



COMPETITION COMMISSION OF INDIA

Reference Case No. 04 of 2014

In Re:

**Shri D. K. Shrivastava,
Chief Material Manager
Rail Coach Factory
Kapurthala Railway Officers Complex
Tilak Bridge
New Delhi- 110002**

Informant

And

1. **M/s Daulat Ram Engg & Services P. Ltd.
10/2, NH-12
Village-Simarai, Post Obedullahganj
District Raisen - 464993
Madhya Pradesh** **Opposite Party No. 1**
2. **M/s Daulat Ram Industries
141, Sector-IIDC
Integrated Industrial Estate, Ranipur
Haridwar – 249403
Uttarakhand** **Opposite Party No. 2**
3. **M/s Amit Engineers
Village Judi Kalan, Tehsil Nalagarh
P.O Baddi, District Solan – 173 205
Himachal Pradesh** **Opposite Party No. 3**



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- 4. M/s Fedders Lloyd Corporation**
C-4, PH-II, Noida – 201 305
Uttar Pradesh **Opposite Party No. 4**
- 5. M/s Intec Corporation**
Mainthapal Industrial area
Kala-amb, District Sirmour – 173 030
Himachal Pradesh **Opposite Party No. 5**
- 6. M/s Lloyd Electric and Engg. Ltd.**
A-146 (B&C), RIICO Industrial Area
Bhiwadi, District Alwar – 301 019
Rajasthan **Opposite Party No. 6**
- 7. M/s Sidwal Refrigeration Industries Ltd.**
108-A, Madangir
New Delhi – 110 062 **Opposite Party No. 7**
- 8. M/s Stesalit Ltd.**
Park Plaza (N), 71, Park Street
Kolkata – 700 016
West Bengal **Opposite Party No. 8**
- 9. M/s Ess Ess Kay Engg. Co. P. Ltd.**
Factory Area, P.O. Box No. 8
Kapurthala – 144 601
Punjab **Opposite Party No. 9**



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CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Justice G.P. Mittal
Member

Appearances:

For Informant Shri Awdhesh Kumar, Deputy Chief Material
Manager, R.C.F. Kapurthala

For Opposite Party No. 1 None

For Opposite Party No. 2 Ms. Ferida Satarawala Chopra, Advocate
Ms. Manika Brar, Advocate
Shri Karan Latayan, Advocate
Shri Rohan Arora, Associate

For Opposite Party No. 3 Shri Anshuman Srivastava, Advocate
Shri Anand S., Advocate

For Opposite Party No. 4 Shri Rajashekhar Rao, Advocate
Shri Akshay Nanda, Advocate
Ms. Khyati Dhupar, Advocate
Ms. Kavita Jitani, Advocate



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For Opposite Party No. 5 Shri Jitendra Singh, Advocate
Shri Ritwik Kumar, Advocate

For Opposite Party No. 6 Shri Rajshekhar Rao, Advocate
Shri Akshay Nanda, Advocate
Ms. Khyati Dhupar, Advocate
Shri Alok Nath, Vice President Legal

For Opposite Party No. 7 Shri Sharad Bhansali, Advocate
Ms. Mamta, Executive Officer to Managing Director

For Opposite Party No. 8 Shri Manoj Arora, Advocate
Shri Siddharth Shankar, Advocate
Shri Sanjeev Chaudhary, Authorised Representative

For Opposite Party No. 9 None

Order

1. The present reference was filed under Section 19(1)(b) of the Competition Act, 2002 (hereinafter, the 'Act') by Shri D. K. Shrivastava, Chief Material Manager Rail Coach Factory, Kapurthala (hereinafter, the 'Informant') against M/s Daulat Ram Engg & Services P. Ltd., Madhya Pradesh (hereinafter, 'OP-1'); M/s Daulat Ram Industries (hereinafter, 'OP-2'); M/s Amit Engineers (hereinafter, 'OP-3'), M/s Fedders Lloyd Corporation (hereinafter, 'OP-4'), M/s Intec Corporation (hereinafter, 'OP-5'), M/s Lloyd Electric and Engg. Ltd. (hereinafter, 'OP-6'), M/s Sidwal Refrigeration Industries Ltd. (hereinafter, 'OP-7'), M/s Stesalit Ltd. (hereinafter, 'OP-8') and M/s Ess Ess Kay Engg. Co. P. Ltd. (hereinafter, 'OP-9') (hereinafter collectively referred to as the 'OPs') alleging *inter alia* contravention of the provisions of Section 3 of the Act.



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2. **Facts, in brief:**

- 2.1 This reference has been filed by the Chief Material Manager, Rail Coach Factory, Kapurthala, Punjab. The Rail Coach Factory (hereinafter, the 'RCF') is the coach manufacturing unit of the Indian Railways. The OPs are manufacturers of Roof Mounted AC Package Unit (hereinafter, 'RMPU') for Linke Hofmann Busch (hereinafter, 'LHB') coaches (hereinafter, 'Item No. 1') and conventional AC coaches (hereinafter, 'Item No. 2'). RMPU is an item used in the AC Coaches manufactured by RCF.
- 2.2 It has been stated that RMPU for LHB and conventional AC coaches are purchased by the Indian Railways through advertised tendering system and the eligibility criteria in the tenders for the said items is as per the guidelines of the Railway Board. The specifications for the said items are issued by the Research Designs & Standards Organisation, Lucknow (hereinafter, 'RDSO'). In the past, the subject items were procured with specification prescribing use of Refrigerant-22 in the manufacturing of AC Unit. However, the said specification was revised by RDSO *vide* Railway Board's letter no. EL 7.2.2 dated 15.12.2011, prescribing use of eco-friendly R-407 C instead of R-22 for manufacturing of AC units. This revision in specification was approved by Railway Board *vide* letter dated 26.07.2012.
- 2.3 The Informant thereafter invited a tender for procurement of Item No.1 on 05.12.2012 in which the lowest rate received from RDSO approved Part I supplier was Rs. 4,93,992 per set (all inclusive rate for revised specification). This rate was the same as earlier purchase rates. Similarly, for Item No. 2, a tender was invited by the Informant on 30.11.2012 which was finalised at Rs. 4,06,000 per set (all inclusive). This rate was 12% higher than the Last Purchase Rate (hereinafter, 'LPR').



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- 2.4 The Informant has alleged that in tenders for Item No. 1 which were opened on or after July 2013, there was an abnormal increase in the rates *vis-à-vis* LPR quoted by the OPs. It was alleged that the increase in rates was in the range of 26.35% to 42.73% for Item No. 1. So far as Item No. 2 was concerned, the Informant has stated that between July 2012 and March 2013, four tenders were opened and the increase in rates over the LPR in those tenders ranged between 0 to 12%. However, in the subsequent tenders, which were opened on and after 25.06.2013, there was an abnormal increase in the rates (*vis-à-vis* LPR of similar time period) by the approved firms. The increase in rates was alleged to be in the range of 21.97% to 44.09%.
- 2.5 The Informant, thus, alleged that such abnormal increase in the rates of these items in a short span of time suggested collusive bidding and cartel formation by the OPs in contravention of the provisions of Section 3 and 4 of the Act.
- 2.6 The Commission *vide* its order dated 23.09.2014 passed under Section 26 (1) of the Act, was of the *prima facie* view that the OPs have contravened the provisions of Section 3(3)(d) of the Act and directed the DG to investigate the case and submit a report. Accordingly, the DG submitted the investigation report on 25.08.2015.

3. DG's Investigation:

- 3.1 In the investigation report, the DG noted that the Informant was procuring Heating, Ventilation and Air Conditioning Systems (hereinafter, 'HVAC') such as Items No. 1 and 2 for use in the manufacture of AC coaches at RCF only from the vendors who were empanelled by the RDSO as per the prescribed specifications. Further, RMPUs were also procured by the Informant, Rail Coach Factory Raebareli (RCF/RBL) and Integrated



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Coach Factory (ICF), Chennai and sixteen other zonal units of the Indian Railways for maintenance purposes.

3.2 The DG noted that the Indian Railways is the only buyer of specially manufactured RMPUs in the domestic market. The product in question was to be supplied to Indian Railways in conformity with the product specification and quality standards laid down by RDSO. The criteria for distribution of the tender quantity amongst the RDSO approved vendors who have quoted competitive prices were:

- (i) maximum 5% of order on non-RDSO registered vendors as developmental source;
- (ii) 15% of order on a single Part II vendor and maximum 25% of order on all Part II vendors in aggregate; and
- (iii) balance of procurable quantity to Part I vendors.

Further, while evaluating the tender bids, the Technical Committee could recommend incorporating $\pm 30\%$ quantity option clause in the Purchase Order (PO) to take care of future fluctuations, if any.

3.3 In this background, the main issue investigated by the DG was whether OPs had indulged in bid rigging in the tenders invited by the Informant for procurement of the following items:

- (i) RMPU for LHB coaches (Item No. 1)
 - a) LHB RMPU Type I – for AC coaches
 - b) LHB RMPU Type II – for generator car
- (ii) RMPU for Conventional coaches (Item No. 2)
 - a) Conventional RMPU Type I – with R-22 refrigerant.
 - b) Conventional RMPU Type II – with eco-friendly R-407C refrigerant.

3.4 For the above purpose, the DG examined sub-issues such as (i) price pattern in bids submitted by the OPs in tenders for RMPUs floated by the



Informant; (ii) quoting of exorbitant rates by the OPs; (iii) collusive bidding by OPs to rig the tender process of the Informant and other railway zones viz. ICF Chennai and RCF Rae Bareli; and (iv) cost implication of change in the variant of refrigerant from R-22 to R-407C by Indian Railways during 2012-2013, etc.

3.5 The DG first looked at the bid price submitted by the OPs during the period 2011 to 2014 in the various tenders floated by the Informant for procurement of RMPUs Conventional (Type- I and Type- II) and LHB (Type-I and Type- II) as to whether the bid price exhibited any specific pattern.

