 and 2011 when significant capacities were being added. Further, ACL was always awarded between 5-16% of the total tender quantity but the actual orders placed upon it and supplies made by it were even lower, generally between 2.72-7.52% of the total tender quantity (with the exception of 2011 where it was asked to supply more than the quantity awarded).

120. On the conclusion drawn by the DG that different basic prices for supply of cement at same destination were quoted with no rational basis or business/ commercial justification for the same, it was submitted that the DG has concluded that the OPs have quoted different basic prices for supply of cement at the same destination *i.e.* different basic rates of supply of cement to government department (with VAT C-3 Form) and different basic rate for supply of cement at the same destination (without VAT C-3 Form) to board/corporations. The DG further notes that the OPs have attributed this variation to back-calculation of price from the final tendered price for each district; however, no rational or logical basis or any computation has been furnished by any of the OPs to establish that there was business/ commercial justification to quote specific tender prices for the various districts.

121. It was submitted that the DG has advanced the investigation on the pre-determined notion that the explanation offered by the OPs for different basic prices quoted by them has no rational nexus or business justification. ACL has provided detailed explanations on its sales strategy, business rationale for quoting the tender price, and the method of arriving at the basic price. Additionally, it has also provided the break-up of the cost components for a 50 Kg bag of cement in the price quoted by it in August,



2012 tender along with an explanation of the factors considered while determining the cement price which was not driven by purely cost plus basis alone.

122. The DG in complete disregard to the responses filed by ACL has incorrectly recorded in the DG Report that “. . . *the OPs were given repeated opportunity to explain the basis of arriving at bid price for each district and furnish the calculations for the same however they have failed to do so*”. This clearly demonstrates non-application of mind by the DG.

123. ACL considers its costs, performance in the previous tender, prevailing trade and non-trade prices and profit margins while deciding on the price to be quoted in a tender. The DG relying on a very simplistic understanding of the working of the cement industry, failed to appreciate that ACL does not conduct its business on a cost plus approach.

124. The DG's conclusion that the OPs have quoted different basic prices for supply of cement at the same destination without any rational or logical basis or any computation to establish that there was no business/commercial justification to quote the specific tender prices for the various districts is wrong, incorrect and unsustainable in the facts and circumstances presented above.

125. Adverting to the conclusion of the DG that all the OPs have quoted rates to acquire L1 status for supply of cement at some destinations, it was submitted that the DG failed to appreciate that it was impossible for the OPs to have certainty of securing L1 position in each destination quoted in the 2012 tender. Birla Corp and Cement Corp were equally competitive in DS&D tenders, therefore, without their participation, the OPs would have no certainty of securing L1 positions. In fact, the DG has failed to explain the fact as to how Birla Corp was L1 in even 3 destinations. Assuming that the DG's logic is correct, Birla Corp must have been accommodated by



others in these destinations.

126. The DS&D does not disclose to the bidders the quantity that it will purchase in a particular destination. Further, there is neither any guarantee that the entire amount advertised would be called for supplying by the consignees, nor was there any announcement from DS&D of the destination wise and cement type wise quantity requirement at the time of placing of the bids.

127. In ACL's experience, any cement company with prior approval from DS&D can supply cement to a consignee of DS&D provided that it is done at the LI price for that destination.

128. In light of the above, there is no way that the parties could substantially reduce the uncertainty of their conduct in the market. Therefore, the question of collusion with competitors for a particular destination does not arise.

129. In relation to the destinations, ACL submitted its bids based on the capacity and the proximity of the destinations to its plants. It is submitted that ACL does not have any cement plants in the State of Haryana but supplies cement in the State of Haryana through its warehouses situated at various locations in Haryana. Further, ACL has more plants producing PPC. In light of the above, ACL submitted bids only for nine destinations in respect of OPC and for all thirty destinations in respect of PPC. However, the DG has summarily ignored this argument and based on surmises and conjectures has stated that there was collusion.

130. There is no evidence to support the DG's conclusion that the OPs have quoted much higher prices in adjoining districts/ destinations or the OPs have accommodated or allowed other OPs to emerge as L1 in these





destinations indicating meeting of minds or that the OPs have not provided any rational explanation for their pricing.

131. On the reliance placed by the DG on circumstantial evidence, it was submitted that CDRs were not supported by a certificate which strictly complies with the provisions of the Indian Evidence Act, 1872 and the Information Technology Act, 2000 as well as the guidelines laid down by the Hon'ble Supreme Court. Therefore, the same cannot be relied upon as evidence. In any case, the DG himself admits that the alleged CDRs presented to the DG's Office by various telecom companies were incomplete and therefore, in the absence of complete CDRs, no reliance can be placed on this evidence.

132. The DG restricted his examination only to the records of July – August, 2012 and did not consider whether the individuals used to communicate on a regular basis. In light of the responses of these individuals that they would discuss personal as well as industry representation matters, the DG could have verified their responses or identified unusual patterns by reviewing the alleged CDRs for a longer period.

133. Alleging breach of principles of natural justice, it was contended that ACL was informed of the deposition of Shri Deepak Mehra through the notice dated 24.09.2015, wherein the DG sought a response from ACL as to why adverse inference should not be drawn against it. ACL sought complete details of the alleged CDR of Shri Deepak Mehra for further examination; however, the DG failed to provide the same. The DG did not even provide a copy of the Affidavit filed by Shri Deepak Mehra, or his deposition to ACL.

134. On conclusion of the DG as to the contravention of the provisions of Section 3(3) of the Act, it was submitted that the DG has wrongly



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concluded that the OPs have colluded with each other to rig the bid pertaining to tenders of OPC and PPC invited by the DS&D in August, 2012. Further, it is incorrect to state that the conduct of ACL is in violation of the provisions of Section 3(3)(d) read with Section 3(1) of the Act. The DG has also incorrectly concluded that the conduct of the OPs has led to an appreciable adverse effect on competition (AAEC) in India in respect of the 2012 tender.

135. The DG has failed to produce any evidence which suggests that ACL acted in furtherance of any agreement and/ or concerted practice. Further, while the DG has looked at various circumstances surrounding the 2012 tender, it has failed to establish the evidentiary threshold which is required to establish a case based purely on circumstantial evidence. Also, there is no evidence to establish that there has been any AAEC in India as a result of the alleged conduct.

136. The DG has failed to provide any direct evidence required to establish the existence of an agreement. Further, the DG has failed to discharge the standard of proof required to be met in respect of reliance on circumstantial evidence. It is submitted that the circumstantial evidence being relied on must support a finding or lead to the conclusion that the conduct of the parties cannot be explained other than as a result of alleged concerted practice.

137. It was further contended that even in civil proceedings, a person cannot be held guilty and awarded punishment in the absence of reasonably strong evidence. The DG has placed reliance on documents such as the minutes of alleged HPPC meeting of 2009 and the minutes of HPPC meeting dated 05.09.2012, which *de hors* the principles of appreciability of evidence under the Indian Evidence Act, 1872 and as such, the DG Report ought to be set aside.



138. In view of the above, it was submitted that for a finding of violation under Section 3 of the Act, the existence of an agreement must be unequivocally established and wherever circumstantial evidence is being relied upon, it must be of such nature that the hypothesis being supported is the most likely outcome. The DG has failed to produce any direct or circumstantial evidence which is sufficiently precise and coherent that an agreement within the terms of the Competition Act can be inferred, especially between ACL and other producers.

139. In conclusion, it was submitted that as the 2012 tender was scrapped and a fresh tender was issued in which ACL did not participate, there is no adverse effect on competition in India established under any of the factors of Section 19(3) of the Act, let alone an appreciable one. Therefore, even if the Commission decides that there has been a breach of Section 3(3) of the Act, there has been no AAEC. Therefore, ACL has not breached the provisions of Section 3(1) of the Act.

140. On the issue of penalty, it was submitted that there is no case to levy any penalty upon ACC; however, in the event the Commission is inclined to levy a penalty, it was submitted that the penalty to be computed under Section 27(b) of the Act should be based on ACL's turnover generated from DS&D tender and should be not based on ACL's total turnover. Further, in the event the Commission were to levy a penalty, it should have due regard to the following mitigating circumstances: a) ACL is not a repeat offender; b) ACL has cooperated with the DG during investigation at all stages; c) No harm has been caused to the consumers in the 2012 tender; d) ACL always acts independently; e) No evidence of direct collusion is there; f) Evidentiary burden has not been met; g) Failure on part of the DG to rebut evidence and appreciate ACL's submissions; h) ACL and LafargeHolcim Group always conform to competition law; and i) High Competition Law awareness.



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Replies/ objections/ submissions of OP-6/ ACC

141. At the outset, ACC denied that it has or is engaged in any anti-competitive behaviour in contravention of the provisions of the Act. ACC specifically denied that it has entered into any agreement or concerted practice, anti-competitive or otherwise, with any other cement producer regarding the 2012 tender issued by DS&D. In fact, from the evidence produced by ACC and the records available with the DG, it is evident that ACC has acted independently in the 2012 tender. The DG has failed to consider the factors specific to ACC and has painted all the OPs with the same brush as a result of which the findings fall short of the standard of proof required to establish the existence of an anti-competitive agreement within the ambit of Section 3 of the Act.

142. ACC has submitted that DS&D tenders lack certainty given that there is, (i) no certainty of the quantity that will be purchased, (ii) no guarantee of supplies that will be required by consignees; and (iii) no certainty of the destination at which the supplies will be required. A fundamental condition for bid rigging to be successful is the certainty of the outcome of a particular tender - DS&D tender does not provide that certainty.

143. The DG simply chose to ignore ACC specific factors/ facts, which were submitted to the DG during the course of investigation.

144. The DG Report merely notes that the justifications and the rationale offered by ACC are either not sufficient or not tenable without providing any reason whatsoever as to why the justifications were not sufficient. The DG must provide detailed reasons rejecting any justifications offered by any enterprise. Lack of reasoning without ascertaining ACC specific facts reflects non-application of mind and shallowness of the findings arrived at by the DG. The DG has relied upon the correlation values computed between percentage increase in the WPI of grey cement and the increase



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in average L1 price of cement for 2012 to conclude that increase in average L1 price is substantially higher than the increase in WPI for the years 2009-2012. The DG has concluded that this indicates price parallelism and collusive bidding.

145. The DG has failed to conduct any comprehensive price parallelism analysis. The DG has merely stated that the significant increase in average L1 price from 2011 to 2012 which does not correlate with the increase in WPI for 2012 is indicative of price parallelism. Correct approach would have been to assess the actual cost increase incurred by each cement company in the manufacture of cement and accordingly analyse the prevailing trade prices which were relied upon by ACC to quote the bid price. WPI is a completely incorrect benchmark given the fact that WPI figure is for all India but the tender prices were specific to Haryana. Secondly, WPI does not take into consideration the freight but the final price is inclusive of freight. Most importantly, ACC did not participate in 2011 tender; therefore, comparing average 2011 L1 prices with 2012 L1 price does not hold good for ACC. Further, ACC participated only in 3 destinations whilst the DG has taken an average of 30 destinations. All these facts lead to a singular conclusion that the DG's analysis is purely speculative in nature.

146. It was further submitted that even though there were nine bidders in the 2012 tender, the DG has merely relied upon the information fed by the Informant and investigated only seven bidders. Cement Corp and Birla Corp had submitted financial and technical bids of 50,000 MT and 30,000 MT respectively which increase the total tendered quantity by 25%. The DG Report carries no explanation for excluding Birla Corp and Cement Corp from the purview of investigation. Failure on the part of the DG to conduct a thorough analysis is fatal to the entire DG Report.



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147. After the financial bids were opened, all the nine bidders were called by DS&D for a meeting with HPPC on 05.09.2012. It is submitted that ACC did not offer any discount at HPPC meeting. However, these facts are not reflected in the minutes of the meeting which were unilaterally drawn up. In accordance with established jurisprudence, no reliance can be placed on such unilaterally drawn up minutes.

148. The DG has failed to appreciate the specific features of DS&D tender. The NIT does not disclose (i) the total quantity that will be purchased, (ii) the quantity of cement that will be required at a specific destination, and (iii) the type of cement to be supplied at a particular destination. Further, DS&D tenders are marred by delays and uncertainty.

149. It was submitted that the DG's finding that the rates quoted by the OPs in response to the 2012 NIT were higher than the existing contract rates finalised by HPPC for the State of Haryana in 2011 which is indicative of price parallelism and collusive bidding, is not only incorrect but also without any basis.

150. A careful review of the DG's own analysis reveals that there is no price parallelism since the DG's analysis is based on lack of understanding of the cement industry and application of wholesale price index.

151. The DG has conducted a correlation analysis between the percentage increase in 2012 from the previous year of the WPI and the average L1 price and recorded that while WPI of grey cement has increased only by 13.32%, the average increase in the LI price of cement for the four categories of cement was 45.38% to 50.69%. However, the analysis of the DG is grossly incorrect since the DG has failed to consider that WPI and average L1 rates are incomparable indicators.

152. Further, the DG has failed to appreciate that ACC did not participate in the



2011 tender at all; therefore, the very basis of the DG's analysis comparing the 2012 tender's L1 prices and the finally negotiated prices for the previous tender falls away. The DG has attributed the average of L1 prices quoted in 2011 to all the OPs without clarifying that it does not comprise of the pricing data for ACC. The DG has compared incomparable data sets and on this basis alone, the DG's finding on price increase should be set aside.

153. The DG has compared L1 prices over the years and relied on 'average L1 price for all the 30 destinations'. This leads to comparison of prices of different players since L1 bidders may differ by tender from year to year. Some companies did not bid for some destination that they had bid for in the previous year which influences the determination of L1 bidder in those destination(s) and has an impact on the change in the L1 price as well. For instance, in case of Bahadurgarh, Grasim was the L1 bidder in 2008 but in 2009 it was J K Lakshmi. There was a change of 28% in the L1 price in 2009 compared to 2008 corresponding to a change in company-specific bid price. The price quoted by Grasim and J K Lakshmi in the bid increased by varying proportions (29% and 13% respectively). Therefore, comparison between changes in L1 price is erroneous since (i) the L1 bidders for two years are different; and (ii) change in L1 price is driven by company-specific factors such as cost structure, business strategy, difference in the state of competition and other market factors in the intervening years not accounted for in WPI. The DG has erred in relying on "average L-1 price for all 30 destinations". The attribution of average of L1 price for- 30 destinations to ACC is incorrect since ACC has never bid for 30 destinations. It has bid for only 3 destinations in 2012 and 9 destinations in 2010, 2009 and 2008. It is well established that conditions of competition vary from place to place and are dependent on several local factors such as connectivity by road or rail, demand and supply in the region, *etc.* This indicates complete non-application of mind by the DG.



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154. The DG's findings in relation to change in price and change in WPI of cement are also based on conjectures and surmises, demonstrating a flawed assessment of economic realities as well as non-application of mind.
155. The DG has ignored the significant increase in the cost of producing clinker from 2010 to 2012 at the Gagal plant of ACC by 66.4% from where cement was proposed to be supplied at the destinations quoted by ACC. Additionally, there has been a significant increase in the cost of production of OPC (increase of 35.2%) and PPC (increase of 31.64%) at Gagal plant No. 1 and increase in cost of production of PPC (increase of 34.5%) at Gagal plant No. 2 from 2010 to 2012 which has been ignored by the DG.
156. ACC's decision to quote a particular price was also influenced by the market conditions in Haryana. ACC relied on the prevailing price of the previous month *i.e.* July, 2012 in the Karnal Area Office, which was the sales unit that submitted the bid. The price bid quoted by ACC was lower than the prevailing OPC and PPC prices in the trade and non-trade segment for the month of July, 2012.
157. The tender prices generally closely follow the trade and non-trade prices during the tender period and are indicative of the fact that the price quoted by ACC in the 2012 tender was in the same range as the price at which cement was being sold to large institutional buyers (the non-trade price). The same was also observed in 2010. Therefore, DG's failure to consider the non-trade price for Haryana reflects a poor understanding of the cement market by the DG.
158. The DG has considered average L1 price to superficially conclude price parallelism. However, as stated previously, the DG failed to conduct a thorough economic analysis to prove existence of price parallelism.





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159. The DG has compared the quantity quoted by the OPs in relation to the 2012 tender with the 2011 tender and the previous tenders issued by the State of Haryana, and concluded that they deliberately quoted smaller quantities to divide the total tender quantity amongst themselves. However, the DG has ignored the fact that ACC did not participate in the 2011 tender at all.

160. While the OPs have quoted 4,20,000 MT of cement, Birla Corp and Cement Corp together quoted for 80,000 MT, increasing the quoted quantity to 5,00,000 MT. The total bid quantity was hence, 25% higher than the tendered quantity. Failure on the part of the DG to even acknowledge this fact clearly indicates shallowness of the investigation and a predetermined approach.

161. Quantity bid by all the companies (except Birla Corp and UltraTech which did not bid in 2010) started declining from 2010 - a trend which continued in 2012; this fact has been ignored by the DG.

162. The DG failed to appreciate the economic rationale behind the companies offering lower quantities in the tenders despite highlighting the difference in the quantity quoted, allocated and actually supplied (based on orders from DS&D's consignees).

163. The DG failed to appreciate the detailed business and economic justifications provided by ACC for participating in DS&D tenders. The DG failed to appreciate that with trade being the primary focus, ACC never bid for the entire tender quantity.

164. ACC quoted a higher quantity of 1,00,000 MT in 2010 since it quoted for 9 destinations. In 2012, ACC quoted 30,000 MT which is 1/3 of the quantity quoted in 2009 since it quoted for only 3 destinations. Simple logic dictates that the quantity quoted in 2012 is proportionate to the



quantity quoted in 2010. In fact, on proportionate basis, the quantity quoted in 2012 is similar to the quantity quoted in 2010. The DG has failed to appreciate this fact as well.

165. It was further submitted that ACC had lost the entire tender in 2010 and did not participate in 2011 tender. At the time of receipt of the 2012 NIT, the Karnal Area Office of ACC was facing significant shortfall in sales as compared to the same period for previous year. Therefore, ACC's decision to bid was an attempt to make up for the sales shortfall.

166. The DG has concluded that both Birla Corp and Cement Corp have been following a consistent bidding pattern and bid in a close range of 10-17% in the impugned tender as well. However, the DG has ignored that similar to these two companies, ACC has also been bidding in close range with the average percentage of quantity being 11.3% for 2009-2012. It is puzzling to note that whilst the DG has accepted the fact that Birla Corp and Cement Corp have maintained similar percentage in terms of overall quantity, it failed to even acknowledge the fact that ACC has a very similar bidding pattern. This clearly indicates that the DG proceeded with a pre-determined mind.

167. It was submitted that ACC reverse calculated the bid price which was provided under the 2012 NIT. The 2012 NIT required the OPs to quote rates in INR per bag, inclusive of excise duty, service tax/ central sales tax/ value added tax as well as unloading and stacking charges for supply to the consignees godowns/ warehouses. Though the DS&D amended the NIT template, it did not amend the actual clause; hence, there was no requirement to quote the ex-factory price.

168. It was further pointed out that ACC relied upon Paragraph 1 under 'Terms and Conditions' of NIT and reverse calculated the FOR price to arrive at a



notional basic price and then deducted the freight and VAT component from the estimated final price to show the bifurcated amount (*i.e.* freight, VAT, basic price *etc.*) to arrive at a basic price.

169. ACC competes on the basis of landed price and not on a cost-plus basis and therefore, as a first step, it considered the final price at which it wanted to sell the OPC and PPC (*i.e.* FOR/ landed price). Given the fact that cement was to be procured from various locations (warehouses and plants), there could not have been a single *ex-factory* price which could have been quoted as the basic price.

170. The DG in his report has incorrectly considered the basic rate to be the *ex-factory* price; however, as per Clauses 4 and 5 of the tender conditions, basic rate includes profits and other costs such as delivery and transport and in such a case, it cannot be the *ex-factory* price.

171. Without prejudice to the above, it was submitted that the price difference in relation to the basic price for the same destination is negligible since the landed price for each destination is different on the basis of full VAT and reduced VAT. Therefore, applying the formula of reverse calculation, slight difference in basic price for the same destination can be seen which is largely due to the VAT calculation.

172. The intention behind reverse calculate and provide the notional basic price was to keep the actual price and cost information for supply of cement from a particular destination confidential. Basic price of cement is a highly confidential matter as disclosure of the same could have serious impact on the competitiveness of the company, since the competitors can utilise the information to weaken the competitive advantage enjoyed by a company. Once the bid is opened, the information will be publicly available to competitors and customers exposing the company to competitive harm.



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173. It was alleged that business reasons and commercial justifications offered by ACC have been ignored by the DG.

174. It was pointed out that tender conditions do not permit collusion to determine destination of supply. Given the uncertainty about the actual quantity of cement that would be allocated and the actual quantity of cement that will be procured, there is no incentive to enter into a bid rigging arrangement.

175. It was further contended that no reliance be placed on the circumstantial evidence and the CDRs submitted by the DG. The Indian Evidence Act, 1872 and the Information Technology Act, 2000 provide that any electronic evidence provided must be supported by a certificate in compliance. Reliance is placed in the decision of the Hon'ble Supreme Court in *Anvar P.V. v. P. K. Basheer & Ors.*, (2014) 10 SCC 473.

176. The CDRs relied on by the DG are not supported by such certificate which strictly complies with the provisions of the Indian Evidence Act and the Information Technology Act and various decisions of the Hon'ble Supreme Court. As such, they cannot be relied upon as evidence.

177. Also, the DG has not only examined incomplete CDRs, but has also restricted his examination only to the months of July-August 2012 and has not considered that Shri Chatterjee communicated with the competitors on a regular basis. In relation to call records of Shri Sudeep Chatterjee, the DG has CDRs for only 3 days *i.e.* 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> August 2012.

178. For violation of Section 3 of the Act, an agreement must be unequivocally established by the DG. In the present case, the agreement has been presumed from incorrect economic analysis and circumstantial evidence which is not a sufficient proof of an agreement. The DG has heavily relied upon circumstantial evidence; however, there are clear legal limitations



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upon the inferences which may be drawn from circumstantial evidence. Inferring an agreement from ambiguous evidence, as produced by the DG in the DG Report, does not satisfy the legal and evidentiary thresholds that are required to be established under the Act.

179. The individual decision by ACC is nothing but an intelligent and independent response to the decisions taken by other companies, in a relatively transparent market, to pursue its goals, without any agreement. Such behaviour cannot be considered as anti-competitive under the provisions of the Act. The observed conduct has economic rational and commercial explanations. Further, the main motive behind a collusive practice is economic benefit which could only be possible if there would have been an understanding amongst all the nine bidders. The DG has failed to establish an agreement among all the parties and has conveniently targeted just seven companies, leaving out Birla Corp and Cement Corp.

180. Therefore, the DG has wrongly concluded that the bidders have colluded and rigged the bids, in violation of Section 3(3)(d) read with Section 3(1) of the Act, and has failed to establish the required elements to make out a case under the provisions of the Act. The entire case of the DG is purely based on conjectures and merely raises a presumption, but does not establish a violation of the Act.

181. Further, it was submitted that no AAEC has been caused due to the following factors: ultimate prices are negotiated further, no effect of the 2012 tender as the same was cancelled, availability of cement during the ensuring period and no platform for exchange of information been created.

182. Lastly, ACC has submitted that there is no case to levy any penalty; however, in the event the Commission is inclined to levy a penalty on ACC, ACC submits that the penalty to be computed under Section 27(b) of the Act, should be based on ACC's turnover generated from DS&D



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tender alone and should be not based on ACC's total turnover. Further, in the event the Commission were to levy a penalty, it should have due regard to the following mitigating circumstances: ACC is not a repeat offender, ACC has cooperated with the DG in investigation at all stages, no harm has been caused to the consumers in the 2012 tender, ACC always acts independently, no evidence is there of direct collusion, evidentiary burden has not been met, failure by the DG to rebut evidence and appreciate ACC's submissions and ACC and LafargeHolcim Group always conform to competition law and high competition law awareness.

Replies/ objections/ submissions of OP-7/ J.K. Lakshmi

183. While adopting the submissions made by the learned counsel appearing for the other OPs, detailed submissions were made by J. K. Lakshmi. Adverting to the CDRs analysed by the DG, it was submitted that at a number of places, J K Lakshmi is in competition with Birla Corp with whom it has no calls. It was submitted that there are several calls made between J K Lakshmi and ACL/ UltraTech, but none of them are in competition at any place. It was stated that Senior Vice President of J K Lakshmi kept on talking throughout the year with some of the competitors. Call details in respect of J K Lakshmi do not indicate that it has emerged L-1 because of someone with whom it talked or it made someone L-1. For call details with Shree Cement, it was argued that J K Lakshmi has explained each and every call, which explanations have not been discarded by the DG.

184. It was further contended that the DG has proceeded with wrong facts as to the bid prices of J K Lakshmi as having been shown deliberately on the higher side and also in respect of the plant from which supply was to be made for PPC cement.



185. Objection was also taken to the understanding of the DG with respect to the freight charges for transporting cement. It was submitted that freight does not mean only transportation costs but also includes cost of loading, unloading, stacking, *dalla* charges etc. which vary from destination to destination as well as location and labour conditions. Even at the same destination, labour charges may vary depending upon the distance a labourer has to walk with bags. Further, it was submitted that the DG has worked out transportation cost per kilometer per bag. It was stated that transportation charges are not worked out in the manner the DG has computed. Transportation charges depend on various factors including volume, mode of transport, capacity and availability. The transport trucks are of varying size (9 tons, 16 tons, 22 tons and 30 tons). Bigger the size, less the freight. For example, if the order is placed for 50 tons, the company has to use the combination of the two or more transports and the transporter charges for full quantity of its capacity irrespective of the fact that the same remains unutilised.

186. The DG has wrongly analysed the bid prices *vis-a-vis* the increase in the cost of cement. The DG ought to have analysed the bid price *vis-a-vis* the prevailing prices of cement in the market. It was contended that prices are market driven and not cost driven. The DG was conscious of this and accordingly, the DG had sought information as to the market prices by various probe letters from various cement companies including the answering party. It was stated that J K Lakshmi provided the market prices of cement and it is believed that all the other bidders provided the market prices of cement as well during the bid period for the last five years. However, the DG, having found the same not supporting the allegation of bid rigging and cartelisation, put the said information under the carpet.

187. The DG knowingly and deliberately ignored the information given by JK Lakshmi that percentage increase in the bid price was much lower than the



percentage increase in the price of non-trade segment. Referring to its reply, it was stated that in absolute terms, increase in the price per bag in 2012 over 2011 for non-trade segment was of Rs.75.89/- as against Rs.60.73/- for bid prices. In percentage terms, the same works out to be 38.61% increase for non-trade segments and 31% increase for bid prices.

188. It was also alleged that the DG concealed the independent price mechanism adopted for determination of the bid prices by J K Lakshmi. J K Lakshmi has disclosed its bid price fixation mechanism based on average price in the non-trade segment 30 days prior to the due date of the tender. That being so, the price was independent and further much less than the prevalent average price in the non-trade segment.

189. In any investigation for collusive prices, the DG ought to concentrate and investigate as to whether the decision making process of J K Lakshmi was independent from others or not. Looking for rationality was not the issue to look at to examine as to whether the prices were independent or not. A person may charge more or less in accordance with his individual assessment and wisdom. However, J K Lakshmi has disclosed the mechanism of the determination of the bid prices based on the average market price of cement in the non-trade segment 30 days prior to the due date of the tender with some plus and minus amount for various destinations depending upon individual assessment as to the rough estimate on quantity, season in which the order is likely to be placed, labour conditions in the said area, mode of transport and availability at such destination, ease of doing business with such Departments *etc.* The bid prices are not determined on per bag per kilometer basis.

190. It was further submitted that the bid prices of J K Lakshmi were in accordance with percentage change in WPI based on 2008 as base year.





191. Choosing previous year as base year and further choosing the average lowest bid price of the various players led the DG to the wrong conclusion. The DG ought to have made a separate study for each company rather than taking average lowest bid prices of the various companies. Further, the DG ought to have assigned cogent reasons for selecting the previous years as the base year in particular when the base year for WPI changes every 10 year or so. It was pointed out that the DG Report has been deliberately manipulated to show that percentage change in the bid prices in 2012 over 2011 is upto 50.69%, whereas as per a separate study conducted by J K Lakshmi, it is merely 31.02%.

192. The DG misconceived the concept of basic price/ *ex*-factory price as *ex*-factory cost/ basic cost. It was submitted that *ex*-factory price means price at which the product is available at the seller's factory. It signifies that profit is included in the *ex*-factory price. That being so, *ex*-factory price would differ even for the same customer depending upon the volume, terms and ease of doing business. Further, difference in basic price for with Form C-3 and without Form C-3 is due to administrative and hidden costs that J K Lakshmi is required to bear for collecting the form and depositing the same with VAT authority. Further, the average difference is mere 26 paise for J K Lakshmi, which is negligible.