3.6 For Conventional Type-I RMPU, the DG tabulated the bid prices quoted by OPs in the various tenders floated by RCF Kapurthala as follows:

BID QUOTES FOR CONVENTIONAL TYPE-I RMPU IN TENDERS FLOATED BY RCF, KAPURTHALA FROM 2011 – 2014			
Tender No.	3102120038	2402120452	3102130055 Dropped (change from old R-22 to new R407-C refrigerant)
Opened On	03.07.2012	25.03.2013	28.06.2013
OP-1 Part-II	NP*	450000	470000
OP-2 Part-I from 15.10.2012	NP*	408000	500000
OP-3 Part-I from 28.09.2006	449182	414000	479900
OP-4 Part-I from 02.02.1998	362000	393910	505000
OP-5 Part-I from 18.01.2000	444970	526400	477000
OP-6 Part-I from 21.06.2004	382400	395000	483200
OP-7 Part-I from 02.02.1998	442523	524999.74	507199.22
OP-8 Part-II	390000	357000	465000
OP-9 Unapproved	1055000	NP*	NP*

* NP (Not Participated)



3.7 From the aforesaid table, the DG noted similar bidding pattern by OP-4 and OP-6 and by OP-5 and OP-7 in the tender nos. 3102120038 opened on 03.07.2012 and 2402120452 opened on 25.03.2013. Further, it was noted that almost all parties quoted in a significant higher range in tender no. 312030055 opened on 28.6.2013 which was subsequently dropped because of a specification change *i.e.* change of refrigerant from R-22 to R-407C.

3.8 For conventional Type-II RMPUs, the DG tabulated the bid prices quoted by OPs in various tenders floated by RCF Kapurthala as follows:

BID QUOTES FOR CONVENTIONAL TYPE-II RMPU IN TENDERS FLOATED BY RCF, KAPURTHALA FROM 2011-2014							
Tender No.	3102120097	3102130044 Dropped (change from new R407-C to old R-22 refrigerant)	3102130207	3102130386	2402140020	3102140007	3102140145
Opened on	30.11.2012	25.06.2013	10.10.2013	28.02.2014	15.05.2014	15.05.2014	28.08.2014
OP-1 Part-II	417500	487000	568500	603000	612000	612000	550001
OP-2 Part-I from 14.11.2013	422100	495200	614000	616000	616000	616000	685000
OP-3 Part-I from 28.09.2006	424783	498000	623000	625999.99	625999.93	625925.75	651000
OP-4 Part-I from 02.02.1998	407975	497080	607980	621100	619250	619200	657500
OP-5 Part-I from 18.01.2000	475480	498900	593000	628000	620000	620000	651000
OP-6 Part-I from 21.06.2004	408500	497950	585000	633000	627300	627300	665400
OP-7 Part-I from 02.02.1998	474199.59	497722.05	618999.89	635998.07	635997.37	635997.4	677999
OP-8 Part-II	385000	490000	563000	634999.05	614500	614500	551000.10
OP-9 Unapproved	NP*	NP*	NP*	NP*	NP*	615000	510000

* NP (Not Participated)



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3.9 From the aforesaid table, on comparison of the rates quoted by the OPs in tender no. 3102120097 opened on 30.11.2012 with subsequent tender no. 3102130044 opened on 25.06.2013, the DG noted that there was increase in rates in the latter tender by all Part-I vendors. It was further noted that almost identical rates were quoted by OP-5 and OP-7 in these tenders. Similarly, OP-4 and OP-6 had also quoted almost identical rates in these tenders. Further, in the subsequent tender no. 3102130207 opened on 10.10.2013 and tender no. 3102130386 opened on 28.02.2014, all OPs increased their quoted rates significantly. In tender no. 3102130207 opened on 10.10.2013, with the exception of OP-5 and OP-6, all the other Part-I vendors quoted above Rs. 6,00,000/-. Though multiple rounds of negotiations were held with Part-I L-I party (OP-6) and rates were brought down to Rs.5,35,750/-, but no order was placed on Part-1 sources. Instead the tender quantity was brought down from 222 sets to 60 sets and order was ultimately placed only on Part II vendor (OP-8) at the rate of Rs. 4, 49, 500/- vide Purchase Order dated 23.01.2014. Despite this, in the next tender no. 3102130386 opened on 28.02.2014, all OPs quoted above Rs. 6.00 lakhs, with OP-8 quoting Rs. 6,34,999.05, *i.e.* 41% more than the rate at which the previous tender was awarded to it only a month back. The trend continued in subsequent tenders, except with the change that all the Part-II vendors brought down their quotes in the range of Rs. 5.50-5.51 lakhs in tenders opened on 28.08.2014 even though rates were increased by Part I vendors.

3.10 For LHB Type-1 RMPU, the DG tabulated the rates quoted by all the nine OPs in the tenders floated by the Informant between November, 2011 and November, 2014 as follows:



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BID QUOTES FOR LHB TYPE-I RMPU IN TENDERS FLOATED BY RCF, KAPURTHALA FROM 2011-2014						
Tender No.	3102110102	3102120199 (tender dropped)	3101130002 (For RCF/RBL)	3102130095 Dropped (change from new R407-C to old R-22 refrigerant)	3102130147	3102140256
Opened on	03.11.2011	05.12.2012	12.06.2013	31.07.2013	15.10.2013	11.11.2014
OP-1 Unapproved	610000	610000	0	650000	697000	700000
OP-2 Part-II	697000	627900	647798	622900	730000	655600
OP-3 Part-I from 09.10.2009	493992.43	493993	530000	624150	714000	658982
OP-4 Part-I from 14.11.2013	665700	515400	509800	622075	693750	674700
OP-5 Part-I from 16.07.2009	617630	539000	490423	627500	742000	668300
OP-6 Part-I from 08.08.2009	538650	516000	530000	630175	726000	691300
OP-7 Part-I from 11.06.2008	616900	537299	491378.37	626299.99	700000	662362
OP-8 Part-II	617680	617680	450000	623778	699000	658400
OP-9 Part-II	687000	699000	694000	0	691951	657500

3.11 The DG compared the rates quoted by the OPs for LHB Type-I RMPU during the period November 2011 to November 2014 and noted that the rates in tender opened on 05.12.2012 went down from the rates in tender opened on 03.11.2011. Similar behaviour was observed in tender opened on 12.06.2013 for RCF/RBL for most of the OPs. In the next tender opened on 31.07.2013, the rates quoted by all the OPs crossed over Rs. 6.00 lakhs. Further, continuing with the increasing trend, in the next tender opened on 15.10.2013, the bids of all the OPs (except OP-9) increased to the range between Rs. 6,97,000 – 7,42,000/-. It was also noted that the bids of all OPs (except OP-1) fell in the next tender no. 3102140256 opened on



11.11.2014. Also, throughout, in all the tenders, the movement of bids of OP-5 and OP-7 were in identical pattern.

3.12 The bids quoted by the OPs in tenders floated by RCF Kapurthala for LHB Type-II RMPU have been compiled as follows:

BID QUOTES FOR LHB TYPE-II RMPU IN TENDERS FLOATED BY RCF, KAPURTHALA FROM 2009-2014					
Tender No.	3102090051	3102110102	3102120199 (tender dropped)	3102130147	3102140256
Opened on	30.07.2009	03.11.2011	05.12.2012	15.10.2013	11.11.2014
OP-1 Unapproved	646600	610000	610000	744000	NA
OP-2 Part-II	649960	694000	630000	778000	703800
OP-3 Part-I from 09.10.2009	729900	518993	518993	728571	708968
OP-4 Part-I from 14.11.2013	706160	734948	545400	742500	724500
OP-5 Part-I from 16.07.2009	818960	646240	569000	743000	715800
OP-6 Part-I from 08.08.2009	818638	562650	546000	784000	737000
OP-7 Part-I from 11.06.2008	818638	644823	567383	760000	711423
OP-8 Part-II	NP	680000	650000	748000	707200
OP-9 Part-II	730000	707000	770000	740901	706000

3.13 The DG observed similar pattern of collective increase and decrease in rates in case of LHB Type II RMPU tenders as observed in case of LHB Type I RMPU tenders. It was observed that in one of the tenders *i.e.*, tender opened on 30.07.2009, the rate quoted by OP-5, OP-6 and OP-7 were almost identical indicating collusion amongst them. In case of OP-5 and OP-7, it was noted that the fall in their rates was almost identical in the tender opened on 05.12.2012. Further, in the tender opened on 11.11.2014, all the OPs



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brought down their bid quotations. The DG pointed out that this tender was floated after the Informant approached the Commission in July 2014 and OPs became aware of the reference filed by the Informant.

3.14 The next issue examined by the DG was the allegation of exorbitant rates quoted by OPs. The DG noted that OPs manufacture RMPUs conforming to the specifications laid down by the RDSO only for supply to the production units and zonal divisions of Indian Railways. As per OPs' submission to the DG, their cost of production is higher than the rates at which the Indian Railways awards tenders, but their production being customer specific, they have no option but to accept the purchase orders placed at low rates by the Indian Railways.

3.15 In order to assess the contention of the OPs, the DG examined the cost structure of conventional and LHB variant RMPUs as furnished by the OPs during investigation, the previous rates at which orders were placed by the Informant and the rate of inflation over the period. Apart from these, in case of LHB variant of RMPUs, the DG also noted that price of RDSO specified micro-processor controller which was required to be procured for such RMPUs from RDSO approved vendors, was hiked by one of the vendors in 2013 which consequently resulted in increase in rates by the OPs. Taking into account the foregoing, the DG found that there were some instances where the bid rates submitted by the OPs were excessive in the conventional category in the later part of 2013 but not very pronounced in the LHB category. Moreover, it was noted that the Informant itself had placed order in 2004 for LHB variant RMPU at Rs.6,60,000/-. Therefore, the allegation levelled by it that minimum L-1 rate of Rs.7,00,000/- quoted by Part-I vendors in tender for LHB Type-I opened on 15.10.2013 was exorbitant, did not hold much water.