193. It was also asserted that cogent reasons have been given by J K Lakshmi for quoting less quantity. In this regard, it was pointed out that J K Lakshmi failed to compete in 2010 and 2011 tenders because its plant at Jaykaypuram in Sirohi Distt in Rajasthan is located at 650 kilometres away from Haryana whereas other OPs plants are located in Haryana or nearby Haryana. Only in 2012, J K Lakshmi set up a new plant in Haryana with maximum annual capacity of 6 lac MTs. Since the order placed is required to be executed in 20 days and further as the company gets the intimation informally only a week or 10 days prior, J K Lakshmi could therefore, take the risk for supply of only a maximum monthly capacity of 50,000 MTs



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and with this, J K Lakshmi quoted lesser quantity.

194. The DG has proceeded with the assumption that bid prices for the year 2011 were most competitive. It was submitted that all the L-1 companies for 2011 tender pleaded before the Commission that they suffered losses in 2011 tender and the details were supplied to the DG.

195. Commenting on the investigation conducted by the DG, it was submitted that the Commission directed the DG to investigate and submit the report. The DG was required to investigate as an extended arm of the Commission. As the Commission is to remain impartial, likewise the DG also ought to have remained impartial. Accordingly, the DG ought to have placed all his findings before the Commission. The DG as an investigator was duty bound to bring on record all the materials and unused evidence in its Report to enable the Commission to arrive at a proper conclusion. However, the DG, instead of assuming the role of an investigator, assumed the role of an advocate for Haryana Government to hunt out for details and information so as to make out a case in favour of the Haryana Government and against the cement companies. Failure to disclose unused materials means conviction cannot be held if a reasonable probability is found that the evidence so discarded by the DG would produce different trial results. It was alleged that DG has not even placed the various replies filed on behalf of J K Lakshmi to the various probe letters issued by the DG before the Commission.

196. Next, it was contended that principles of natural justice were not complied with by the DG. It was alleged that the DG even did not permit the counsel for J. K. Lakshmi to remain present during the recording of statements of its officials despite written request to this effect. The DG has suppressed the finding with respect to the prevailing prices during the month of the tender in the non-trade segment. It was alleged that Regulation 23(3) of the



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Competition Commission of India (General Regulations), 2009 (General Regulations) was not followed causing great prejudice to the company in preparing its defence. The DG has not provided the right of hearing also. The DG also concealed the quotation price of Birla Corp and Cement Corp while giving them clean chit.

197. Lastly, it was contended that there was no collusion on the part of J K Lakshmi as it emerged L1 because of competitive rates quoted in 2012 tender in comparison to the 2011 tender. The average bid price in comparison to the average market price for the non-trade segment was much lesser in 2012 in comparison to the 2011 tender. At several places, J K Lakshmi was in competition with Birla Corp. The DG failed to investigate the information provided by J K Lakshmi that some of the players even objected to filing of tender by J K Lakshmi manually.

#### Points for determination

198. DS&D, Haryana through the impugned tender floated in 2012 invited bids through online/ press advertisement for the supply of cement at various destinations in the State of Haryana. The approximate quantity indicated in the NIT was 4 Lac Metric Ton which was required to be supplied at 30 different destinations to the Government Departments & Boards/ Corporations of State of Haryana. The rate contract was to be arranged for two grades of cement which were 43 grade Ordinary Portland Cement (OPC) and Pozzolana Portland Cement (PPC). In case of cement to be supplied to Government Departments, concessional rate of VAT was applicable if the bidder firm offered to raise VAT billing from Haryana.

199. In response to the tender inquiry, 9 bidders including the 7 OPs herein submitted their bids. After technical scrutiny of the bids, financial bids of all the bidders were opened on 28.08.2012. As per the State Government



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purchase procedure, all the tenders regarding the arrangement of rate contract for stores are decided by HPPC headed by the Finance Minister, Haryana. The case was, thus, put up in the meeting of HPPC held on 05.09.2012. HPPC in the said meeting observed that the rates quoted by the bidders were considerably higher than the existing rate contract rates. The last rate contract was negotiated/ finalised by HPPC in the meeting held in August, 2011. It was noted by HPPC that the increase in bid prices of cement was not justified in light of the Price Index for Cement as reported by the Office of Economic Adviser, Ministry of Commerce and Industry, Government of India which had risen from 151.7 to merely 169.3 since the finalisation of the last rate contract. Thus, HPPC observed that there was no justification for the bidders to quote rates that were higher by 35-42% over the existing rate contract rates. On being asked by HPPC, the representatives of the bidders could not offer any justification for the increase in quoted rates with reference to the escalation in costs of inputs. On a detailed examination of the bids, HPPC made the following observations:

- (i) There was an exorbitant increase in the bid prices quoted by the parties in comparison to the existing rate contracts.
- (ii) The bidders had quoted substantially lower quantities in comparison to the past and there was a clear division of bids amongst the bidders.
- (iii) The rates quoted presented a pattern where all the bidders acquired L1 status for supply of cement in at least one destination.
- (iv) Different basic prices were quoted for the same destination to Government departments (with VAT C-3 form) and to the corporations (without VAT C-3 form).

200. Accordingly, HPPC observed that the bids were not competitive due to formation of a cartel by the bidders and decided to re-invite the tender on short term basis. Further, HPPC also directed DS&D to file a reference



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with the Commission.

201. Accordingly, the present reference was filed before the Commission under Section 19(1)(b) of the Act against the seven-named OPs whereupon the Commission ordered the DG to conduct investigation into the matter.

202. The DG, consequent upon investigation, as noted earlier, concluded that the evidences gathered during the course of investigation indicated that OP-1 to OP-7 have colluded with each other and thereby rigged the bid in the impugned tender. The DG noted that they were in violation of the provisions of Section 3(3)(d) read with Section 3(1) of the Act.

203. Based on the averments made in the reference, DG Report and the objections/ suggestions filed thereto by the OPs, the following points arise for determination:

- (i) *Whether the bid prices quoted by OPs in the 2012 tender were unusually higher than the bid prices quoted in the previous tenders? Whether such bid prices were arrived at independently by OPs based on business/ commercial consideration(s)?*
- (ii) *Whether the lower quantities quoted by OPs in the impugned tender than the bid quantities quoted in the previous tenders, was due to an arrangement to divide the total quantity amongst OPs to allocate markets? Whether the bid quantities were arrived at independently by OPs based on business/ commercial consideration(s)?*
- (iii) *Whether OPs have bid for the impugned tender so as to divide the market in order to secure LI status inter se?*



(iv) *Whether Call Detail Records point towards prior arrangement amongst OPs in submitting their respective bids?*

204. The Commission shall now examine the aforesaid issues in *seriatim*.

(i) *Whether the bid prices quoted by OPs in the 2012 tender were unusually higher than the bid prices quoted in the previous tenders? Whether such bid prices were arrived at independently by OPs based on business/ commercial consideration(s)?*

205. To examine the allegation of increase in bid prices in the 2012 tender, the DG collated the figures pertaining to the average L1 prices for the four categories of cement from the tenders floated during the years 2008 to 2012. Then, the DG compared the percentage change (tender-on-tender) in the average L1 price with the percentage change (monthly value of WPI corresponding to the latest tender with the monthly value of WPI corresponding to the previous tender) in the WPI for grey cement, as given in the Table below:



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**Table-1**

Percentage change in Price Index of Cement over previous year						
Year	Date of the Tender	Wholesale Price index* (for grey cement)** (in %)	Average L1 for OPC (VAT with form C-3) (in Rs.)	Average L1 for OPC (VAT without form C-3) (in Rs.)	Average L1 for PPC (VAT with form C-3) (in Rs.)	Average L1 for PPC (VAT without form C-3) (in Rs.)
2008	17 November 2008	137.80	191.10	202.35	177.98	190.78
2009	26 May 2009	147.40	235.64	247.18	216.64	228.29
% change in 2009 over 2008	–	6.97	23.31	22.16	21.72	19.66
2010	18 June 2010	150.30	185.89	195.13	172.63	185.16
% change in 2010 over 2009	–	1.97	(21.11)	(21.06)	(20.31)	(18.89)
2011	1 August 2011	151.70	170.18	184.06	155.39	167.47
% change in 2011 over 2010	–	0.93	(8.45)	(5.68)	(9.99)	(9.55)
2012	16 August 2012	171.90	247.40	267.40	233.00	252.37
% change in 2012 over 2011	–	13.32	45.38	45.28	49.97	50.69

Note \*Office of Economic Adviser (<http://eaindustry.nic.in/home.asp>)

\*\*WPI has been taken for the month in which the tender was to be bid in the relevant year.

Figures in brackets indicates negative values.

206. Based on the comparison, the DG observed that the percentage increase in the average L1 price was disproportionately high as compared to the increase in WPI for the years 2009 and 2012. For the year 2009, it was observed that while WPI had increased by 6.97% over the previous year, the average L1 prices in the four different categories were found to have increased by 19.66% to 23.31% which was nearly 3-3.5 times the increase in WPI. In the year 2010, while WPI increased by 1.97%, the average L1 price fell significantly registering a negative growth rate in the range of 18.89% to 21.11%. Similarly, in 2011, while the WPI increased by just 0.93%, the average L1 price again registered a negative growth rate falling between 5.68% to 9.99%. However, in year 2012, while WPI increased by 13.32% over the previous year, the average L1 prices for the four categories increased in the range of 45.38% to 50.69%. This was found to be 3.4 to 3.8 times higher than the corresponding increase in WPI. Further,



the said trend observed in the price (*i.e.* average L1 price and WPI) in the impugned tender was similar to the trend witnessed in 2009.

207. Based on the above analysis, the DG concluded that in the years 2009 and 2012, there was a substantial increase in the average L1 price for the different categories of cement *vis-a-vis* the corresponding increase in the WPI values for grey cement, showing that this pattern was indicative of price parallelism and collusive bidding.

208. The OPs in their submissions have argued that the rates to be quoted for a tender are determined on the basis of factors such as prevailing market prices, demand-side factors including demand and consumption levels for various sectors and supply side factors including cost of production, freight charges *etc.*, as well as the fact that the price to be quoted for the tender is going to remain static for the next one year irrespective of the changes that might take place at the market place during that period.

209. Further, the OPs have argued against use of WPI values for grey cement as an indicator to assess whether the rise in bid prices quoted in the 2012 tender was justified or not. They have argued that WPI values for grey cement is not a good indicator for comparison, as WPI indicates the change in cement prices at a Pan-India level and cannot be employed for price analysis at the regional level. It was further contended that if changes in WPI is a good tool to determine the market price, then what would explain the fall in average L1 price quoted in 2010 and 2011 *vis-a-vis* the rise in WPI values for the same period.

210. In this regard, the Commission has analysed the data on the quoted bid prices of the OPs in the tenders for years 2008, 2009, 2010, 2011 and 2012, as provided in the DG Report. The following Tables provide the percentage change in the quoted bid prices for all the OPs (tender on





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tender) for OPC and PPC with and without VAT C3:

**Table-2: OPC with VAT C3**

Year	Shree Cement	Jaiprakash Asso. Ltd	JK Cement	ACL	ACC	JK Lakshmi	Ultratech
2009	12.25		10.93			10.10	
2010	-18.45		-21.76			-15.88	
2011	-11.75	-6.78	1.23	0.65		-5.63	
2012	46.42	33.93	32.17	30.02		32.64	42.68

**Table-3: OPC without VAT C3**

Year	Shree Cement	Jaiprakash Asso. Ltd	JK Cement	ACL	ACC	JK Lakshmi	Ultratech
2009	14.58		16.13			13.07	
2010	-24.42		-21.16			-19.25	
2011	-4.54	-7.93	2.78	-0.77		-1.87	
2012	45.58	34.85	28.72	31.16		32.35	43.23

**Table-4: PPC with VAT C3**

Year	Shree Cement	Jaiprakash Asso. Ltd	JK Cement	ACL	ACC	JK Lakshmi	Ultratech
2009	9.96	22.76	10.72	15.03	15.26	10.52	
2010	-15.56	-15.70	-20.91	-12.82	-14.26	-12.90	
2011	-13.67	-6.95	4.63	-17.94		-5.47	
2012	48.55	38.03	29.72	53.17		31.26	43.23

**Table-5: PPC without VAT C3**

Year	Shree Cement	Jaiprakash Asso. Ltd	JK Cement	ACL	ACC	JK Lakshmi	Ultratech
2009	15.01	23.62	15.86	16.36	16.59	15.59	
2010	-22.33	-16.14	-20.88	-13.03	-14.60	-16.76	
2011	-7.26	-7.97	4.93	-18.79		-1.52	
2012	49.46	39.38	28.52	54.05		31.02	44.39



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211. The above Tables (Nos. 2 to 5) show that the percentage change in average bid prices of cement in both the categories and for both OPC and PPC, have not necessarily moved in tandem with the percentage changes in WPI, both in 2010 and 2011. However, positive correlation is discerned both in 2009 and 2012. Further, the tender for the year 2012 stands out in terms of the magnitude of the percentage change in prices of both OPC and PPC quoted by all the OPs. Since ACC did not bid in 2011, the figures in its case are not available, but in absolute terms, the average prices quoted by ACC in the 2012 tender are in the range of Rs. 233.25 to Rs. 268.63 which are comparable with the average quoted bid prices of the other OPs. What is striking is that the percentage change in 2012 starts from a minimum of 28.52% in the case of PPC and 28.72% in the case of OPC and goes up to as high as 53-54% for PPC and 45%-46% for OPC. The Commission notes that even if WPI is disregarded as an indicator to assess the rate of change, which the DG has done and which has been argued to be an inappropriate indicator for comparison, the fact remains that the increase in prices for the 2012 tender is exceptionally high on a standalone basis as well as in comparison with the previous years.

212. To examine the factors which contributed to the increase in the bid prices in the 2012 tender, parties were asked to provide an explanation. In response thereto, OP-1 stated that the price quoted for a certain destination is based on the marketing team's assessment of expected realisation in that market which in turn is based on several other factors. To provide an idea of the prevailing market trends, OP-1 also provided data on prices prevailing for PPC and OPC in case of trade and non-trade segments for one month period prior to the date of the tenders for the years 2011 and 2012. The Table below provides the range for day-wise prevailing prices of OP-1 in the institutional segment in the one month prior to the tender in 2011 and 2012:



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**Table-6**

Type of Cement	Range of prices in the institutional segment (in Rs. / Bag)	
	2011	2012
OPC	193-225	255-283
PPC	180-210	240-275

213. Based on the above, it was contended that there was an increase in the prices in the institutional segment in 2012 in comparison to 2011 and that the quoted tender prices were near about the prevailing prices in the institutional segment. OP-1 argued that cement being a dynamic industry, prices change frequently and there is no settled formal pricing mechanism. For a tender requiring 120 price quotations, the marketing team relies on its understanding of the destination-wise prevailing prices and their expectation about the likely price movements during the tender period to arrive at the price quotes.