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3.16 The DG also looked at whether OPs supplied the items to any other vendor for price comparison. However, it was gathered the RMPU units, manufactured as per specifications laid down by RDSO, are specialised products procured by the Indian Railways only. Since the RMPU units, as specified above, are not supplied to any other party, no independent price comparison could be made.

3.17 To analyse whether OPs had engaged in collusive bidding to rig the tender process of the Informant and whether the collusive bidding was extended to other railway zones, the DG referred to all India bid figures of OPs in the following RMPU tenders of Indian Railways:

- *Tender for RMPU Conventional Type-I during 2011-14.*
- *Tenders for RMPU Conventional Type-II during 2011-14.*
- *Tenders for RMPU LHB Type-I during 2011-14.*
- *Tenders for RMPU LHB Type-II during 2011-14.*

3.18 *Conventional Type I RMPUs:* For this item, the DG compared rates quoted by OPs in tenders floated by RCF Kapurthala *i.e.* Informant, with the rates quoted by them in tenders floated by other production units such as Integral Coach Factory Chennai (ICF) and RCF Rae Bareilly (RCF/RBL) and Zonal Railways namely Southern Railway (SR), South Eastern Railway (SER), South Western Railway (SWR), Central Railway (CR), South Western Railway (SWR), Western Railway (WR), Northern Railway (NR), Central Railway (CR), North Western Railway (NWR), West Central Railway (WCR), East Central Railway (ECR) and South Central Railway (SCR) from 2011 to 2014. From scrutiny of above tenders, DG *inter alia* noted the following:

- a. from January 2011 till April 2013, the quotes of OP-3 were almost consistent in the range of Rs. 4.14 - 4.49 lakh throughout that time



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- except in one tender that was opened on 03.11.2011 by Informant, where it quoted a figure of Rs. 3,94,199/-;
- b. incidents of identical quotes were observed amongst OP-3, OP-5 and OP-7 in tenders opened by SR and ICF on 21.01.2011. In fact, in the tender that was opened on 21.01.2011 floated by ICF, OP-5 and OP-7 had quoted identical rates and there was a difference of only 0.92 paise in the rate quoted by OP-3;
 - c. OP-5 and OP-7 had quoted rates which were almost identical to each other in the tenders floated by various zonal railways throughout India. Similar behaviour was observed in case of OP-4 and OP-6 (eg. tender dated 12.05.2011 floated by SER); and
 - d. till June 2013, the bids rates submitted by the OPs in pan-India tenders of Indian Railways for Conventional Type I RMPUs were below Rs. 5 lakhs, with only few instances of bids crossing that figure. But in tenders after June and September 2013, there was substantial increase of rates by all the OPs. Such collective increase of rates and identical quotes or quotes in very close proximity to each other by OP-3, OP-5 and OP-7 in one group and OP-4 and OP-6 in another group indicated collusion amongst the OPs to rig the tender processes for RMPUs floated by the Indian Railways.

3.19 *Conventional Type-II RMPUs*: DG examined the tenders floated by the Informant, ICF and SR during the years 2011-14 and *inter alia* had the following observations:

- a. there was collusion amongst OP-4 and OP-6 & OP-5 and OP-7 for this type of RMPU also. Particularly, during the period, October 2012 to June 2013, these two groups had submitted their bids in tandem-
 - i. In tender no. 3102120097 opened on 30.11.2012 floated by the Informant, OP-4 and OP-6 quoted near identical rates and so did OP-5 and OP-7.



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- ii. In the tender opened on 25.06.2013 floated by the Informant, OP-3, OP-4, OP-5, OP-6 and OP-7 had quoted similar rates. Identical rates for OP-3 and OP-5 were also found in the tender that was opened on 28.08.2014 floated by the Informant.
 - iii. The near identical pattern of bidding by OP-4 and OP-6 & OP-5 and OP-7 was observed in subsequent tenders also.
- b. when the rates quoted by the OPs in tender opened on 28.06.2013 by ICF were compared with those quoted by them in tender opened on 10.10.2013 by the Informant, a substantial increase in the bid rates of all the OPs in the latter tender was observed. From this tender onwards, the rates of all the OPs stayed over Rs. 6 lakhs except for OP-9 who had quoted Rs. 5.5 lakhs;
 - c. in tender no.3102140145 opened on 28.08.2014 by the Informant, OP-3 and OP-5 quoted identical figure; and
 - d. OP-4 and OP-7 quoted above Rs.7 lakhs during the period October 2013 to December 2014 in tenders floated by ICF.

DG concluded that the instances of quoting near to identical rates by the OPs in the tenders indicated that few of the OPs had joined hands to defeat the very purpose of discovery of price through process of tendering.

3.20 *LHB Type-I RMPUs*: DG compared the rates quoted by the OPs in tenders floated by the Informant with rates quoted by them in the tenders floated by RCF/RBL, ICF and WR during the years 2011-14, and found trends similar to the trends observed in tenders for conventional RMPUs. Further, the following was *inter alia* observed:

- a. in case of tender opened on 03.01.2011 floated by the Informant, OP-5 and OP-7 had quoted identical rates and in the tender opened on 18.01.2011 floated by RCF/RBL, OP-3 and OP-7 had quoted identical rates and OP-5, near to identical rate.



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- b. there was an increase in rates by about Rs. 2 lakhs in tender opened on 31.07.2013 floated by the Informant as compared to the rates quoted in previous tender opened on 08.03.2013 floated by RCF/RBL. In the previous tender floated by RCF/RBL, the lowest rate quoted by Part-II vendors was Rs. 4,50,000/- and Part-I vendors was Rs. 4,90,423/-. Whereas in the Informant's tender opened on 31.07.2013, the lowest rate quoted by Part II vendor was Rs. 6,22,075/- and Part-I vendor was Rs. 6,24,150/-; and
- c. there was increase in rates in case of tender opened on 06.09.2013 floated by ICF with lowest rate being Rs. 6,35,000/-.

Considering such sudden increase in rates quoted by the OPs, DG observed that such action was taken by the OPs consequent to an understanding between them to increase their quotes in tenders floated by Indian Railways after June 2013.

3.21 *LHB Type-II RMPUs*: DG scrutinized the tenders for this product floated by the Informant and ICF during 2011-2014 and found indication of collusive action by the OPs. The following observations were *inter alia* made:

- a. OPs' rates had fallen over a period of time till 2012, however, in tender no. 3102130147 opened on 15.10.2013 by the Informant the bids by all the OPs increased substantially, with bids crossing over Rs. 7 lakhs; and
- b. in the subsequent tenders that were opened on 21.02.2014 and 09.09.2014 floated by ICF, the bids remained on the higher side.

Thus, analysing these tenders, the DG arrived at the view that there was price parallelism amongst the OPs when they raised the price collectively in October, 2013 and subsequently.



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3.22 In order to ascertain whether the price movement of normal conventional air-conditioner ('AC') (captured by the respective wholesale price index) could be compared with the price movement of RMPU sets, the DG compared normal AC with RMPU and noted that RMPU is a specialised product designed and made as per the specifications of the RDSO. The development cost of RMPUs incurred on research and development is very high. In terms of material used, RMPU is totally different from a normal AC as the construction of the RMPU is of stainless steel, while in case of normal AC, the primary material used is mild steel. The motors of RMPU are made as per RDSO specifications and are equal to traction motor specifications. Further, RMPU units are designed for operation at 50°C and must operate continuously at 57° C. In addition, RMPU must withstand shock and vibration three times the gravitational force and is designed to operate satisfactorily in trains running at a speed of upto 160 kmph. On the other hand, domestic ACs are made as per ISI specification and the rating is only till 35-46° C. They are made for operation in stationery condition without shock and vibration. The normal air-conditioners are commodity appliances subject to pricing in the open market. There are multiple buyers for these domestic products whereas RMPUs operate in monopsony market controlled by the Indian Railways. RMPUs are specifically designed for the Indian Railways and there is no open market for them. Therefore, the DG found that the comparison of Wholesale Price Index of normal AC with RMPU would not be suitable.

3.23 During 2012-2013, the Railways changed the refrigerant from R-22 to environment friendly R-407C. With respect to cost assessment of this change, the DG noted from the statement of the Informant that as per its records, no independent assessment of cost implication seems to have been carried out. RDSO also submitted that it had not done any cost estimation either with R-22 refrigerant or R-407C refrigerant. Further, it submitted



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that prices of any product are normally governed by market forces which are to be dealt by the tendering/ purchasing authority. From the submissions of the OPs, the DG noted that the increase in cost due to change in refrigerant from R-22 to R-407C varied between 7-8 % to 30 %. Accordingly, it was observed that though the change of refrigerant led to a definite increase in the cost of RMPU, but the scale of increase in cost differed from party to party.

3.24 After having made the observations above, the DG found the following:

a. On going through the bid documents/minutes of Tender Committee in respect of RMPU tenders floated by the Informant and other railway units, it was found that as per the extant railway procurement procedures, Part-II vendors technically could not compete with Part-I vendors for the same product, even if they quoted lower prices than Part-I vendors and Part-II vendors could get orders for a maximum of 15% of the tendered quantity (subject to overall cap of 25% on all Part-II vendors combined) whereas Part-I vendors could easily get 85% of the tendered quantity despite quoting higher prices than Part-II vendors for the same product; therefore, price coordination made business sense among Part-I vendors only, rather than among Part-I and Part-II vendors, to capture the market. Further, for a vendor to graduate from Part-II to Part-I, it had to supply certain quantities as prescribed within a time frame. Therefore, generally it was seen that Part-II vendors quoted comparably lower prices than Part-I vendors so that they got a decent amount of purchase order for quite a while so as to make itself eligible to become Part-I vendors. Therefore, any price coordination of Part-II vendors with Part-I vendors did not make sense.

b. OP-1 and OP-8 were categorised as Part-II vendors for RMPUs for conventional AC coaches and OP-2, OP-8 and OP-9 were Part II



vendors for RMPUs for LHB AC coaches. No clear-cut price coordination/concerted action was visible among Part-II vendors; however, there was visible price coordination/concerted action among some Part-I vendors.

- c. The behaviour of the present Part-I vendors indicated that their cartel-like behaviour dated back to 2007. The DG noted that following vendors submitted strikingly similar quotes for supply of RMPU units to Indian Railways in 2007 and 2008 as below:

Name of the Party	Quote in tender opened on 01.08.2007 (Rs. In lakh)	Quote in tender opened on 17.06.2008 (Rs. In lakh)
OP-3	8.20	9.95
OP-4	8.20 (Ind. Micro) 8.83 (Imp. Micro)	9.96
OP-5	8.20 (Ind. Micro) 8.88 (Imp. Micro)	9.96
OP-6	8.20 (Ind. Micro) 8.88 (Imp. Micro)	9.96
OP-7	8.20 (Ind. Micro) 8.88 (Imp. Micro)	9.94

From the above, the DG observed that OP-3, OP-4, OP-5, OP-6 and OP-7 had quoted identical bids in railway tenders for RMPUs even prior to May, 2009 (when the relevant provisions of the Act were not in force). Further, this behavior continued even after the enforcement of the Act as they continued to form cartels either together or in pairs.

- d. Intec Corporation (OP-5) and Sidwal Refrigeration (OP-7) are sister concerns. The managing partner of OP-5 is Mr. Ronsher Singh Sidhu who is the son of Mr. Sherjung Singh Sidhu, Managing Director of OP-7. The other Director of the company is Mrs. Randhir Kaur, mother of Mr. Ronsher Singh Sidhu. Mr. Ronsher Singh Sidhu admitted that his firm *i.e.*, OP-5, used the same office space and other



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infrastructure as that of OP-7. Further, the quotes for various Railway bids were being uploaded from the same IP address namely '122.160.156.213'. Therefore, it appeared that the rates quoted by them were likely to be coordinated. This was further corroborated by the fact that in some of the tenders floated by the Informant or other railway units, the rates quoted by these two concerns were completely identical or almost similar as given below.

Tender No.	Date of opening	Quote of OP-5	Quote of OP-7
3102100167	03.01.2011	8,06,900	8,06,900
3001102001	18.01.2011	8,06,990	8,06,900
11100580	21.01.2011	4,29,990	4,29,900
08101459	21.01.2011	4,18,615.92	4,18,615.92
45115005	12.05.2011	4,06,900	4,08,900
08111259	06.10.2011	4,38,890	4,37,123
3102110102	03.11.2011	6,17,630	6,16,900
310110099	03.11.2011	4,23,470	4,22,923
08112119	05.12.2011	5,34,900	5,33,723
08121050	06.08.2012	5,35,800	5,34,323
3102120097	30.11.2012	4,75,480	4,74,199.59
45121394	02.01.2013	4,49,450	4,47,722.97
310113002	12.06.2013	4,90,423	4,91,378.37
3102130044	25.06.2013	4,98,900	4,97,722.05
3102130095	31.07.2013	6,27,500	6,26,299
4102130611	27.08.2013	5,04,380	5,01,821.78
45131104-A	10.10.2013	5,86,800	5,84,999.81
45135060-A	02.01.2014	5,86,123	5,85,000
12135030-B	05.09.2014	7,04,440	7,04,999.33

- e. OP-7 and OP-6 had quoted identical base rates of Rs. 7,87,161.66 (Total quotation value Rs. 8,18,637.73) in the Informant's tender No. 3102090051 opened on 30.07.2009, with their quotes matching upto the last paisa. It was noted that incidentally, only these two companies were eligible Part-I vendors at that relevant time. By quoting identical rates, both of them won the contract at Rs. 8,18,637.73 and a part of the contract was shared with OP-5, a sister concern of OP-7 at the L-1 price of Rs. 8,18,637.73. When



OP-6 and OP-7 were asked about identical rates quoted by them, OP-7 stated that for the tender opened on 05.02.2009, it had quoted the same rate and had got the contract. Therefore, it repeated the rate, whereas OP-6 stated that it got the hint from LPR. However, their contention was found fallacious due to following reasons.

- i. Since OP-6 and OP-7 were the only two Part-I vendors, OP-6 could have got almost 100% of the contract by quoting even Re. 1 less than the LPR.
- ii. Further, since OP-7 knew that it got the previous contract at the LPR of Rs 8,18,637.73 and it had only one competitor, it should have quoted a little less than LPR.
- iii. Also, OP-6 and OP-7 had completely different cost structures for RMPU units which further obviated any chance of quoting identical bids.

The fact that both the eligible Part-I vendors had quoted identical rates coupled with the above facts, was found to be a clear indication of formation of cartel amongst these two OPs and of violation of Section 3(3)(a) and 3(3)(d) of the Act by them.

- f. Though both OP-6 and OP-4 were listed on the stock exchange, they were run by same management. Moreover, both were headed by Shri Brij Raj Punj, the Chairman of both companies. They also had some common factory locations. Further, OP-4 and OP-6 had been quoting identical or similar bids as given below and had received contracts of supply in some of these cases through identical bidding, showing that their conduct was collusive in nature.

Tender No.	Date of opening	Quote of OP-4	Quote of OP-6
45115005	12.05.2011	4,17,000	4,17,000
08121320	16.11.2012	4,60,000	4,58,000
3102120097	30.11.2012	4,07,975	4,08,500
3102120199	05.12.2012	5,15,400	5,16,000
2402120452	25.03.2013	3,93,910	3,95,000



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3102130044	25.06.2013	4,97,080	4,97,950
08132052	28.06.2013	5,36,600	5,35,150
08130 003	28.10.2013	6,32,140	6,31,975
08132114-A	11.11.2013	6,10,600	6,09,500
3102130314	11.12.2013	7,17,250	7,15,000
3105130031	16.01.2014	7,18,650	7,17,750

g. M/s Amit Engineers (OP-3) coordinated price with Intec Corporation (OP-5) and Sidwal Refrigeration (OP-7) quoting identical bids for railway RMPU tenders indicating cartelisation, even though Amit Engineers had widely different cost structure from OP-5 and OP-7 and had completely different business establishment. The fact that they had been quoting almost similar or identical bids, despite widely varying cost structure, indicated collusion among them to rig the tenders.

Tender No.	Date of opening	Quote of OP-3	Quote of OP-5	Quote of OP-7
3102100167	03.01.2011	8,07,100	8,06,900	8,06,900
3001102001	18.01.2011	8,06,900	8,06,990	8,06,900
11100580	21.01.2011	4,29,990	4,29,990	4,29,900
08101459	21.01.2011	4,18,615	4,18,615.92	4,18,615.92
4102130611	27.08.2013	5,01,822	5,04,380	5,01,821.78
45131104-A	10.10.2013	5,87,000	5,86,800	5,84,999.81
3105130031	16.01.2014	7,14,500	7,02,500	7,15,000
08141494	09.09.2014	8,10,200	8,14,990	8,11,923.40

3.25 By engaging in above behavior, OP-3, OP-4, OP-5, OP-6 and OP-7 had got major chunk of the tenders for supply of RMPU's floated by Indian Railways especially the tenders floated by the Informant which was found evident from the total quantity of RMPU units garnered by the Part-I vendors during the financial years 2011-12, 2012-13 and 2013-14. It was found that out of the total quantity of 1624 units recommended by the Technical Committee for orders to be placed, the active members of the



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cartel namely OP-3, OP-4, OP-5, OP-6 and OP-7 cornered more than 90% of the RMPU tenders.

3.26 In view of the foregoing, the DG concluded that OP-3, OP-4, OP-5, OP-6 and OP-7 had contravened the provisions of Section 3(3)(a) and 3(3)(d) of the Act.

4. **Objections/ submissions of the Opposite Parties:**

4.1 Pursuant to the receipt of the investigation report of the DG, the Commission *vide* its order dated 22.12.2015 decided to forward a copy of the non-confidential version of the investigation report of the DG to the Informant and the OPs and also to the persons identified by DG under Section 48 of the Act for filing their respective suggestions/objections to the investigation report of the DG. Further, the Commission heard the arguments of the learned counsel for OP-2, OP-3, OP-4, OP-5, OP-6, OP-7, OP-8 and the Informant on the investigation report of the DG. During the hearing, the Commission also considered the submissions made by the respective learned counsel on behalf of officers of OP-3, OP-4, OP-5, OP-6 and OP-7. None appeared for OP-1 and OP-9. While OP-1 filed a written submission dated 06.02.2016, OP-9 did not file any objections/ suggestions to the investigation report of the DG and only submitted its balance sheets and profit & loss accounts. The responses/ submissions to the investigation report of the DG made on behalf of the parties in the matter are summarised below.

OP-1:

4.2 OP-1 in its objections/ suggestions to the investigation report of the DG has stated that it is in agreement with the DG's finding wherein it has been concluded that OP-1 was not part of the cartel. However, OP-1 has



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disagreed with the finding of the DG that OP-1 and its Managing Director indulged in price parallelism in the tenders. OP-1 has submitted that the price increase, as observed in the tenders, was purely a response to the product profitability and market dynamics and not due to any unfair practice followed by OP-1.