214. OP-2 stated that the cement prices are determined based on the prevailing demand and supply, market prices, cost of production as well future expectations in relation to prices. It stated that among other factors a rise in input costs is one of the reasons behind a substantial increase in the price and certain data with respect to cost increase was provided.

215. OP-3 stated that the prices quoted in the tender were based on the prevailing market conditions along with certain other factors. It was stated that the prevailing market prices in the trade segment heavily influence the determination of the bid price. Furthermore, it was also submitted that the increase in the bid price in 2012 was partly to cover the production and sales cost incurred which in previous years often could not be recovered.

216. OP-4 stated that cement prices are determined on the basis of its own costing, the prevailing market prices, the demand and supply position,



logistic and local labour conditions and last but not least the fact that the price to be quoted now is going to remain static for next one year irrespective of what might take place in the market during that period. Such quoted price is usually lower than the prevailing market price particularly in view of the 'Fall Clause' condition contained in the terms of the tender which require that the tenderer shall not supply cement to any other person in the market at a price lower than the price quoted in the tender. In its reply dated 14.10.2015, OP-4 had also stated that price was determined based on the prevailing market forces as well as input cost of production which had gone up significantly.

217. OP-5 stated that cement prices were determined based on various demand and supply factors. It was submitted that several times cost increases were witnessed between 2011 tender and 2012 tender which contributed to the increase in price in the 2012 tender. The prevailing trade price in the first/second week of August also contributed to determining the bid price. Furthermore, the demand conditions for cement were negatively affected by the non-availability of sand and aggregates in Punjab and Haryana because of the ban imposed on sand/aggregate mining in various parts of Punjab and Haryana. This contributed to the slump in the demand in the trade segment and saw lower prices for the 2011 Tender.

218. OP-6 stated that while determining prices, it relied on the prevailing market prices. Furthermore, there was an increase in the cost of raw materials; specifically, there was a significant increase in the cost at the Gagal plant between 2010 and 2012 from where cement was supposed to be supplied.

219. OP-7 stated that in a competitive market like cement, market forces determine the prices. In this regard, it was submitted that the bid prices quoted are based on a rough idea of the prices prevailing in at least the 30



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- day period prior to the due date of the tender at the tightest possible margin. JK Lakshmi provided the average price for PPC in the trade and non-trade segment (during the 30-day period prior to the tender) and compared it with the average rates quoted for the tender during the years 2008, 2009, 2010, 2011 and 2012.

220. As will be seen from the foregoing paragraphs, the OPs have tried to justify the higher bid prices by giving a variety of reasons such as by relating the increase in bid prices to similar increases in the trade and non-trade segment as well as by attributing, among other factors, to the rise in input factors. They have also, argued that cement is a dynamic industry and that prices change frequently. As a result, there is no settled formal pricing mechanism. Some of the other specific reasons given are the ban imposed on sand mining in some parts of Punjab and Haryana, production and sale costs which could not be covered in the previous year, *etc.* The Commission notes that there is no doubt that there is an increase in prices in the trade and non-trade segment in 2012 over 2011 and in support of it, the OPs have given average/ month-wise/ day-wise tables of prices as well as average prices over different periods. The Commission, however, notes that such an explanation offered by the OPs does not appear to justify the increase in the quoted bid prices. In the first place, it may be observed that the increase in prices in trade segment does not bear direct relationship with the supplies to be made against the tender for the reason that sales in trade segment are a continuous phenomenon throughout the year in cement industry and that they go through cyclical changes on a day-on-day and month-on-month basis. Therefore, an increase in the prices in this segment may not provide a good comparison and justification for the increase in the tender price which, once fixed, does not change for the entire duration of the tender. Besides, the tender prices are fixed for the entire duration of the tender. If the OPs indeed relied on the prices in the trade and non-trade segment to determine the quoted bid price then firstly, they should have



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some estimates of the projected prices in these segments during the tender months. Secondly, they should have demonstrated how the changes in day-on-day/ month-on-month or cumulative prices in the trade and non-trade segments related with the determination of the quoted bid prices. However, the parties have not been able to provide any material in this regard which can persuade the Commission to lend its concurrence with such pleas. As for the other reasons such as change in input costs, difficulties in procurement, losses incurred in the previous years *etc.*, no verifiable details have been provided by the parties either before the DG or the Commission wherefrom the Commission can deduce any rationale for the increase in the quoted prices. Thus, in the absence of any methodology or computation sheet supplied by the parties, the Commission notes that the purported data provided by the parties in a piece-meal manner in support of the increase in the tendered price, is not of any consequence.

221. To illustrate the point, Shree Cement has stated that in 2011, market conditions were subdued leading to low prices. But in 2012, the market was buoyant which can be seen from the upward trend in the cement prices in the trade and non-trade segment. The Commission notes that this explanation does not provide clarity on the factors which may have brought about this change in the market conditions in 2012 over 2011. The Commission observes that this is also to be seen with the fact that the OPs have quoted different prices for different destinations with an accuracy of 2 decimal points in certain cases. Moreover, the precision upto 2 decimal points in prices is not limited only to the quoted prices for different destinations. What is surprising to note is that for the same destinations, derived basic price is different for OPC and PPC, with and without VAT. The following Tables (a-g) contain the basic prices quoted by the different OPs for 10 districts in different categories:



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**Table-7**a) Basic Price quoted by Shree Cement for different categories of cement in ten districts (in Rs.)

Name of Districts	OPC		PPC	
	Basic price with VAT C3 form	Basic price without VAT C3 form	Basic price with VAT C3 form	Basic price without VAT C3 form
Chandigarh/ Panchkula/ Pinjore/ Kalka/ Morni	151.47	155.01	148.35	147.99
Ambala/ Sahabad	161.51	160.05	155.01	154.40
Yamuna Nagar/ Jagadhri	158.49	156.83	155.69	155.03
Naraiangarh	161.51	160.05	155.69	155.03
Kurukshtera/ Pehowa	160.36	158.99	155.37	154.94
Kaithal	171.66	170.13	159.62	159.19
Jind/Safidon	166.26	165.21	158.93	158.84
Karnal/Madhuban	163.28	161.76	161.00	160.55
Panipat	167.24	165.72	164.92	164.47
Gohana	169.33	167.80	166.03	165.49

**Table-8**b) Basic Price quoted by UltraTech for different categories of cement in ten districts (in Rs.)

Name of Districts	OPC		PPC	
	Basic price with VAT C3 form	Basic price without VAT C3 form	Basic price with VAT C3 form	Basic price without VAT C3 form
Ambala/ Sahabad	163.07	161.44	149.95	151.32
Yamuna Nagar/ Jagadhri	164.00	162.49	153.59	153.96
Naraiangarh	157.84	156.16	148.21	148.62
Kurukshtera/ Pehowa	165.97	164.34	150.37	151.15
Kaithal	168.60	167.03	152.33	152.97
Jind/ Safidon	172.26	170.71	157.84	151.91
Karnal/Madhuban	163.63	162.35	155.12	155.90
Panipat	166.36	164.81	163.10	159.03
Gohana	172.99	171.44	161.83	162.47
Rohtak	172.55	171.27	158.27	153.34

**Table-9**

c) Basic Price quoted by JAL for different categories of cement in ten districts

(in Rs.)

Name of Districts	OPC		PPC	
	Basic price with VAT C3 form	Basic price without VAT C3 form	Basic price with VAT C3 form	Basic price without VAT C3 form
Chandigarh/Panchkula/Pinjore/Kalka	186.38	185.27	175.28	175.04
Ambala/ Sahabad	190.79	189.54	177.98	177.74
Yamuna Nagar/ Jagadhri	189.08	187.91	175.42	175.32
Naraiangarh	189.09	187.84	174.57	174.47
Kurukshtera/ Pehowa	192.48	191.43	183.08	182.78
Kaithal	196.28	195.11	181.76	181.73
Jind/ Safidon	198.74	197.49	186.78	186.48
Karnal/Madhuban	198.68	197.63	189.28	188.98
Panipat	202.68	201.63	191.57	191.40
Gohana	198.93	197.88	186.11	186.08

**Table-10**

d) Basic Price quoted by JK Cement for different categories of cement in ten districts

(in Rs.)

Name of Districts	OPC		PPC	
	Basic price with VAT C3 form	Basic price without VAT C3 form	Basic price with VAT C3 form	Basic price without VAT C3 form
Yamuna Nagar/ Jagadhri	134.91	150.64	N.Q.	N.Q.
Kaithal	139.83	155.57	N.Q.	N.Q.
Jind/ Safidon	138.33	154.06	N.Q.	N.Q.
Karnal/ Madhuban	140.33	156.07	N.Q.	N.Q.
Panipat	143.33	159.07	N.Q.	N.Q.
Rohtak	144.40	160.13	134.96	150.69
Bahadurgarh	145.97	161.71	133.38	149.12
Jhajjar	144.40	160.13	133.38	149.12
Bhiwani/ Tosham	144.33	160.06	136.46	152.19
Charkhi Dadri	144.33	160.06	134.88	150.62

Note: N.Q. indicates Not quoted.





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**Table-11**

e) Basic Price quoted by JK Lakshmi for different categories of cement in ten districts

(in Rs.)

Name of Districts	OPC		PPC	
	Basic price with VAT C3 form	Basic price without VAT C3 form	Basic price with VAT C3 form	Basic price without VAT C3 form
Chandigarh/ Panchkula	183.66	182.14	169.99	169.55
Ambala/ Sahabad	183.66	182.14	109.89	169.55
Yamuna Nagar/ Jagadhri	186.91	184.93	171.99	171.55
Naraingarh	184.66	183.14	172.7	172.13
Kurukshetra/ Pehowa	186.8	185.35	173.14	172.76
Kaithal	189.8	188.35	176.14	175.76
Jind/ Safidon	186.88	185.71	175.78	175.48
Karnal/ Madhuban	187.3	185.85	173.64	173.26
Panipat	192.8	191.35	179.14	178.76
Gohana	191.99	190.57	179.14	178.376
Rohtak	195.38	194.21	184.28	183.98

**Table-12**

f) Basic Price quoted by ACL for different categories of cement in ten districts

(in Rs.)

Name of Districts	OPC		PPC	
	Basic price with VAT C3 form	Basic price without VAT C3 form	Basic price with VAT C3 form	Basic price without VAT C3 form
Chandigarh/ Panchkula	240.94	240.00	227.93	227.62
Ambala/ Sahabad	238.54	237.79	226.97	226.74
Yamuna Nagar/ Jagadhri	242.37	241.33	227.93	227.62
Naraingarh	239.02	238.23	225.05	224.97
Kurukshetra/ Pehowa	242.85	241.77	227.45	227.18
Kaithal	242.13	241.10	224.57	224.53
Jind/ Safidon	242.37	241.33	229.37	228.95
Karnal/ Madhuban	241.42	240.44	226.49	226.30
Panipat	242.37	241.33	227.45	227.18
Gohana	N.Q.	N.Q.	227.45	227.18

Note: N.Q. indicates Not quoted.



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**Table-13**

g) Basic Price quoted by ACC for different categories of cement in ten districts

(in Rs.)

Name of Districts	OPC		PPC	
	Basic price with VAT C3 form	Basic price without VAT C3 form	Basic price with VAT C3 form	Basic price without VAT C3 form
Chandigarh/Panchkula	N.Q.	N.Q.	N.Q.	N.Q.
Ambala/Sahabad	N.Q.	N.Q.	216.78	216.37
Yamuna Nagar/Jagadhri	220.94	219.35	N.Q.	N.Q.
Naraingarh	N.Q.	N.Q.	N.Q.	N.Q.
Krurkshetra/Pehowa	N.Q.	N.Q.	N.Q.	N.Q.
Kaithal	217.68	216.07	N.Q.	N.Q.
Jind/Safiadon	N.Q.	N.Q.	N.Q.	N.Q.
Karnal/ Madhuban	N.Q.	N.Q.	N.Q.	N.Q.
Panipat	N.Q.	N.Q.	N.Q.	N.Q.
Gohana	N.Q.	N.Q.	N.Q.	N.Q.

Note: N.Q. indicates Not quoted.

222. From the above Tables, it can be seen that there are differences in the basic price quoted for the same destination for supply of PPC with and without VAT C3 form as well as for supply of OPC with and without VAT C3 form. The OPs were asked to provide an explanation for this. In response, they have stated that they had arrived at the final prices to be quoted for each district for each category of cement first, and from that figure, they had deducted the various components such as freight, VAT *etc.* to arrive at the basic price. This methodology, called the Backward Calculation Method, accounted for the differences in the basic prices for supply of cement at the same destination to the Government Departments and to the Boards/ Corporations. It has been stated by some of the OPs that since cement was being dispatched from a number of plants to their various warehouses and then forwarded to the destinations specified in the tender, it was not possible to have a single basic price. Some OPs have also argued that different basic prices for the same destination were also quoted in the previous tenders as well and this was not specific to the 2012 tender alone.

223. The Commission notes that surprisingly the explanations offered by all the parties to arrive at the basic price are same. All of them have stated that



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they have first determined the final price and then deducted from it the various components to arrive at the basic price. The Commission is of the view that it is paradoxical that all the cement companies which are managed by professionals will arrive at the tender price on an *ad hoc* basis first and then work backwards to arrive at the basic price. This defies logic that without determination of *ex-factory/* basic price based on the cost of production and then adding various components like freight, VAT *etc.*, the companies would arrive at the final price. None of the Ops have provided data for bid price determination based on this approach even though a number of them have discussed about rise in costs being a factor which caused an increase in the quoted bid prices for the 2012 tender.

224. Even if the contention of the parties with regard to the purported difference in the basic prices at the same destination is acceded to, none of the OPs have provided a single illustration demonstrating as to how they have arrived at the 'final price' in the first instance. Moreover, the Commission notes that if the OPs had indeed determined the 'final prices' independently as is contended by them, they would have made price computation for determining the final price in each of the district they had bid for. However, each of the OPs or their representatives in their replies to the DG Report or in their submissions before the Commission have not furnished the basis for final price computation.

225. Some of the OPs *viz.* OP-5 (ACL) and OP-6 (ACC) have submitted that they did not submit the actual basic price in the financial bid at the time of the tender because revealing the actual basic price would have allowed their competitors to access confidential information which could have caused them to lose their competitive advantage to their competitors and their customers as well.