4.3 OP-1 has averred that the substantially higher rates quoted by unapproved vendors compared to the rates quoted by approved vendors in the same tenders indicates that market rates of the products were much higher and that the Indian Railways had managed to control the price of the product by deliberate negotiations with the approved vendors knowing well that these products could not be sold in the open market. Thus, approved vendors had no choice but to accept orders at low rates during negotiations so that they could keep their factories working, even if not with reasonable profits. However, when after a point of time, the prevailing rates of the product made business unviable to pursue, it triggered the increase of rates by approved vendors even though after this increase, the rates quoted were much lower than the rates quoted by unapproved vendors.

4.4 OP-1 has submitted that as a Part-II vendor, it did not have complete freedom in submitting bids since, as per extant policy and procedure, Indian Railways would not place orders on Part-II vendors at the same rates as those that were accepted for Part-I vendors. OP-1 has prayed that the Commission direct the Indian Railways to take strict action against erring vendors and take action to correct procurement procedures.

OP-2:

4.5 OP-2 filed its objections/ suggestions to the investigation report of the DG. It has submitted that the rates were quoted in each tender based on various visible and invisible factors taking into account not only past sales but also



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future projections. Further, it has been stated that profit making is the primary motive of any business enterprise and that most business decisions are based on such motive. Thus, the decision of OP-2 to gradually increase the quoted price was a purely business decision and was solely made with the objective of running a commercially viable business.

4.6 OP-2 has submitted that it had been incurring substantial losses in the past in its RMPU business, and its management had reached a stage where it was contemplating winding up the RMPU business altogether. At the beginning of financial year 2013-14, the management of OP-2 was forced to take a commercial decision whether to altogether shut down its RMPU business, or start supplying RMPUs at a higher rate so as to minimise the losses and sustain the existing expenditure. Since shutting down RMPU business could have negatively impacted OP-2's relationship with the Indian Railways and the Indian Railways was OP-2's primary customer for other business (undertaken by the Bhopal unit) as well, OP-2 took a commercial decision not to impair its relationship with the Indian Railways and decided to continue with its RMPU business. However, OP-2 could only continue with this business if it increased its quoted price in the bids, which would allow it to recover its past losses and cover existing expenditure. In financial year 2013-14, OP-2's manufacturing costs had substantially increased and OP-2 was also under heavy pressure from third parties such as banks who had provided substantial loans. Accordingly, OP-2 was forced to start quoting higher prices in its bids for RMPUs, and it was for this reason that OP-2 gradually increased its quotes. OP-2 has also stated that the rates quoted by it were at all times related to the costs incurred/anticipated by it.

4.7 In light of the above and the fact that price parallelism *per se* is not enough to establish contravention of Section 3 of the Act, OP-2 has submitted that



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it agrees with the investigation report of the DG that no case of contravention of Section 3 of the Act is made out against it.

OP-3:

4.8 OP-3 has filed its objections to the investigation report of the DG. In its preliminary submissions, OP-3 has submitted that the DG Report is biased and partial in so far as the DG willfully suppressed material facts to arrive at a pre-determined conclusion that OP-3 to OP-7 have formed a cartel while exonerating OP-1, OP-2, OP-8 and OP-9. In this regard, OP 3 has averred that

4.8.1 While conducting the analysis of the tenders of various products under investigation from 2011-2014, the DG Report does not take into consideration the quotes submitted by OP-1 and OP-2 in tender no. 31022140007 and tender no. 2402140020, both opened on 15.05.2014 by RCF for Conventional Type-II RMPU. In the said tenders, OP-1 and OP-2 quoted bids of INR 6,12,000/- and INR 6,16,000/- respectively. These bids of OP-1 and OP-2 were very near to the bids of OP-3 to OP-7. Also, tender no. 31022140007 was awarded to OP-1 and OP-2.

4.8.2 While analysing the tenders from 2011 to 2014 for procurement of Conventional Type-II RMPU, the DG does not consider the quotes submitted by OP-1 in tender no.3102130207 dated 13.10.2013 of RCF where OP-1 and OP-2 quoted bids of INR 5,68,500/-. Further, in tenders for procurement of Conventional Type-I RMPU for 2011 to 2014, DG Report does not consider the quotes submitted by OP-1 in tender no. 2402120452 dated 25.03.2013 of RCF where OP-1 quoted bid of INR 4,50,000 which is within the bid-range of OP-3 to OP-7.



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- 4.8.3 The finding of the DG that OP-3 to OP-7 have cornered 90% of the RMPU tenders is factually incorrect given the fact it does not include tenders of 2014-15 and 2015-16. In tender no. 31022140007 dated 15.05.2014 of RCF, OP-1 and OP-2 were awarded the entire tender to the extent of 70 sets to OP-1, and 402 sets to OP-2. Further, RCF exercised $\pm 30\%$ quantity increase option to increase the tendered quantity of OP-2 to 523 sets. If the same was taken into consideration, it would have revealed that no alleged cartel could exist between OP-3 to OP-7, considering OP-2 (being a Part-I supplier of RMPU Conventional) could always corner the tenders by undercutting any proposed/alleged cartel.
- 4.8.4 Tender no. 3102130147 dated 15.10.2013 as well as tender no. 3102140007 dated 15.05.2014 show that the conduct of OPs considered part of the cartel (OP-3 to OP-7) is consistent with the conduct of parties exonerated in the present investigation. Where the conduct of OP-1, OP-2, OP-8 and OP-9 is considered unilateral, similar conduct of other OPs cannot be considered as coordinated. Such conflicting assessment in the DG Report magnifies its inherent flaws.
- 4.9 It is contended that in the present case, the DG has based its findings merely on identical/very close quotes of OP-3, OP-5 and OP-7 in 3 of 89 tenders and in case of OP-4 and OP-6, such a finding is based on just 1 of the 89 tenders analysed. Further, it has been emphasised that the percentage of tenders in which the rates are identical/very close in case of OP-3, OP-5 and OP-7 are less than 3.5% of the total tenders analysed by the DG. In light of the same, OP-3 has contended that the inference drawn by the DG is not tenable.



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4.10 On the issue of identical pricing, OP 3 argues by referring to the decision of Hon'ble Competition Appellate Tribunal in *Escorts Limited v Competition Commission of India & Anr*, (Appeal no.13 of 2014 decided on 18.12.2015) and the decision of the Hon'ble Supreme Court in *Union of India v Hindustan Development Corporation & Others* [(1993) 1 SCC 467] that mere quoting of identical rates is not sufficient to establish that the parties have formed a cartel. Further, it is argued that the DG has failed to take note of the fact that LPR is in public knowledge and that bids are quoted keeping in mind the previous LPR.

4.11 In order to strengthen its argument, OP-3 referred to the Commission's order in Ref. Case 05 of 2011, titled Shri B. P. Khare, Principal Chief Engineer, South Eastern Railway against M/s Orissa Concrete and Allied Industries Ltd & Ors. wherein it was noted that, "*The quotation of identical rates by large number of firms is no doubt suggestive of and indicative of formation of a cartel but the same in itself is not conclusive and determinative of the issue.*" Therefore, OP 3 submitted that the finding of the DG drawing adverse inference from the sporadic instances of identical bidding by some of the OPs is legally untenable and deserves to be rejected by the Commission.

4.12 It is contended there is no evidence in the Report to show any direct or indirect exchange of information by the OPs through e-mails or other forms of communication or evidence of any meeting between the OPs.

4.13 With regard to the issue of exorbitant pricing alleged by the Informant, OP-3 submitted that it is in agreement with the DG's view that the tender rates were not exorbitant.

4.14 Further, it is submitted that the upsurge in prices by OP-3 was due to the loss making RMPU division which affected the over-all profits of OP-3. This fact and other aspects like economic necessities, intelligent adaptation of the



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market, *etc.* were acknowledged by the DG but he has given a contradictory conclusion that OP-3 was a part of the cartel for parallel pricing.

4.15 OP-3 submitted that the Part-II vendors exert competitive pressure on Part-I vendors and any cartel without the involvement of Part-II vendors would be economically infeasible. That competitive pressure was exercised by Part-II vendors on Part-I vendors is clear from tender no. 3102130207 dated 10.10.2013. As noted in the Report, L-1 bid by Part-I vendor was brought down to INR 5,35,750/- per unit after multiple rounds of negotiations by the Railways. However, the Railways still did not place any order on Part-I vendor and instead placed part order on Part-II vendor at a rate of INR 4,49,500/-. The order placed on Part-II vendor was more than 25% of the tendered quantity, showing deviation from Railway procurement guidelines. The same is evident of the fact that if any cartel was meant to operate between Part-I vendors, it would not be sustainable in so far as Part-II vendors could undercut the Part-I vendors and corner the orders, thus defeating the entire commercial purpose of the alleged cartel between Part-I vendors, as is being suggested by the DG.

4.16 OP-3 has referred to the bids submitted by all the OPs in tender no. 3102130147 dated 15.10.2013 and stated that a bare perusal of the bids will show that there can be no compartmentalisation of any alleged cartel. Where the bids submitted by all the bidding parties are in such a low bid range, it is preposterous to suggest that half the bidders are part of a cartel and half the bidders aren't. It is stated that the said tender was the first in which OP-9 participated for RMPU LHB Type-II. However, the bid of OP-9 (INR 7,40,901 per unit) was in sync with those of all the OPs. In similar situation in tender no. 3102140007 dated 15.05.2014 for procurement of RMPU Conventional (Type-II), OP-9 which has been exonerated in the Report had quoted bid within the bid-range of OP-3 to OP-7. Given the fact that the conduct of OP-9



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is considered unilateral by the DG, it is arbitrary on the part of the DG to consider OP-3 to OP-7 as a cartel.

4.17 Further, OP 3 has argued that the increase in the rates was pursuant to practice and policies of Indian railways. It is alleged that because of the Informant's practice of adopting multiple rounds of negotiations for reduction in rates, an unsustainable situation was created. Therefore, for continued sustenance, OP-3 increased its prices in consonance with the discussions with Indian Railways. Further, it is argued that the quantity variation clause which empowers the Indian Railways to enhance or decrease the order quantity upto 30% at the same price and conditions without the consent of the supplier, results in loss to vendors irrespective of whether quantity is increased or decreased. Due to this vague policy, the cost of product also increases due to uncertainty to the vendors.

4.18 OP-3 has agreed with the conclusion drawn by the DG that change of refrigerant from R-22 to R-407C led to a definite increase in cost of RMPU. It is stated that increase in cost was primarily because of incidental cost of switchover to new technology but exact change in switchover cost is impossible to calculate because of the research and design costs associated with the development of the new product/design.

4.19 With regard to the appreciable adverse effect on competition in the market, OP-3 has submitted that such presumption of appreciable adverse effect on competition is rebuttable and the onus to prove that pro-competitive effects of such agreements outweigh the anti-competitive effects is on the entities facing charges. With respect to entry barriers and foreclosure of competition, it is stated that entry is controlled by RDSO approval and new entrants can start supplying to Railways as and when they are approved. It is also submitted that nowhere in the DG Report it was found that the alleged anticompetitive conduct of any OP was aimed at driving out existing competitors from the



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market. In any case, it is economically untenable to suggest that the existing competitors would be driven out of the market through increased prices. Further, it is argued that the present investigation involves supply at low/ unsustainable prices by the OPs to the Railways; that being so, even if tacit understanding between the OPs to agree to lower prices were to be understood by the Commission, it should nevertheless be accepted that the prices being charged were lower than the market driven price, thus leading to accrual of benefit to the consumers, *i.e.* the RCF.

4.20 On penalty, it is submitted that OP-3 is a small scale industry and at the time of alleged contravention, OP-3 was completely unaware of the law relating to competition and was under *bonafide* impression that its conduct is legally permissible. The Commission has considered the same as a valid ground for non-imposition of penalty in terms of Section 27(b) of the Act in *Reference Case No. 05 of 2011* titled Shri B. P. Khare, Principal Chief Engineer, South Eastern Railway against M/s Orissa Concrete and Allied Industries Ltd & Ors. It is submitted that the same disposition should be extended to the case of OP-3 also. Further, reference has been made to the decision of Hon'ble Competition Appellate Tribunal in *Excel Crop Care Limited vs Competition Commission of India & Ors.* (Appeal no. 79 of 2012) wherein the penalty imposed on Sandhya Organic Chemicals (P) Limited by the Commission was reduced to 1/10th on the ground that, *inter alia*, Sandhya Organic Chemicals (P) Limited was relatively a small enterprise. Thus, the same should be considered as a mitigating factor and lenient view should be taken by this Commission towards OP-3.

4.21 Further, if at all a penalty is imposed by the Commission, the quantum of penalty must correspond with the gravity of offence and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case. It is submitted that in the present case, it stands



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proved that though contravention is being claimed to be committed by the OPs, but the real victims are the vendors of RMPUs to the RCF. Whereas the OPs first suffered on account of unfair/ unreasonably low prices being offered by the Railways to the OPs, they have to now suffer on account of the penalties being imposed for supplying the relevant product at a cost which covers their investment at the very least. This consideration should mean that a penalty, if any, should either be symbolic or bare minimum taking into consideration the (lack of) gravity of the offence.

4.22 It is also stated that if penalty is to be imposed the same should be based on relevant turnover and not total turnover. To support its case, OP-3 has cited Hon'ble Competition Appellate Tribunal's decisions on relevant turnover in *Excel Crop Care Limited vs Competition Commission of India & Ors.* and *Dr. L.H. Hiranandani Hospital vs. Competition Commission of India & Anr.* (Appeal no. 19 of 2014)

OP-4:

4.23 OP-4 filed its objections/ suggestions to the investigation report of the DG on 10.03.2016. At the outset, OP-4 has submitted that the findings of the DG against OP-4 ought to be dismissed outrightly as the DG has drawn incorrect conclusions and erred in the application of established principles of competition law and the provisions of the Act. Further, it is contended that OP-4 has not engaged in any conduct that would constitute an infringement under Section 3(3) of the Act. Rather the actions of OP-4 were pro-competitive and did not in any manner whatsoever, amount to contravention of the provisions of the Act.

4.24 OP-4 has averred that the DG has failed to provide any evidence, direct or circumstantial, to establish that OPs colluded and indulged in bid rigging



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in the tenders for supply of RMPUs. Further, the DG has failed to consider crucial pieces of evidence, the dynamics of the bidding market and the dominance of the Indian Railways which establish that the OPs did not collude in any manner whatsoever.

4.25 Further, OP-4 has stated that the DG has made several fundamental errors while analysing contravention for the purposes of Section 3(3) of the Act, for *e.g.* enterprises belonging to the same group *i.e.*, a single economic entity have been held to be a cartel, no evidence of any communication between the parties has been found, no reasons have been provided to show how the justifications provided by the OPs for their conduct are incorrect or incoherent. Further, the DG has not established the existence of an ‘agreement’ among the OPs which is a *sine qua non* for arriving at a finding of a cartel under Section 3(3) of the Act.

4.26 OP-4 has submitted that the existence of an agreement between the competing entities is the basis for a finding of violation of Section 3(3) of the Act; however, it is an established principle of competition law that the existence of a written agreement is not necessary to establish common understanding, design, motive, intent or approach amongst the parties to an anti-competitive agreement and that these aspects may be established from the activities carried on by the competitors in a particular market, from the objective sought to be achieved and the evidence gathered from the anterior and subsequent relevant circumstances.

4.27 To explain further, OP-4 has placed reliance on OECD’s paper, ‘Prosecuting Cartels without Direct Evidence’ and stated that it is not necessary that direct evidence has to be found, contravention can be proved on the basis of circumstantial evidence also. The two general types of circumstantial evidence are communication evidence and economic evidence, of which, communication evidence is an important



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circumstantial evidence. OP-4 has contended that, in the instant matter, the DG has not found any communication evidence to establish that OP-4 had communicated and colluded with the other OPs for the purpose of rigging the bids. The DG has, solely on the basis of increase in prices, concluded that OP-4 had colluded with certain other OPs and rigged the tenders for supply of RMPUs.

4.28 OP-4 points out that, in order to reach a conclusion that the OPs had colluded with each other in the tendering process, the DG was required to establish certain plus factors in line with some of the earlier decisions of the Commission such as Case No. 29 of 2010, *Suo Moto* Case No. 02 of 2014 and *Suo Moto* Case no. 03 of 2012, which has not been done by the DG in this case.

4.29 It is submitted that, in any case, the instant matter was not that the OPs had placed identical bids but the case is about increase in rates quoted by the bidders. For this, the DG was required to provide even more credible evidence than in case of identical bidding. However, the DG has placed no evidence on record to support its conclusions. OP-4 has contended that the DG has failed to establish that increase in bids was on account of collusion between OPs.

4.30 OP-4 contended that the conclusion of the DG that OP-4 and OP-6 are colluding with each other since the said enterprises are part of the same group is also unsustainable and untenable under the law. It has been submitted that even assuming on demurrer that OP-4 and OP-6 colluded with each other, the alleged conduct would not fall foul of Section 3(3) of the Act as both the enterprises for the purposes of competition law constitute a 'Single Economic Entity'. To substantiate this argument, OP-4 has made reference to *Exclusive Motors Pvt. Limited v. Automobili Lamborghini S.P.A* (Case No. 52/2012), where the Commission had held



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that agreements between entities constituting one enterprise cannot be assessed under the Act as such entities will be considered a single economic entity for purposes of the Act.

4.31 OP-4 has submitted that an agreement between enterprises which are part of the same group or have the same management *etc.* cannot be deemed to be an 'Agreement' for the purpose of Section 3 of the Act. The reason for the same being that from an economic perspective, the said entities are considered to constitute a single economic entity and a single entity cannot enter into an agreement with itself. It has been further stated that for existence of an 'Agreement', a minimum of two parties are required and despite noting that OP-4 and OP-6 are sister concerns, the DG has failed to appreciate that there could not have been a cartel between the said entities as they constituted a 'single economic entity' and were immune from Section 3(3) of the Act. This understanding is stated to be consistent with the internationally accepted doctrine of 'Single Economic Entity'.

4.32 OP-4 has stated that even if it is assumed, on demurrer, that OP-4 and OP-6 do not constitute a single economic entity for the purpose of Section 3 of the Act, yet the DG has not provided any credible/communication evidence whatsoever in order to substantiate its findings that both the enterprises are colluding and contravening the provisions of Section 3 of the Act. Merely quoting prices close to each other or within a certain range cannot be considered a sign that a cartel exists. It has also been pointed out that it is not feasible for OP-4 and OP-6 to collude with each other considering that there are several competitors that bid for the RMPU tenders of the Indian Railways. It has been submitted that the basic purpose of collusion between competitors is to increase prices beyond the competitive levels *i.e.*, beyond what they could have earned in a competitive scenario. In the event, OP-4 and OP-6 collude with each other



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and increase the bid prices, it would not yield any benefit for the said enterprises as other competitors could quote lower and take away all the tenders.

4.33 On economic evidence, OP-4 has submitted that the DG, in its report had listed out certain economic evidences such as high concentration, high entry barrier and exit barriers, homogeneity of the products, similar production cost, excess capacity, high dependence of consumers on the products, history of collusion and active trade association that may corroborate a finding of the existence of cartel but has done no analysis to ascertain whether the said conditions existed in respect of the RMPUs tendering process. OP-4 has provided its own analysis on these factors in detail and submitted that the market was not conducive to cartelization.