226. The Commission notes that if the OPs indeed had the data on the actual basic prices, nothing prevented the companies from submitting such



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computation sheets, if any, before the Commission to support their submissions and at the same time to claim confidentiality thereon to protect their commercially sensitive information. Mere arguments without any supportive evidence, do not establish the contention of the OPs. Thus, it cannot be a mere coincidence that all the OPs have arrived at the basic price through backward calculation method.

227. There is another fact emerging from the data on quoted bid prices given by different OPs for 4 categories of cement for different destinations in 2011 and 2012 as given in Annexure - A to the DG Report. For the 2012 tender, looking at the case of OPC (without VAT C3 Form) and OPC (with VAT C3 Form), it is observed that in case of all the OPs, the difference between the price quoted for OPC (without VAT C3 Form) and OPC (with VAT C3 Form) in all destinations is Rs. 20 barring the case of Ultratech and JK Cement where the price differences are in the range of Rs. 19.75 to Rs. 20.25 and 19.99 to Rs. 20.01 respectively. It is noted that even in these 2 cases, the range for price difference is in a very narrow band. In contrast, in the 2011 tender, there is no consistency in price difference across different destinations for the same OP, nor across all OPs. These price differences in respect of all the OPs are given in the Table below:



**Table-14**

Difference in quoted bid price for OPC without VAT C3 Form and with VAT C3 Form for 30 Destinations in 2012 and 2011 Tenders

Destinations	Shree Cement		UltraTech Cement		Jaiprakash Associates Ltd.		JK Cement		ACL		ACC		JK Lakshmi	
	2012	2011	2012	2011	2012	2011	2012	2011	2012	2011	2012	2011	2012	2011
	Difference (in Rs.)													
Chandigarh/ PKL	20.00	20.95			20.00	16.12			20.00	19.00			20.00	17.00
Ambala/ Shahabad	20.00	21.70	20.00	14.00	20.00	13.58			20.00	11.00			20.00	16.00
Yamuna Nagar/ Jagadhari	20.00	20.70	20.12	14.00	20.00	16.16	19.99		20.00	16.00	20.00		20.00	16.00
Naraingarh	20.00	21.45	20.00	14.50	20.00	17.92			20.00	5.50			20.00	17.00
Kurukshetra/ Pehowa	20.00	11.20	20.00	14.00	20.00	10.40			20.00	9.00			20.00	17.00
Kaithal	20.00	14.10	20.00	13.50	20.00	9.77	20.01		20.00	12.00	20.00		20.00	17.00
Jind/Safidon	20.00	14.10	20.00	13.00	20.00	12.50	19.99	17.00	20.00	14.86			20.00	17.00
Karnal/ Madhuban	20.00	13.00	20.00	13.50	20.00	10.00	20.01		20.00	20.00			20.00	13.00
Panipat	20.00	13.95	20.00	13.50	20.00	3.85	20.01		20.00	14.85			20.00	15.00
Gohana	20.00	13.75	20.00	13.50	20.00	7.31		16.75		20.31			20.00	17.00
Rohtak	20.00	14.95	20.00	13.00	20.00	11.16	20.00	16.61		8.45			20.00	17.00
Sonepat	20.00	12.85	20.00	13.00	20.00	8.40		16.75		14.31			20.00	11.00
Bahadurgarh	20.00	14.20	20.00	13.00	20.00	15.81	20.01	16.56		20.02			20.00	16.00



Destinations	Shree Cement		UltraTech Cement		Jaiprakash Associates Ltd.		JK Cement		ACL		ACC		JK Lakshmi	
	2012	2011	2012	2011	2012	2011	2012	2011	2012	2011	2012	2011	2012	2011
	Difference (in Rs.)													
Jhajjar	20.00	13.10	20.00	12.50	20.00	15.91	20.00	16.34		19.61			20.00	16.00
Bhiwani/ Tosham	20.00	14.10	20.00	13.00	20.00	16.10	19.99	16.50		20.60			20.00	16.00
Charkhi Dadri	20.00	12.70	20.00	13.00	20.00	16.77	19.99	16.50		17.60			20.00	14.00
Mohindergarh	20.00	13.60	20.00	12.50	20.00	15.91	20.00	16.04		17.63			20.00	13.00
Rewari	20.00	13.85	20.00	12.50	20.00	16.01	19.99	16.04		18.63			20.00	15.00
Narnaul	20.00	13.70	20.00	12.00	20.00	16.30	20.01	15.94		16.79			20.00	8.00
Gurgaon	20.00	13.70	19.80	11.50	20.00	15.36		16.29		18.61			20.00	17.00
Faridabad	20.00	14.10	20.00	13.00	20.00	8.98	20.00	16.68		23.01			20.00	16.00
Palwal/Sohna	20.00	14.10	20.00	13.50	20.00	16.14	19.99	16.29		11.01			20.00	16.00
Nuh	20.00	12.45	20.00	12.50	20.00	15.74	20.00	16.48		12.32			20.00	17.00
Hansi	20.00	14.45	20.00	14.00	20.00	13.39	20.00	16.87		3.87			20.00	16.00
Hisar	20.00	13.95	20.25	13.50	20.00	16.03	20.00	16.87		2.00			20.00	13.00
Fatehabad	20.00	14.45	20.25	13.50	20.00	15.30	20.00	16.98		5.72			20.00	16.00
Narwana	20.00	14.10	19.75	14.00	20.00	10.71	19.99			10.71			20.00	17.00
Tohana	20.00	14.20	19.75	14.00	20.00	11.95	20.01			7.56			20.00	16.00
Sirsa	20.00	14.45	19.75	13.00	20.00	16.40	20.00			7.56			20.00	17.00
Dabwali/ Kalanwali	20.00	14.20	20.00	14.50	20.00	16.67	19.99			8.27			20.00	17.00



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228. It is noted that, it is not clear as to how all the OPs have been able to maintain such a consistent and uniform difference of Rs. 20 in the quoted price of OPC without and with VAT C3 Form in the 2012 tender (barring certain destinations in case of Ultratech and JK Cement). Such consistency in the price difference is not observed in the 2011 tender where the difference in quoted price without and with VAT C3 Form is fluctuating and is in a much wider range.

229. The Commission observes that all these details cumulatively bring out the behaviour of the OPs which is not consistent with the conduct in case they were competing with each other in a free and competitive market.

- (ii) *Whether the lower quantities quoted by OPs in the impugned tender than the bid quantities quoted in the previous tender, was due to an arrangement to divide the total quantity amongst OPs to allocate markets? Whether the bid quantities were arrived at independently by OPs based on business/ commercial consideration(s)?*

230. The Informant had further alleged that the OPs had quoted/ bid substantially lower quantities in the impugned tender, as compared to the quantities quoted by them in the previous years' tenders, so as to divide the total tender quantity amongst themselves.

231. The following Table provides the quantities quoted by the OPs in the tenders for the years 2010, 2011 and 2012.



**Table-15**

(in MT)

Name of the Company	Quantity quoted in 2012 tender	Quantity quoted in 2011 tender	Quantity quoted in 2010 tender
	Tendered quantity 400000 MT	Tendered quantity 400000 MT	Tendered quantity 600000 MT
Shree Cement	105000	400000	500000
J. K. Cement	50000	200000	600000
ACL	60000	400000	500000
JAL	50000	120000	240000
J K Lakshmi	50000	400000	600000
ACC	30000	0	100000
UltraTech	75000	400000	0
<b>Total quantity quoted by all the OPs</b>	<b>420000</b>	<b>1920000</b>	<b>2540000</b>

Note: '0' indicates that the company did not participate in the tender.

232. From the above, it can be seen that in the tenders for the years 2010 and 2011, the cumulative quantity quoted by the OPs for each of these years was significantly higher than the total tender quantity of 600000 MT and 400000 MT in the 2010 and 2011 tenders, respectively. There are also instances where some OPs have quoted for the full quantity of the tenders in 2010 and 2011. For example, J K Cement and J K Lakshmi Cement had quoted for the full tender quantity in 2010, and Shree Cement, ACL, J K Lakshmi Cement and UltraTech Cement had quoted for the full tender quantity in 2011. However, in the 2012 tender, there has been substantial reduction in the quantity quoted by each of the OPs in comparison with the quantities quoted by them in previous years. What is striking is that the cumulative quantity quoted by the OPs in the impugned tender is 420000 MTs which is close to the total tender quantity of 400000 MTs. In fact, none of the OPs has quoted for the full tender quantity or a sizable





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part of it, unlike in the previous tenders. In the replies explaining the reduction in quantity quoted in the 2012 tender *vis-à-vis* the previous tenders, it was stated by the OPs that in most cases in past tenders, they were awarded lower quantity by DS&D in comparison to the total quantity bid by them. Another reason for the lower quantity tendered was that DS&D did not disclose to the bidders the quantity that it would purchase for a particular destination. Further, the quantities actually requisitioned/ lifted by DS&D in the past were lower than the quantity allotted.

233. To examine the tenability of these justifications, the DG has analysed the data on the quantity quoted, quantity allocated and quantity actually supplied by the OPs for the tenders in the years 2009 to 2011. The DG has also examined the capacity utilisation figures for those plants from which the OPs proposed to supply/were supplying cement to the State of Haryana in 2012-13. The following Tables provides the quantity quoted, quantity allocated and quantity actually supplied by the OPs for tenders in 2009 to 2011:

**Table-16**

Year 2009: Total tendered quantity: 8 lakh MT

(in MT)

Name of the company	Quantity quoted	Quantity allocated	Quantity actually supplied	Quantity quoted as a % of the total tender quantity
Shree Cement	2,70,000	2,35,000	1,22,000	33.75
J.K Cement	1,50,000	3,00,000	2,22,918	18.75
ACL	1,25,000	1,25,000	1,12,000	15.625
JAL	80,000	25,000	32,330	10
Grasim Industries	2,55,000	85,000	65,000	31.875
Birla Corp	80,000	40,000	22,000	10
J.K Lakshmi	1,50,000	65,000	57,000	18.75
Cement Corp	50,000	25,000	12,000	6.25
ACC	80,000	No qty. allotted	Not applicable	10
Tuff Cemento	30,000	No qty. allotted	Not applicable	3.75
Mittal Infracon (Pakistan)	5,000	No qty. allotted	Not applicable	0.625



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**Table-17**

Year 2010: Total tendered quantity: 6 lakh MT

(in MT)

Name of the company	Quantity quoted	Quantity allocated	Quantity actually supplied	Quantity quoted as a % of the total tender quantity
Shree Cement	5,00,000	3,08,000	1,12,000	83.33
J.K Cement	6,00,000	1,41,000	69,406	100.00
ACL	5,00,000	30,000	13,000	83.33
JAL	2,40,000	1,12,000	67,436	40.00
Samruddhi Cement	3,00,000	9,000	9,000	50.00
Cement Corp	40,000	No qty allotted	Not applicable	6.67
ACC	1,00,000	No qty allotted	Not applicable	16.67
J.K Lakshmi	6,00,000	No qty allotted	Not applicable	100

**Table-18**

Year 2011: Total tendered quantity: 4 lakh MT

(in MT)

Name of the company	Quantity quoted	Quantity allocated	Quantity actually supplied	Quantity quoted as a % of the total tender quantity
Shree Cement	4,00,000	1,51,000 +/- 10%	1,17,249	100
J.K Cement	2,00,000	No qty allotted	Not applicable	50
ACL	4,00,000	73,000 +/- 10%	1,09,972	100
JAL	1,20,000	1,10,000 +/- 10%	1,20,978	30
UltraTech	4,00,000	65,000 +/- 10%	42,000	100
Cement Corp	30,000	No qty allotted	Not applicable	7.5
J.K Lakshmi	4,00,000	No qty allotted	Not applicable	100
Birla Corp	50,000	40,000 +/- 10%	33,000	12.5

234. From the above Tables, it is seen that Shree Cement quoted a quantity of 2,70,000 MT in 2009 (out of the total tendered quantity of 8,00,000 MT) and was allocated 2,35,000 MT. The quantity actually supplied by it was 1,22,000 MT. Despite this, in the 2010 tender, Shree Cement increased its quoted quantity to 5,00,000 MT (out of the total tendered quantity of 6,00,000 MT) and supplied only 1,12,000 MT out of the 3,08,000 MT allocated to it by DS&D. Thus, in both 2009 and 2010 tenders, Shree Cement was allocated 87.03% and 61.60% of the total quantity bid by it



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the actual quantity procured by DS&D was even lower *i.e.* 45.18% and 22.40% of the total quantity bid by it. In spite of the experience of lower allocation and lower quantity supplied in both the 2009 and 2010 tenders, Shree Cement went on to quote for 100% of the total tendered quantity in 2011 of 4,00,000 MT.

235. Similarly, in the case of ACL, in 2010, it had quoted 5,00,000 MT, was allocated only 30,000 MT and actually supplied even lower amount of 13,000 MT. Despite this, it went on to quote for the full tender quantity in the 2011 tender of 4,00,000 MT. Similar patterns are observed in cases of other OPs as well as where notwithstanding lower allocation and even a further reduction in actual procurement by DS&D in comparison to quoted bid quantity, the OPs had proceeded to quote for the full or a large portion of the tender quantity in succeeding tenders. The explanation offered by the OPs that the reduction in quantities quoted for the 2012 tender was due to lower off-take of cement in past tenders is hence, found to be in contradistinction to their behaviour in previous years.

236. Furthermore, the two parties namely, Cement Corp. and Birla Corp. who have also tendered, do not show such a variation in the quantity quoted over the years. The percentage of total tendered quantity bid by Birla Corp. for the years 2009 to 2012 are 10% (2009), 'not bid' (2010), 12.5% (2011) and 12.5% (2012) respectively. Similarly in case of Cement Corp., the percentage of tendered quantity bid for the tenders from the years 2009 to 2012 are 6.25% (2009), 6.67% (2010), 7.5% (2011) and 7.5% (2012) respectively. These two enterprises have thus, been consistent in their bidding in successive tenders. Most notably, Cement Corp. and Birla Corp. have not reduced the quantity bid in the impugned tender as compared to the previous years and unlike the OPs, their bidding pattern did not undergo a change in the impugned tender. The Commission notes that similar to the OPs, in the case of Birla Corp. and Cement Corp., also,



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the actual offtake by the Informant in previous tenders was lower (even '0' in certain cases) in comparison to the quantity bid by them as well as the quantity allocated to them by the Informant. However, lower allocation and reduced offtake did not result in reduction in the quantity quoted by them in the 2012 tender. The quantity bid by these two bidders shows a consistent pattern in their conduct from 2009 to 2012, which is distinct from the quantities bid by all the OPs in the impugned tender.