4.34 OP-4 has pointed out that the DG has not provided any reasons whatsoever to support its finding that change of specification did not justify an increase in bids and has denied the justifications provided by the OPs for the increase in prices by merely stating that “higher input costs does not justify such abnormal increase in prices”. OP-4 has stated that the Indian Railways had recommended a change in the specifications of the RMPUs purchased from OPs *i.e.*, change from RMPU with R-22 refrigerant to eco- friendly R-407C refrigerant based system. This was one of the main reasons for the increase in rates being quoted by OPs post 2012. However, the DG did not conduct any analysis to determine whether the increase in bids was justified on account of the change of specifications and erroneously concluded that the higher input prices did not justify abnormal increase in prices. This conclusion was arrived at by the DG despite noting that the Indian Railways exercises monopoly power and negotiates the prices down and that the prevailing price of RMPU is not market driven price.



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4.35 Further, OP-4 has submitted that the increase in rates quoted in the RMPU tenders by OP-4 was on account of various reasons such as change of specifications from R-22 refrigerant to eco-friendly R-407C refrigerant based system, recoupment of capital invested in research and development, losses incurred in the previous years and devaluation of the rupee *vis-à-vis* US dollar which resulted in higher input costs. It is averred that the Railways, the RDSO and the DG have done no analysis whatsoever to ascertain whether the increase in prices was justified or not on account of the change in specifications.

4.36 OP-4 has stated that, without conceding that it was part of a cartel, even assuming that it was, there has been no adverse effect caused on competition in India by OP-4's conduct. Rather OP-4 has alleged that it is the Indian Railways that arbitrarily reduces the quantity of the tenders, negotiates and forces the enterprises to bring down their prices, arbitrarily awards tenders to parties, which do not quote the winning bid and has also discharged tenders on suspicion that OPs may have indulged in a cartel. This clearly establishes that the Indian Railways had not suffered in any manner whatsoever and that no appreciable adverse effect on competition in India has been caused by OP-4. It has been stated that the Indian Railways has not paid higher price for the procurement of RMPUs from OPs. In-fact OP-4 has been incurring significant losses in the past several years, which clearly shows that it was not part of a cartel and that even if it is held to the contrary, no appreciable adverse effect has been caused to competition in India by the conduct of OP-4.

4.37 Further, OP-4 has submitted that a failed cartel or an unsuccessful cartel does not cause an appreciable adverse effect on competition in India. If the alleged cartel has been unable to increase prices beyond the competitive



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levels, then such conduct does not amount to having an adverse effect on competition in India.

4.38 On penalty, OP-4 has submitted that the Commission should levy penalty based on the turnover from the product to which the infringement relates and not based on the entire turnover of the enterprise. The penalty that should be levied should be proportionate to the effect of the conduct of OP-4 on competition in the relevant market in India. Levying a penalty without analyzing the effect of the conduct on competition in the market would lead to unreasonable and arbitrary outcome. It has been submitted that penalty, if any, that may be levied, should be calculated on the basis of the turnover from the relevant product *i.e.*, the RMPUs and not on the entire turnover of the enterprise.

OP-5:

4.39 OP-5 filed its objections/ suggestions to the investigation report of the DG on 10.03.2016. At the outset, OP-5 has stated that the DG has failed to prove any meeting of minds amongst the various vendors. Further, in the present case, similarity in rates and pattern of increase/ decrease in quoted rates in the given time period of OP-5 with any other supplier can be justified with plausible explanations including market realities and conditions prevailing at the time when such rate was quoted. Infact, the said identical rates were based on the LPR and quoting of LPR by two or more parties cannot be a basis to conclude existence of meeting of minds.

4.40 It is further submitted that OP-5 quoted rates by taking into account LPR, quantities to be purchased as part of the tender, expected increase in cost of production, expected changes in exchange rates, expected changes in labour charges, its competitive position in the market *etc.* It is also



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mentioned that the rates quoted in a tender are not the basis for determination of the final price. At the most, these rates determine the supplier with whom Indian Railways shall enter into negotiations. Since the product cannot be sold to any other buyer, vendors often have to accept the price and conditions of delivery to remain in business and keep the facilities and workforce occupied. All these factors have a bearing on the actual cost of production of RMPUs and, accordingly, these need to be factored in while deciding the rates to be quoted.

4.41 OP-5 states that the rates quoted by OP-5 had been in the range of 4 to 5.5 lakhs from the year 2011 till September 2013. However, increasing costs of input materials, drastic changes in exchange rate, *etc.* had forced it to increase the rates in September 2014. Thereafter, the rates quoted by OP-5 have been completely on the basis of quantities of the tender, expected increases in cost of production, expected changes in exchange rates, expected changes in labour charges, overhead costs, *etc.*

4.42 As regards increase in rates, OP-5 has stated that, pressurized by the loss of orders and mounting fixed costs of labour and other overheads, it had no option but to match its rates to the low rates being offered by other vendors so as to acquire orders just to remain in the market. Thus, it had quoted the unsustainably low rate of Rs. 4,90,000/- and received order for 88 units in October 2013. However, by then, rupee had depreciated to an all-time low of Rs. 69 per USD and it was expected that there would be further fall. This coupled with increasing labour rates, diesel prices, revision in specification *etc.*, further increased the cost of production. Hence, OP-5 realized that the price of Rs. 4,90,000/- was unsustainable and it would have to bear losses even for the order already received from the Indian Railways. Thereafter, OP-5 had no option but to quote the reasonable price previously quoted by them. Further, OP-5 has highlighted that in case it did not bid in tenders for conventional RMPUs, then its continued non-participation in the bidding



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process for conventional RMPUs could have resulted in loss of its standing approved status for tenders for supply of RMPUs for LHB coaches. Thus, OP-5 has argued that the increase and/or decrease in rates quoted by it was based on its own business variables including the current and future costs.

4.43 With respect to the issue of identical bid prices of OP-5 and OP-7 in tenders opened on 03.01.2011, 18.01.2011 and 25.10.2011 for LHB RMPUs *i.e.*, Rs. 8,06,900/- for LHB Type 1 RMPUs and Rs. 8,61,678/- for LHB Type II RMPUs, OP-5 has submitted that the numerical figure of Rs. 8,06,900/- for LHB Type I RMPU and Rs. 8,61,678/- for LHB Type II RMPU was based on the LPR of the said types of RMPUs finalized by the Railways on 09.06.2010. It has been submitted that this cannot be seen as an evidence of meeting of minds. It has also been stated that since the competent authority of the Indian Railways, more often than not, renegotiates the price and quantity after the tenderer gets shortlisted; hence, as a basic preemptory factor for deciding on the final price, the bidders quote the LPR, which usually are the rates that have been pre-determined by the Railways. In tools of negotiation, it is usually helpful for the vendors to argue that since the Indian Railways had already agreed on the same price in previous bids/tenders; hence, any effort to ask the vendors to reduce their prices beyond that would be countered. It has been submitted that this is a very standard negotiating tactic and there is nothing abnormal in any other party also quoting its bid price on the LPR. It has been alleged that this has led to similarity in the rates quoted by OP-5 and OP-7 in tenders dated 03.01.2011, 18.01.2011 and 25.10.2011 for LHB RMPUs.

4.44 With regard to the issue of similar rates quoted by OP-5 with OP-3, OP-4 and OP-6 in certain tenders and pattern of increase/decrease of bid price with these vendors in certain tenders, OP-5 has submitted that the increase in bid price by OP-5 from 2011 onwards was due to change in market



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conditions. Since any change in the market conditions would be equally felt by all the vendors in the market, hence, increase/ decrease in cost of production due to market conditions would force all the players in the market to increase/ decrease bid prices accordingly. In such circumstances, to read collusion amongst such parties is completely unfounded.

4.45 It is argued that the DG cannot rely upon any relationship between the partners of OP-5 with the directors of OP-7 to prove meeting of minds and hence, price-coordination. It has been stated that OP-5 is a partnership firm with Mr. Ronsher Singh Sidhu, being its Managing Partner and his wife Mrs. Simran Sidhu, a partner. The Managing Partner of OP-5 is the son of Mr. S.S. Sidhu and Mrs. Randhir Sidhu, who are the only directors of OP No.5. The partners of OP-5 and the directors of OP-7 are therefore part of the same family. However, their businesses are at arm's length. It is submitted that the land and building in which OP-7 is housed is co-owned by Mrs. Randhir Sidhu and HUF of M/s SS Sidhu & Sons with Mr. S.S. Sidhu as its Karta. OP-7 has taken the land and building on rent from the co-owners thereof. The owners of the said property have also let out a part of the said property to OP- 5 on payment of a monthly rent by way of a proper lease deed. It is further submitted that while OP-5 has its office at Village Deramandi (New Delhi), it also uses this space for reasons of sheer convenience. Under the aforesaid understanding and due to the relationship explained above, OP-5 uses certain basic facilities like common areas, washroom facilities, security guard, reception, high-speed internet, conference room with equipment electricity and water, pantry *etc.* of OP-7. As a result, the bids are uploaded and submitted by OP-5 using the same internet connection as OP -7 and hence, the IP addresses for the bids submitted by OP-7 and OP-5 can be the same. It is submitted that due to the relationship of OP-5 and OP-7, using the same office space and internet connection cannot be stretched to prove any meeting of minds for bid



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rigging. It is however reiterated that all decisions relating to management and control of OP-5 including pricing decisions are completely separate and independent from OP-7.

4.46 It is submitted that DG has further tried to justify meeting of minds on the basis of varying cost structure of various vendors. It is submitted that such inference of DG is erroneous and not based on market realities. It is submitted that cost structure of OP-5, as submitted to DG, cannot be seen as proxy for standard cost of production of a given unit. This is because the cost of production in the given market is variable and is dependent on various factors including the number of orders received from Indian Railways and the number of orders in hand. Higher the number of such orders, the lower is the cost of production due to economies of scale. On the other hand, the costs reflected in the books of accounts are reflective of the costs associated for the supplies made during that period against orders received in the past. Accordingly, the bid price cannot be a function of historical cost structure alone but is in fact anticipated every time a bid has to be submitted by OP-5.