237. Furthermore, the capacity and capacity utilisation of those plants from which the OPs proposed to supply/ were supplying cement to the State of Haryana in 2012-13, have been analysed by the DG. The data submitted by the OPs, is given in the following Table:

**Table-19**

Name of the OP	Unutilized capacity (MT)	Unutilized capacity as a % of tendered quantity (Unutilized capacity/ 400000)*100]
<b>Shree Cement*</b>	2,36,252	59.03%
<b>UltraTech Cement**</b>	20,39,000	509.75%
<b>Jaiprakash Cement</b>	29,13,000	728.25%
<b>J. K. Cement</b>	0	0.00%
<b>ACL ***</b>	18,96,498	474.14%
<b>ACC Limited</b>	12,61,657	315.41%
<b>J.K. Lakshmi Cement</b>	2,00,000	50.00%

\*Unutilised capacity at Beawar and Ras Plants

\*\*Unutilised capacity at Aditya Works-I, Aditya works-II, Kotputli Cement Works and Panipat Cement works Plants

\*\*\*Unutilised capacity at Darlaghat, Roorkee, Dadri and Nalagrah Plants

238. From the above Table, DG has observed that except in the case of J K Cement, for all other OPs, there is substantial un-utilised capacity in 2012-13. This was in fact, many times the total tender quantity of 4,00,000 MT in the 2012 tender. Based on this, the DG has observed that the decline in the tendered quantity in 2012 cannot be explained by the capacity utilisation figures of the OPs which shows a significant amount of unutilised capacity lying idle with the OPs.



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239. The OPs in their replies to the DG Report have provided reasons for the decline in quoted quantity in the 2012 tender as well an explanation for the significant unutilised capacity at their plants in the year 2012-13. All the OPs have reiterated that one of the primary reasons for quoting lower quantities in the 2012 tender was the uncertainty in the quantities allocated as well as the final offtake by DS&D as was witnessed in the previous tenders. Besides, DS&D did not provide the break up for the quantity to be supplied at different destinations.

240. OP-1 in its submissions has stated that the decision on the quantity to be tendered is based on the pattern of capacity utilisation during the months prior to the actual tender, commercial viability and for enhancing profits. It was stated that in the two-month period prior to the impugned tender, capacity utilisation was 101.22% (in June 2012) and 91.14% (in July 2012) against 75.26% and 73.20% in June and July of 2011, respectively. This shows that there was not much under-utilised capacity. OP-1 has further argued that the quantity quoted by it was based on the average of the quantities lifted by the Informant in the past 3 tenders. Based on this figure, the marketing team of OP-1 decided to bid for 1,00,000 MT in the impugned tender but increased it further to 1,05,000 MT due to certain '*socio-religious belief*'.

241. OP-2 stated that it was a commercial decision to make a lower quantity bid as it was more profitable to sell to the trade and non-trade segment than to sell to the State of Haryana. OP-2 has further contended that capacity utilisation at the end of the year is based on multiple factors and an estimate of the capacity utilised at the end of the year cannot be made in August. It was further stated that Panipat and Kotputli plants from where it intended to supply the Informant were more recently commissioned and OP-2 was in the process of ramping up the capacity of these plants. OP-2 argued that based on previous tenders, the maximum



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share of quantity allocated to OP-2 in terms of the total quantity allocated to total tender quantity was 16.25% in previous years. Hence, keeping this figure in mind, it took a 'commercially sound decision' to quote for 18.75% of the total tender quantity in the 2012 tender.

242. OP-3 has argued that it has been consistently reducing its quoted quantity because of the inconsistency in the quantity awarded and indented by the Informant. It has further stated that the higher cost of production at the Panipat plant, downward trend in cement dispatches from this plant in months prior to the tender and losses suffered in the previous tenders contributed to quoting lower quantities in the 2012 tender. It was further stated that it quoted for a proportion of its expected available capacity which was approximately between 17% to 33% or a midpoint of 25%. OP-4 argued that there has always been an element of uncertainty as to what quantities of cement would be finally awarded to a bidder by the Informant. Further, it was argued that even after the award of a certain order to a bidder, the Informant is under no obligation to lift even one single bag of cement despite having awarded an order for certain quantity. However, on the other hand, the bidder is obligated to tie down the awarded order quantity of the cement for supply to the Informant. Further, it was submitted that another factor for quoting less than the tendered quantity was that Government of Haryana, Department of Industries and Commerce *vide* its Order No.2/2/2010-4-IB-I1 dated 20.4.2012, had issued guidelines regarding approval of more than one party in rate contract cases to be finalised by the High Powered Purchase Committee. These guidelines *inter alia* provide that generally the number of parties should be restricted to three but in case of supply of cement, it should be more than three. Hence, it was contended that it was futile to quote for the entire quantity.



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243. OP-5 argued that one of the prime reasons for higher bid quantities in 2010 and 2011 was that there were significant capacity additions in some of its plants. Thus, in order to secure a market for these newly added capacities, OP-5 had bid for higher quantities in 2010 and 2011 tenders. The higher quantities quoted in 2010 and 2011 would also compensate for the dip in demand for cement in the Northern region in those years. It has also stated that it bid for lower quantity in the impugned tender because there was uncertainty about the actual off-take and there were significant delays between the initial NIT, award of the rate contract and the actual order placed by the consignees. It is stated that in the previous tender, actual offtake by DS&D was higher than the quantity awarded to OP-5 which had resulted in a huge monetary loss of Rs. 5 crore and therefore, OP-5 made a conscious business decision to quote for 60,000 MT in the 2012 tender. It is stated that this quantity was quoted based on the estimate that trade sales would increase by 5,000 MT every month during the year.

244. OP-6 argued that it quoted for lower quantity in 2012 in comparison to 2010, as it had bid for only 3 destinations in the 2012 tender against for 9 destinations in the 2010 tender. Thus, in 2010, OP-6 had quoted 1,00,000 MT quantity for 9 destinations; but in 2012, it bid for 3 destinations and quoted for one-third of 2010's bid quantity, viz. 30,000 MT in 2012. It was further argued that though it did not participate in the 2011 tender, but decided to participate in the 2012 tender due to decline in its sales by 17,000 MT in the period between January-July 2012 vis-a-vis January-July, 2011. It was also stated that since the lean season was fast approaching, OP-6 expected the overall sales shortage to be 30,000 MT for the remaining part of the year. Hence, OP-6 decided to bid for 30,000 MT to be supplied by 30 November, 2016 and specifically noted this in the bid document that all care should be taken to supply cement by this period. With regard to capacity utilisation, OP-6 has argued that the reason for low capacity utilisation of its plants at Galgal was due to shift of certain



volumes for clinkering to Asian Concrete II from Gagal. It was stated that although it may appear that OP-6 has reduced its production in Gagal in 2011 and 2012, total production including Nalagarh plant has actually increased in 2011 and 2012.

245. OP-7 argued that it had set-up a new plant in Jhajjar in Haryana which came into operation in April, 2012 *i.e.* 4 months prior to the impugned tender in August, 2012. Hence, it was not confident to offer a higher quantity and thus, quoted only 50,000 MT which was the maximum capacity it could produce in a given month as according to the tender conditions, the supply had to be made within 20 days of the placement of an order. OP-7 has stated that its existing plant at Jaykaypuram which is located far-off, was used to supply in the previous tenders, leading to huge transportation cost. This resulted in a higher bid prices and non-allocation of quantity in the previous tenders. This was the chief reason that it decided not to supply from the said plant in the new tender. It is further stated that another reason for quoting lower quantity was that it wanted to give priority to trade segment which was yielding better prices.

246. On a careful examination of the submissions of the OPs and their analysis, it is seen that none of the OPs has been able to provide a valid justification for reduction in the bid quantity in the 2012 tender *vis-a-vis* its tenders in the previous years. The argument of the OPs that the pattern of allocation/procurement in past tenders is the major reason for quoting lower quantities in the 2012 tender, is not found to be tenable, especially since in most cases, as discussed above, OPs have not bid reduced quantity in both 2010 and 2011 despite the fact that actual offtakes were low. Rather, in a number of cases, OPs continued to quote for significant quantity or the entire tender quantity in 2010 and 2011.

247. Almost all the OPs have sought to justify the lower bid quantity in the impugned tender by attributing it to the uncertainty in allocation and





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difference between the allocated and finally allotted quantity in the previous tenders. Along with the same, the OPs have also given specific reasons, such as, better realisation in the trade/ non-trade segment, guidelines of the HPPC that supply would be from a minimum of three bidders, low capacity utilisation of some of the plants, financial constraints, *etc.* In this regard, it is well known that companies are juridical persons who are managed/ run by professionals who would conduct analysis within the company to arrive at commercial decisions. This is intrinsic to the working of any professional organization. Specifically, the learned senior counsel appearing on behalf of OP-5 argued that the DG has completely ignored the justification and rationale provided by OP-5 for quoting lower quantity in the impugned tender which was contained in its Internal Business Proposal which approved participation in the 2012 Tender. It was vehemently argued that the said proposal contained the basis for quoting 60,000 MT for bidding in the tender and the same remained uncontroverted. Similarly, the learned senior counsel who also appeared on behalf of OP-6, sought to demonstrate the independent behaviour of OP-6 by contending that its bid document specifically stated that the quantity of 30,000 MT can only be supplied till 30<sup>th</sup> November, 2012 unlike other OPs who did not have similar condition.

248. The Commission has examined these submissions made by the OPs. At the outset, the Commission observes that the diverse reasons assigned by the OPs to quote lower quantity in the impugned tender could have some merit if the parties had furnished any verifiable data in support thereof. Furthermore, the Commission is of considered opinion that the plea of the OPs for offering lower quantity in the impugned tender, based upon the uncertainty in allocation in previous years, stands negated from the following Table which unequivocally demonstrates that uncertainty in the allocations in the previous tenders did not result in quoting of lower quantities by the bidders in the subsequent tenders in the past:



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**Table-20**

Name of the OP	Year of the tender	Quantity quoted	Quantity allocated	Quantity actually supplied
Shree Cement	2009	2,70,000	2,35,000	1,22,000
	2010	5,00,000	3,08,000	1,12,000
	2011	4,00,000	151000+/- 10%	1,17,249
ACL	2009	1,25,000	1,25,000	1,12,000
	2010	5,00,000	30,000	13,000
	2011	4,00,000	73000+/- 10%	1,09,972
J.K. Lakshmi	2009	1,50,000	65,000	57,000
	2010	6,00,000	No qty allotted	Not applicable
	2011	4,00,000	No qty allotted	Not applicable

249. From the above Table, it can be seen that in case of Shree Cement, it quoted a quantity of 2,70,000 MT in 2009 (out of the total tendered quantity of 8,00,000 MT) and was allocated 2,35,000 MT. The quantity actually supplied by it was 1,22,000 MT. Despite this, in the 2010 tender, Shree Cement increased its quoted quantity to 5,00,000 MT (out of the total tendered quantity of 6,00,000 MT) and actually supplied only 1,12,000 MT. In spite of the experience of lower allocation and lower quantity supplied in both the 2009 and 2010 tenders, Shree Cement went on to quote for full tender quantity of 4,00,000 MT in 2011 tender.

250. In the case of ACL, in 2010 tender, it quoted 5,00,000 MT, was allocated just 30,000 MT and actually supplied only 13,000 MT. Despite this, it went on to quote for the full tender quantity in the 2011 tender of 4,00,000 MT. In the case of J.K. Lakshmi, in 2009 tender, it quoted for 1,50,000 MT and actually supplied just 57,000 MT. Despite this, it went on to quote for the full tender quantity in 2010 and but was not allocated any quantity in this tender. Even after such an experience in 2009 and 2010 tenders, it still went onto to quote for the full tender quantity in the 2011 tender.



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251. Considering all this, the Commission notes that the reduction in bid quantity by each of the OPs in the impugned tender without any convincing basis for such a conduct cannot be but for meeting of minds/ arrangement between the OPs. So far as the purported justifications offered by the learned senior counsel in support of the “independent” behaviour exhibited by OP-5 are concerned, it is important to note that the internal business proposal was dated 09.08.2012 whereas the last date for filing of tenders was 16.08.2012. As will be shown in the succeeding paras, executives of OP-5 were communicating with the representatives of some of the other OPs as evidenced from CDRs, even prior to 09.08.2012. In these circumstances, no credence can be lent to such an “internal” document prepared by the party, which, in any event, does not detract the overwhelming and unimpeachable evidence pieced together by the DG. So far as the “independent” behaviour of OP-6 based upon the condition it incorporated in the tender document is concerned, the Commission notes that it is neither the requirement of law nor any other jurisprudence that colluding bidders must submit bids containing identical or similar conditions. More often than not, the colluding parties would like to break the pattern through artificial conditions or terms in the bid documents so as to create a façade of competitive behaviour.

252. Some of the OPs have argued that the DG has not considered the 2012 re-tender floated by the Informant in which certain OPs did not participate but which was awarded to Shree Cement, J K Cement and J K Lakshmi. In this regard, the Commission is of the opinion that participation or otherwise of certain OPs in the re-tender in October, 2012 after the cancellation of the impugned tender, has no bearing on the conduct of the OPs in the instant impugned tender.



- (iii) Whether OPs have bid for the impugned tender so as to divide the market in order to secure L1 status inter se?

253. The Informant has further alleged that the OPs have bid/ quoted rates in the 2012 tender in such a manner that all the OPs acquire the lowest bidder status (L1 status) for supply of cement in at least some destination. In this context, the DG has conducted examination of the following variables with respect to bid prices to analyse the Informant’s allegation: a) Distribution of L1 status for different destinations in the 2012 tender *vis-a-vis* the earlier tenders; and b) Analysis of whether the OPs had placed higher bids in certain districts to allow other OPs to emerge as L1.

- a) Distribution of L1 status for different destinations in the 2012 tender *vis-a-vis* earlier tenders

254. The DG has looked at the data of a number of districts/ destinations in which tender participants have emerged as L1 in the 2012 tender as well as in previous tenders. The details are summarised in the Tables below:

**Table-21**

Number of districts/ destinations in which the parties emerged as L1 in 2012

Name of the party	OPC: Number of destinations emerging as L1		PPC: Number of destinations emerging as L1		Total number of destinations emerging as L1
	With VAT C3 form	Without VAT C3 form	With VAT C3 form	Without VAT C3 form	
Shree Cement	7	7	9	7	30
UltraTech	2	2	2	6	12
JAL	7	7	7	5	26
J. K. Cement	6	6	5	4	21
ACL	2	2	5	3	12
ACC	2	2	1	1	6
J K Lakshmi	4	4	5	3	16
Cement Corp	0	0	0	0	0
Birla Corp	0	0	0	3	3
<b>Total</b>	30	30	34*	32*	126*

Note: \*indicates that more than 1 party has emerged as L1 in that category of bid.

‘0’ indicates that the party did not emerge as L1 in the said category.



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**Table-22**

Number of destinations in which the parties emerged as L1 in 2008

Name of the party	OPC : Number of destinations emerging as L1		PPC: Number of destinations emerging as L1		Total number of destinations emerging as L1
	With VAT C3 form	Without VAT C3 form	With VAT C3 form	Without VAT C3 form	
Shree Cement	0	1	0	0	1
JAL	2	1	24	13	40
J K Cement	0	0	0	0	0
ACL	0	0	0	0	0
ACC	0	1	0	0	1
J K Lakshmi	0	0	0	0	0
Grasim	20	29	6	17	72
Cement Corp	0	1	0	0	1
Birla Corp	00	0	0	0	0
Tuff Cemento	00	1	0	0	1
Binani Cement	08	0	0	0	8
Total	30	34*	30	30	124*

Note: \*indicates that more than 1 party has emerged as L1 in that category of bid.

'0' indicates that the party did not emerge as L1 in the said category.

**Table-23**

Number of destinations in which the parties emerged as L1 in 2010

Name of the party	OPC: Number of destinations emerging as L1		PPC : Number of destinations emerging as L1		Total number of destinations emerging as L1
	With VAT C3 form	Without VAT C3 form	With VAT C3 form	Without VAT C3 form	
Shree Cement	1	28	0	25	54
JAL	0	0	2	0	2
J. K. Cement	25	0	27	4	56
ACL	4	2	1	1	8
ACC	0	0	0	0	0
J K Lakshmi	0	0	0	0	0
Samruddhi Cement	0	0	0	0	0
Cement Corp	0	0	0	0	0
Total	30	30	30	30	120

Note: \*indicates that more than 1 party has emerged as L1 in that category of bid.

'0' indicates that the party did not emerge as L1 in the said category.



**Table-24**

Number of destinations in which the parties emerge L1 in 2011

Name of the party	OPC: Number of destinations emerging as L1		PPC : Number of destinations emerging as L1		Total number of destinations emerging as L1
	With VAT C3 form	Without VAT C3 form	With VAT C3 form	Without VAT C3 form	
Shree Cement	19	20	7	10	56
UltraTech	0	0	0	1	1
JAL	0	0	0	0	0
J. K. Cement	0	0	0	0	0
ACL	3	4	20	17	44
J K Lakshmi	0	0	0	0	0
Cement Corp	0	0	0	0	0
Birla Corp	8	6	3	2	19
Total	30	30	30	30	120

Note: \*indicates that more than 1 party has emerged as L1 in that category of bid.  
'0' indicates that the party did not emerge as L1 in the said category.

255. The Commission notes that in tenders in which there is no alleged collusion, bidders having competitive advantages emerged as L1 for most districts/ destinations. However, it can be seen that in respect of 2012 tender, this is not the case. In this tender, all the OPs have acquired L1 status in some or the other destination and none of the OPs has failed to obtain a bid, *i.e.*, all OPs have become L1 in at least one destination.

256. The OPs have argued that in the 2012 tender in 6 categories of bids, more than one party had emerged L1 and had there been a prior agreed distribution of L1 destinations amongst the seven OPs, this would not have been the case. In this regard, the Commission notes that out of 120 (30 destinations × 4 categories) categories of bids, there are merely 6 categories of bids in which more than one OP has emerged as L1. This in itself does not prove that OPs were behaving independently in the bids, as in the remaining 95% of the categories of bids, *i.e.* in 114 categories of bids, only a single bidder has emerged as L1. In order to analyse the OPs' contentions, the Commission has analysed the distribution of L1 status in the 2012 tender *vis-à-vis* the previous tenders.



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257. The Commission observes that the distribution of L1 status in the 2012 tender is significantly distinct from the pattern witnessed in the tenders for 2008, 2010 and 2011. What is important to note in the previous tenders is the following: (i) few tenderers secured bids for all the destinations (ii) other tenderers did not become L1 even at one destination (iii) there has not been an instance in the past bids in which all the tenderers have secured L1 status for one or more destinations. This is ordinarily indicative of competitive bid process wherein the competing bidders genuinely compete for securing more and more L1 positions and are in the process awarded tender over other participants who lose the bid. In contrast, 2012 tender shows a departure from the previous years (2008, 2010 and 2011) by distribution of L1 status across all the OPs.

- b) Whether the OPs had placed higher bids in certain districts to allow other OPs to emerge as L1?

258. The DG has stated that since the real *ex-factory* price for all destinations, VAT component and other taxes would be the same for each category of cement, difference in destination-wise price of cement of one company *vis-à-vis* another, would be on account of difference in freight charges only. Freight charges would vary according to the distance between the factory from which an OP proposes to supply the cement and the proposed destination. The DG has noted that if the bid prices of the districts in which OPs emerged as L1 are taken as reference price, then one would logically expect the bid prices to vary only marginally in the adjoining districts and in destinations located further away, bid prices would be higher, if both are supplied cement from the same plant. In this regard, the DG has made a detailed analysis of the variation in bid prices quoted by the OPs for the neighbouring districts. For the sake of brevity and illustratively, analysis in respect of one OP *viz.* Shree Cement is presented below:



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**Table-25**

Destination wise Distance, Freight Rates, Basic Price and Total Price for Supply of Category: OPC (without VAT C-3 form) in case of Shree Cement

Neighboring Destination	Distances in Km. from the nearest cement plant at Beawar	Freight Charges (Rs.)	Basic Price (Rs.)	Total Price (Rs.)
Rohtak*	457 km	46.75	163.23	266.90
Bahadurgarh*	447 km	46.75	164.76	268.85
Jhajjar*	420 km	44.50	165.64	267.10
Bhiwani	435 km	45.50	166.29	269.20
Mohindergarh	368 km	42.00	171.60	271.50
Rewari*	364 km	41.75	166.66	264.90
Narnaul	341 km	39.75	173.73	271.35
Gurgaon*	417 km	44.00	164.64	265.20
Nuh	409 km	45.50	164.76	267.25
Hisar*	460 km	42.25	167.89	267.10

Note: ‘\*’lowest bidder in these destinations.

259. In its tender documents, OP-1 has stated that OPC will be supplied predominantly from its mother plant at Beawar/ Ras in Pali, Rajasthan. It can be seen from the above Table that OP-1 has quoted a price of Rs 266.90 at Rohtak which is at a distance of 457 km from the Beawar plant. The districts of Narnaul (341 km), Mohindergarh (368 km), Nuh (409 km), Bhiwani (435 km) and Bahadurgarh (447 km) are all closer to OP-1's factory at Beawar than Rohtak (457 km). However, the prices quoted by OP-1 for all these districts are much higher than the price quoted for Rohtak. The quoted price of Rs. 267.25 for Nuh, Rs. 268.85 for Bahadurgarh, Rs.269.20 for Bhiwani, Rs. 271.35 for Narnaul and Rs. 271.50 for Mohindergarh, are all higher than the quoted price of Rs 266.90 for Rohtak. The freight rate quoted for Bhiwani (435 km) is Rs. 45.50. It is Rs. 1.25 cheaper than the freight rate for Rohtak (457 km) which is Rs. 46.75. Yet, the actual bid price for Bhiwani is Rs. 269.20, which is Rs. 3.55 more than the bid price for Rohtak (Rs. 266.90). This is despite the fact that Bhiwani is closer to the source of production than Rohtak. The difference in freight charges for Rohtak (Rs.46.75) and Bhiwani (Rs. 45.56) is Rs 1.25. The freight rate advantage could be reflected by OP-1 in its quoted bid price for Bhiwani. Had this cost advantage been factored





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in, OP-1 could quote a price of Rs. 265.65 for Bhiwani (*i.e.* the deduced price from quoted price for Rohtak of Rs. 266.90). Instead, it quoted a bid price of Rs. 269.20 at Bhiwani. If OP-1 had quoted even one rupee more than the deduced price of Rs. 265.65, it would have emerged as the lowest bidder at Bhiwani. Instead, J K Cement is the lowest bidder at Bhiwani with a bid price of Rs. 267. Thus, Shree Cement did not take advantage and bid despite having a competitive advantage.

260. Similarly, the freight rate for Mohindergarh (368 km) is Rs. 42.00. This is Rs. 4.75 cheaper than that of Rohtak (457 km). For Mohindergarh, OP-1 had freight cost advantage of Rs. 4.75. Yet, the actual bid price for Mohindergarh was Rs. 271.50, which is Rs. 4.60 more than the bid price for Rohtak (Rs. 266.90). Moreover, Mohindergarh is closer to OP-1's cement plant at Beawar/Ras. The difference in freight charge for Rohtak and Mohindergarh is Rs 4.75 and gave OP-1 a competitive price advantage for Mohindergarh. OP-1 could quote Rs. 262.15 or even marginally more for Mohindergarh and could emerge as L1. Instead, it quoted a higher bid price of Rs. 271.50 at Mohindergarh and due to this, J K Cement emerged as L1 in Mohindergarh at a bid price of Rs. 265.00. Thus, for Mohindergarh also, OP-1 quoted a higher bid price and did not take advantage of lower freight cost. Similar other instances are Bahadurgarh, Narnaul and Nuh. Even in case of PPC without VAT C-3 Form, it is observed that OP-1 did not bid competitively to capture the nearby destinations by taking advantage of the freight cost.

261. The DG has presented similar behaviour in respect of the remaining OPs, wherein it is seen that they did not bid in accordance with the competitive locational advantage in some districts. All the OPs have argued that based on freight charge analysis alone, it could not be concluded that the OPs could quoted a lower price in some of the districts. It is contended that bid prices depend on a variety of factors which include prevailing market



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conditions, anticipated future prices, *etc.* They also contribute to the difference in prices quoted across districts. It is further submitted that basic prices are not identical with *ex-factory* prices and cannot, thus, be assumed to be the same across all the districts. Some of the OPs have argued that the plants/ grinding units for supplying cement for some of the destinations chosen by the DG for the analysis of distances, are not the most appropriate plants/ units for supply. For instance, OP-1 has argued that for supply at Sirsa, most appropriate plant is Suratgarh and not Khushkera. It has provided data showing that for Sirsa and Fatehabad, the respective distance from Suratgarh is 164 km and 235 km. This is less than the distance from Khushkera. OP-7 has also contended that it was to make supply from its new plant at Jharli in Jhajjar district in Haryana and not from Jaykapuram Plant at Sirohi which the DG has considered for the purpose of analysis.

262. The Commission notes that even if the argument of the OPs that difference in the rates quoted across districts is not on account of difference in freight charges alone but owing to other factors also such as difference in market conditions is accepted, OPs have only stated them as a reason. None of the OPs has taken care to substantiate and explain as to why is the price in district 'A' higher or lower than the price in an adjacent/ nearby district 'B'. They have also not provided reasons for the price quoted for each of the districts. In the absence of any corroborating evidence, the Commission holds that they are mere statements which are in themselves not sufficient to explain the higher prices of tenders in adjacent districts.

263. The Commission notes that while OPs had bid for lower prices in certain destinations to emerge L1, they have quoted much higher prices in adjoining destinations. The Commission observes that since OPs have emerged L1 in certain destinations, it is natural to expect that they would compete to emerge L1 in the neighbouring/ adjoining destinations as well



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for optimal utilisation of their competitive wherewithal and economic resources. However, this is not observed to be the case. The OPs have not provided any rational explanation for why they quoted higher prices in neighbouring destinations. Based on this, it is observed that this is indicative of the fact that the OPs have tried to accommodate each other to emerge as L1 in these neighbouring destinations.

*(iv) Whether Call Detail Records point towards prior arrangement amongst OPs in submitting their respective bids?*

264. At this juncture, it is useful to refer to the CDRs which have been analysed by the DG. The CDRs of the officials of OP companies who were responsible and involved in the submission of the impugned tender or in the determination of the bid price, have been examined and analysed by the DG. Such details and analysis thereof, as noted in the DG report in Chapter 6, Investigation-3 at pp. 106 to 143, are not being reproduced in this order and it would be sufficient to note therefrom that various officials of the OPs had been making a number of calls and exchanging SMSes with each other in the month preceding the tender.

265. It is observed that around 49 SMSes and 43 calls have been exchanged between such officials. The frequency and duration of calls had increased as the date of tender *i.e.* 16.08.2012 was approaching. The maximum number of calls (*i.e.* 9 calls) was made on the last date of e-filing of the tender *i.e.* on 16.08.2012. Specifically, on this day, calls have been exchanged between Shri KK Talwar (Shree Cement), Shri Sunil Agarwal (JK Lakshmi), Shri Sanjay Mathur (UltraTech), Shri Sharad Agarwal (JAL), Shri Arun Pandita (Shree Cement) and Shri Sudeep Chatterjee (ACC). It is important to note that on 16.08.2012, Shri Arun Pandita of Shree Cement called Shri Sudeep Chatterjee of ACC at 12:07:02 for 26 seconds and the e-tender of ACC was submitted one hour and 45 minutes



later.

266. In the Affidavits and statements made by the officials of the respective OPs before the DG, it is observed that none of them was able to recall the content of the calls made to other OP's officials. In fact, some of the officials initially denied the fact of such communications with other bidders. They changed their stand after they were confronted with the CDRs by the DG. To illustrate, Shri Sharad Agarwal of OP-3 denied having any communication with other bidders in his Affidavit on oath dated 07.08.2015. However, in a later statement on oath dated 18.10.2015 before the DG, after he was confronted with the CDRs, he recanted and accepted that he had communicated with other OPs but on social matters which were unrelated to the tender. Interestingly, all officials of the OPs have stated that these calls were for social or personal purposes. Later, some of them have furnished few other unsubstantiated justifications such as general problem of industry, problem with the employees, seeking job opportunity, marriage of daughter *etc.*, as the reasons for these communications. SMS records also show communications existing between the officials of the OPs. Specifically, on 10.08.2012/ 15.08.2012, SMSes have been exchanged between some of these officials within a short duration of time.

267. All the OPs have argued that the CDRs containing call details of short durations do not constitute evidence of an 'agreement' between the OPs. Some OPs who had submitted the bids prior to 16.08.2012 have argued that calls made on 16.08.2012 cannot be held to be relevant in relation to the impugned tender.

268. The Commission notes that none of the OPs have disputed the factum of making calls and exchanging SMSes. Considering this aspect and the fact that timing of SMSes and calls, which have increased steadily and closer to the tender period, it is unlikely that these communications were



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personal and/ or social in nature, as is claimed by the OPs. The Commission observes that the pattern, duration of calls made and SMSes sent during the tender period and the increase in their frequency closer to the last date of filing of the tender, unequivocally establish the communication taking place amongst OPs in relation to the tender. The Commission has reasons to believe that communication amongst the OPs had manifestly an anti-competitive purpose.

269. Since prohibition on participating in anti-competitive agreements and bid-rigging and the penalties which infringers may incur are well known, it is normal for such practices and agreements to take place in a clandestine fashion, for meetings to be held in secret, and for associated documentation to be reduced to a minimum. The Commission in this regard notes that in respect of cases concerning cartels which are hidden or secret, there is little or no documentary evidence and evidence may be quite fragmentary. The evidence may also be wholly circumstantial. It is therefore 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 any other plausible explanation, constitute evidence of infringement of the competition rules. In this case, all other logical explanations are eliminated. The only logical explanation for unusual price increase, reduced bid quantity and bidding for specific destinations in the tender of 2012, compounded with factum of communication between OPs during the tender period which increased in frequency close to the tender date, when viewed collectively show that there is no other plausible explanation other than that OPs have engaged in bid-rigging.

270. In view of the foregoing discussion, the Commission is of the considered opinion that the OPs have acted in a concerted and collusive manner in submitting their bids in response to the impugned tender floated by the



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State of Haryana for supply of cement at different locations within the State. This is evidenced from the analysis made that the OPs not only quoted unusually high prices in response to the impugned tender acting in unison *vis-a-vis* the prices quoted in the previous tender, bid have also allocated the market amongst them by committing lower quantity and by bidding in a manner so as to secure L1 positions in select district as a part of the sharing arrangement. The total quantity tendered by the OPs almost matched with the total quantity which was sought to be procured. Such division was in deviation of the conduct of the OPs in previous tenders where they have quoted significantly higher quantity each time and in which, different quantity by a few, equaled the total quantity tendered. The OPs have not been able to explain the methodology or the basis for quoting the final prices which were with an accuracy of two decimal points. A uniform approach in first deciding the final quoted price and then doing reverse calculation to arrive at the basic price by deducting the various components of cost as well as statutory levies (which could not have been different), establishes the *modus operandi* adopted by the OPs in rigging the tender. Different basic prices of cement for the same destination defies logic and signifies clear manipulation of bids. Such parallel conduct on several counts, cannot be a sheer coincidence. Such behaviour which has remained unexplained by the OPs, is reinforced by the forensic evidence in the form of CDRs and SMSes. All of these go on to affirm the collusive conduct of the parties.

271. In these circumstances, before concluding, it would be appropriate to address one common plea raised by the parties. A lot was made by the parties of the fact that there were a total of 9 bidders in the 2012 Tender, yet the DG has relied on the information provided by the Informant and excluded Cement Corp and Birla Corp from the purview of the investigation without assigning any reason.



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272. From the record, it appears that out of the total of 9 bidders in the impugned tender, 2 bidders *viz.* Birla Corp and Cement Corp were technically disqualified. Presumably, the reference was filed against the remaining bidders who were found to be technically qualified and accordingly, the same were arraigned as OPs in the present case. From the minutes of the meeting of HPPC held on 05.09.2012, it is seen that nothing adverse was found against the disqualified bidders *i.e.* Birla Corp and Cement Corp. The Commission has already discussed the conduct of Birla Corp and Cement Corp in the preceding paras and it is observed that Cement Corp and Birla Corp did not reduce the quantity bid in the impugned tender as compared to the previous year and, unlike the OPs, their bidding pattern did not undergo a change in the impugned tender. Further, similar to the OPs, in the case of Birla Corp and Cement Corp also, actual offtake by the Informant in previous tenders was lower (even '0' in certain cases) in comparison to the quantity bid by them as well as the quantity allocated to them by the Informant. However, lower allocation and reduced offtake did not result in reduction in the quantity quoted by them in the 2012 tender. The quantity bid by these two bidders did show a consistent pattern in their conduct from 2009 to 2012, which is distinct from the quantities bid by all the OPs in the impugned tender.

273. The OPs sought to demonstrate similar conduct exhibited by these two enterprises by harping upon the fact that their quoted bid price was also excessive as was the case of the OPs who have been made parties in the case. The Commission finds that the plea does not hold as the DG returned the findings against the OPs based upon the various circumstances and material collected during investigation, as detailed in this order. It appears to the Commission that OPs have been cherry-picking one circumstance against these two enterprises without taking into account the past consistent conduct of these two enterprises and the other overwhelming evidence and circumstances presented by DG against the OPs. The



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Commission also notes that Cement Corp could not emerge as L1 at any destination and Birla Corp emerged as L1 at only 3 categories of bids out of a total of 120 categories of bids even though they bid for 14 and 68 respectively in the impugned tender. Hence, securing of no L1 status by one of these enterprises and securing of L1 status by the other for 3 categories of bids indicates their independent behaviour.

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

275. Further, as per the explanation appended to sub-section (3) of Section 3 of the Act, “bid rigging” means any agreement, between enterprises or





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persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

276. In case of agreements as listed in Section 3(3) (a) to (d) 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 parties. In the present case, the OPs could not rebut the said presumption. Further, the OPs have not been able to show how their impugned conduct resulted in accrual of benefits to consumers or made improvements in the production or distribution of the goods in question. In fact, far from accrual of any benefits, the impugned conduct of the OPs had resulted in cancellation of the 2012 tender forcing the State of Haryana to re-initiate its entire tendering process, resulting in drain of public money and wastage of time.

277. As the OPs are cement companies engaged in similar business of manufacturing of cement and are therefore, operating at the same level of the production chain, allegations of anti-competitive agreements, decisions or practices among them squarely stand covered within the ambit of Section 3(1) read with Section 3(3) of the Act.

278. Further, it may be noted that 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 intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. An understanding may be tacit and the definition under Section 2(b) of the Act covers even those situations where parties act on the basis of a nod or a wink. The Commission notes that the Act envisages civil liability. Thus, the standard



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of proof required to prove an understanding or an agreement would be on the basis of 'preponderance of probabilities' and not 'beyond reasonable doubt'. There is rarely any direct evidence of action in concert and in such situations, the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In light of the definition of the term 'agreement', the Commission has to assess the evidence on the basis of benchmark of preponderance of probabilities.

279. Applying the aforesaid legal test to the evidence detailed in the present case, the Commission is of the considered view that the OPs through their impugned conduct have contravened the provisions of Section 3(3)(d) read with Section 3(1) of the Act by acting in a collusive and concerted manner which has eliminated and lessened the competition besides manipulating the bidding process in respect of the impugned tender floated by the State of Haryana. Their conduct stands established from the series of actions taken by the OPs which are detailed in the preceding paras. To reiterate, the conduct includes quoting of unusually higher rates than the rates quoted in the previous tender, determining different basic prices for supply of cement at the same destination through reverse calculation, quoting of quantity by 7 out of 9 participating parties in a manner that the total bid quantity almost equals the tendered quantity that too in departure from the previous years, quoting of rates for the districts in a manner that all the OPs acquire L1 status at some of the destination(s) *etc.* The SMSes exchanged and calls made and their heightened frequency during the period *close* to the date of tender amongst the officials of the OPs, reaffirms their anti-competitive conduct.

280. The OPs have raised a plea relating to violation of the principles of natural justice by the DG. Without in any manner elaborating on the scope and extent of requirement to observe the principles of natural justice by the



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investigating arm, it is suffice to note that the OPs were made available copies of the DG Report alongwith the Annexures appended thereto. The OPs have availed of the inspection of the DG Records as well. In these circumstances, the plea alleging violation of the principles of natural justice by the DG in not supplying documents, is totally misconceived. In fact, all such pleas are misdirected and deserve to be dismissed. Similarly, the Commission finds no substance in the plea raised by some of the parties that CDRs relied upon by the DG are not supported by a certificate which strictly complies with the provisions of the Indian Evidence Act, 1872 and the Information Technology Act, 2000 as well as various decisions of the Hon'ble Supreme Court. Not only is the plea unfounded but even otherwise, none of the OPs has challenged the veracity of the CDRs. In fact, when confronted with the same during investigation, these were not only accepted but the parties even tried to give obscure reasons for making such contacts.

281. Lastly, the Commission notes that though the DG has identified the individuals of the OPs for the purpose of proceeding under Section 48 of the Act; however, on perusal of the DG Report, it appears that, save and except recording the designation of such individuals and noting briefly their work profile based on their respective statements, no specific investigation was undertaken to link their role with the impugned conduct of the OPs. In these circumstances, the Commission is not inclined to proceed against such individuals as reported by the DG in Chapter 8 of the Investigation Report. Resultantly, proceedings initiated against them under Section 48 of the Act stand discharged forthwith.

282. Some of the parties have filed confidential as well as non-confidential version of their response to the DG Report and the confidential versions were directed to be kept separately during the proceedings before the Commission. It is, however, made clear that such direction shall enure for



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a further period of 60 days only from the passing of this order.

283. Based on the above discussion, the Commission is of opinion that the impugned act/ conduct of the OPs is found to be in contravention of the provisions of Section 3(1) of the Act read with Section 3(3)(d) thereof.

284. In view of the above, the Commission, in exercise of the powers conferred under Section 27 of the Act, passes the following:

### **ORDER**

285. The OPs are directed to cease and desist from indulging in the acts/ conduct which have been found to be in contravention of the provisions of the Act.

286. The Commission, for the reasons recorded below, finds the present case fit for imposition of penalty. Under the provisions contained in Section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreement or abuse. Further, in cases of cartelisation, the Commission may impose upon each such cartel participant, a penalty of upto three times of its profit for each year of continuance of the anti-competitive agreement or ten per cent of its turnover for each year of continuance of such agreement, whichever is higher.

287. It is evident that the legislature has conferred wide discretion upon the Commission in the matter of imposition of penalty. It may be noted that the twin objectives behind imposition of penalties are: (a) to reflect the



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seriousness of the infringement; and (b) to ensure that the threat of penalties will deter the infringing undertakings. Therefore, the quantum of penalties imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case.

288. The Commission has given its thoughtful consideration to the issue of quantum of penalty. The impugned tender was for entering into annual rate contract with respect to cement by DS&D for supply to various Departments and Statutory Bodies of the Government of Haryana. It is not in dispute that due to the anti-competitive conduct of OPs, the impugned tender had to be cancelled forcing the State to start the process to procure cement- a critical input for infrastructure, afresh, resulting in possible delay in timely supply for the execution of public infrastructure projects which may result in time and cost overrun.

289. At the same time, the Commission is cognizant of the peculiarities of tendering process which have been pointed out by some of the OPs (ACL, ACC). It has been submitted by the parties that the NIT issued by the DS&D advertised the tentative quantity based on estimated figures of cement requirement by various departments/ boards (*i.e.* direct consumers) during the course of the tender year. The DS&D does not disclose (i) the total quantity that will be finally purchased, (ii) the quantity of cement that will be required at each of the specific destinations, (iii) the type of cement to be supplied at each of these destinations, and (iv) the quantity requirement at a particular destination. Therefore, at the time of submitting bids, a bidder is not aware of the quantity that any Department or Board would procure for a destination. Further, in practice, the consignee is not under an obligation to purchase the specific quantity amount even thereafter. It has been argued that it is entirely possible that when final orders are placed, demand at one destination may be nil and at the other destination, it may actually double *vis-a-vis* the original quantity.



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Further, the consignee is not obligated to purchase the entire quantity from the specific L1 bidder identified by the HPPC.

290. Having said that, it is not in dispute that in the instant case, the impugned tender was cancelled and fresh bids invited by re-tendering. Though competition law frowns upon even the agreements which are 'likely' to cause appreciable adverse effect on competition, while quantifying penalties, a distinction has to be made between the agreements which actually cause appreciable adverse effect on competition and the agreements which are likely to cause such effects. The Commission is also not oblivious of the total quantity of the procurement requirement while deciding the quantum of penalty. The Commission has also taken note of submissions made by the learned senior counsel appearing on behalf of ACC/ ACL that they are subject to an intensive and robust competition law programme through LafargeHolcim's Fair Competition Review Programme, the purpose whereof is to create awareness and impart training to key employees. The employees have to undertake regular competition law training and assessment of their business dealings and practices. The learned counsel appearing on behalf of JAL also pointed out that it has put in place a competition compliance programme through which employees are being imparted knowledge on competition law.

291. On a careful consideration of the pleas advanced by the OPs and the peculiar conditions of the tender, the Commission finds it appropriate to impose a penalty on OP-1 to OP-7 at the rate of 0.3 % of their average turnover of the last three financial years based on the financial statements filed by them. Details of the quantum of penalties imposed on the OPs are set out below:



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(In crore)

S. No.	Name of OPs	Turnover for 2012-13	Turnover for 2013-14	Turnover for 2014-15	Average Turnover for Three Years	@ 0.3 % of average turnover
1.	Shree Cement Limited	5778.58	6072.25	6591.42	6147.41	18.44
2.	UltraTech Cement Limited	21622.68	21974.92	24699.04	22765.54	68.30
3.	Jaiprakash Associates Limited	13512.08	13327.02	11185.73	12674.94	38.02
4.	J.K. Cement Ltd.	2960.76	2844.12	3458.67	3087.85	9.26
5.	Ambuja Cements Limited	9583.05	10424	9834.56	9947.20	29.84
6.	ACC Limited	11392.73	12006.49	11916.18	11771.80	35.32
7.	J.K. Lakshmi Cement Ltd.	2110.40	2100.87	2335.26	2182.17	6.55

292. Accordingly, a penalty of Rs. 18.44 crore, Rs. 68.30 crore, Rs. 38.02 crore, Rs. 9.26 crore, Rs. 29.84 crore, Rs. 35.32 crore and Rs. 6.55 crore is imposed upon OP-1 to OP-7 respectively.



293. The Commission directs the above OPs to deposit the penalty amount within 60 days of receipt of this order.

294. It is ordered accordingly.

**Sd/-  
(Devender Kumar Sikri)  
Chairperson**

**Sd/-  
(S. L. Bunker)  
Member**

**Sd/-  
(Sudhir Mital)  
Member**

**Sd/-  
(U. C. Nahta)  
Member**

**Sd/-  
(Justice G. P. Mittal)  
Member**

New Delhi  
Date: 19/01/2017