4.47 It is pointed out that the entire production of OP-5 is centered around Indian Railways as the sole buyer. OP-5 does not manufacture any other product for the consumer market. Hence, it is completely dependent on the orders received from the Railways. Therefore, the increase or decrease in the cost of production is more marked in the case of OP-5. Its bid price takes into consideration such anticipated factors and is not the result of its cost structure reflected in its books of account. Thus, varying cost structure is completely irrelevant in concluding any collusive meeting of minds.

4.48 It is contended that there cannot be a cartelization to increase prices between few players in the market as the same would never be successful.



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The player which is not a member of the said cartel would automatically get all the tenders as it would invariably quote a lower price.

4.49 It is also submitted that the unique nature of RMPU market rules out collusion. It is submitted that for a single buyer, there are sufficiently large number of vendors existing in the market. Moreover, the numbers of vendors are increasing in the market and almost every tender in the last few years includes quotes by new entities. Further, entry barriers in the said market are not very high since Railways provide the technical know-how and specifications for the manufacture of RMPU. Also, there are approved sources of procurement of raw materials. It is also contended that the procurement policy of Railways also rules out the possibility of any collusion. Railways dictate all pricing decisions.

OP-6:

4.50 OP-6 filed its objections/ suggestions to the investigation report of the DG on 10.03.2016. The submissions of OP-6 are on the same lines as that of OP-4. Therefore, for the sake brevity, the same are not repeated. The submissions that are found to be different from that of OP-4 are provided here.

4.51 At the outset, OP-6 argues that one instance of identical bids and that too the LPR, which is a known price, does not imply that a cartel exists between two competitors. It is averred that the DG has failed to understand that there is a high probability of two parties quoting the same identical bid which is the last purchase price and that it was a mere coincidence that both the parties quoted the same price. Further, the DG also failed to analyze that the bid placed was not a random number picked from the air but a known price. It states that it was, in fact, the last winning bid and that it is quite probable for two parties to quote the same without collusion with each other.



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4.52 It is submitted that OP-6 was unaware of any complaint being filed by OP-1, namely Daulat Ram Engineering Services Pvt. Ltd., before the Chief Materials Manager ('CMM'), RCF/Kapurthala regarding the alleged cartel. CMM, RCF/Kapurthala was correct in dismissing the complaint of OP -1. It also submits that the DG has failed to give due credit to the reasons of the Technical Committee for dismissing the complaint of OP-1 and has dismissed the said reasoning without providing any coherent counter to the findings of the Technical Committee of RCF/Kapurthala. It stated that the Technical Committee of RCF/Kapurthala was very well aware of the fact that the complaint was motivated and that the purpose of the complaint was to delay the tendering process and to serve the selfish interests of OP-1. Furthermore, it is quite probable that two bidders can quote the last winning bid without colluding with each other. The probability would decrease with the increase in the number of bidders. In the event the parties would have quoted a similar random previously unknown figure, then it would have raised a concern of collusion.

4.53 OP-6 points out that the finding of collusion between OP- 6 and OP- 7 based on the reasoning that prudent business sense implies that OP-6 should have quoted a comparably lower figure is erroneous. It is submitted that this reasoning is based on a very narrow understanding of how business and Railways tendering works. It is stated, in case of tenders floated by Indian Railways, generally bidders have a tendency of quoting higher bids as the Indian Railways exercises its monopsony power and brings down the prices. It is stated that, prior to the said tender, OP-6 had become a Part I vendor and it is quite rational for a Part I vendor to check the last purchase bid by a Part I vendor. Furthermore, it is quite probable for OP-6 to assume at that time that OP-7 would have quoted a higher price than what it previously quoted and thereby, quote LPR in order to win the



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tender. Thus, it is stated that the reasoning of the DG that it is quite probable for OP-6 to assume that OP-7 would quote the same price and that, it should have quoted a lower price by one rupee and win the tender, is erroneous. It is submitted that OP-6 would have quoted a lower price had it been aware that OP-7 was going to quote the same LPR which it was not.

4.54 It is contended that the DG's reasoning that completely different cost structure of OP-6 and OP-7 for RMPU units further obviates any chance of quoting identical bids is also erroneous. It is submitted that businesses always do not quote as per their cost structures. There are various dynamics at play while bidding for a tender and a rule cannot be laid down that companies only bid in accordance with their cost structures. Lastly, it is contended that in order to find a contravention of Section 3(3) of the Act, the DG is required to show evidence of communication between the competitors which the DG has failed to do.

OP-7:

4.55 OP-7, in its submission dated 10.03.2016, argues that inferences and conclusions drawn by DG do not satisfy the ingredients of bid – rigging/collusive tendering as defined in Section 3(3) (d) of the Act and the explanation attached to the same. It is stated that an 'agreement' between 'competing bidders' aiming at bid-rigging is a *sine qua non* for establishing contravention of Section 3(3) (d) of the Act. The DG has erroneously concluded that there seems to be a meeting of minds between OP-3, OP-4, OP-5, OP-6 and OP-7 for collusive bidding/bid-rigging in the various tenders floated on behalf of Indian Railways. It is contended that meeting of minds has been assumed on the basis of parallelism in bid prices quoted by various parties without taking into consideration plausible justifications behind such quotes. The DG has failed to produce any conclusive proof or establish the existence of the circumstantial factors from where the easy inference can be drawn as to existence of an agreement. There is no



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evidence to prove that there has been any exchange of information, directly or indirectly, between OP-3, OP-4, OP-5, OP-6 and OP-7 collectively. It is surprising that the DG has concluded meeting of minds on behalf of certain players in the market (*i.e.* OP-3, OP-4, OP-5, OP-6 and OP-7) while absolving other Part I vendors (*i.e.* OP-2) and Part II vendors (*i.e.* OP-1, OP-8 and OP-9). Thus, it is submitted that based on the material available on record, the DG has not been able to come to a conclusion or recorded any finding of existence of any 'agreement' as understood under Section 2(b) of the Act.

4.56 It is further argued that mere parallelism of price alone cannot be an indication of meeting of minds. It is stated that Indian Railways is the sole buyer and the cost of production of RMPU varies significantly depending on the quantity of orders received from it. At the same time, the oligopolistic nature of the supply side provides interdependencies based on comparative market study and the existing market/competitive circumstances. In this background, each supplier including OP-7 quotes its bid prices by taking into consideration several factors which may affect its anticipated cost of production of RMPUs if an order is placed on it by Indian Railways. Most of these factors are common to all the vendors and hence, there may arise certain degree of parallelism between the bid prices quoted by each of the supplier. It is submitted that such a pricing pattern alone cannot amount to meeting of minds as parallelism of behaviour, in this context, could be inferred arising as a result of independent business decisions taking into account the present and foreseeable market conditions and the conduct of the competitors. This cannot be considered as proof of collusive meeting of minds between these vendors in the absence of substantially compelling plus factors.



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4.57 OP-7 avers that the DG has arbitrarily and summarily rejected the detailed reasoning given by OP-7 with regard to the few incidents where the bid prices were identical. The DG's conclusion is contrary to the jurisprudence established in the case of *Shailesh Kumar v Tata Chemicals Ltd. & Ors.* (Case No 66/2011) according to which, meeting of minds cannot be presumed if there is a plausible explanation for similar or identical pricing. In the instant case, identical prices happen to be the same as LPR, which is made known to all and sundry by the buyer itself. The fact that such identical pricing has happened only in a few cases further proves the case of OP-7 that identical pricing is nothing but a coincidence as more than one parties decided to quote the LPR only in stray cases.

4.58 It is also stated that the manner of buying, quantity and acceptance of the final purchase rate for these RMPU is completely in the hands of the Indian Railways and its production units. The supply market to Railways is also highly competitive and contestable in view of the fact that there are a large number of vendors competing for a product which is produced as per strict specifications and technology provided by buyers/RDSO. Such market structure and conditions play an important role in the determination of prices of RMPU. Besides, the procurement policy of the sole buyer also plays a pivotal role.

4.59 It is contended that the DG has failed to take into account this aspect of the tender process which is one of the most plausible explanations for quoting a particular price. It is stated that the quantities are distributed amongst various vendors who may be L-1, L-2 and L-3 and so on and so forth. In this backdrop, the pricing decisions for the bid price as quoted by OP-7 is dependent on several factors which, *inter alia*, include estimated size of the tender, anticipated changes in cost of production, foreign exchange rate which affects the cost of procurement directly, quantity that OP-7 is likely



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to get, changes in the cost of utilities/other inputs, overhead costs, fixed cost of highly skilled labour which cannot be retrenched even if there are no orders, LPR, *etc.* It is also stated that the production in RMPU market is completely dependent on the orders received from the Railways. The loss of major orders by OP-7 not only resulted in financial loss but also caused idleness of labour force and consequent labour problems. Therefore, as a matter of distress and with a view to liquidate the raw material stocks and to keep the labour force gainfully employed, OP-7 had no alternative but to reduce its bid prices for supply of both LHB as well as Conventional RMPUs.

4.60 It is submitted that the subsequent increased prices offered by OP-7 took into account the existing cost structure, additional cost due to change in market conditions of input materials as well as additional costs on account of enhanced specifications. OP-7 did not raise the price exponentially but merely reverted to pre-2011 prices for both LHB and Conventional RMPU. It is contended that the allegation of steep increase in price from June 2013 onwards for about six months thereafter is misleading as the allegation only looks at the increase during a few months whereas the trend for prices quoted by OP-7 during the last six years or more would reveal a totally different and true picture.

4.61 In view of the above, OP-7 submits that the increase in price in the alleged few months when compared appropriately with the prices of the preceding years would establish that the apprehension expressed with regard to undue and steep rise in prices is wholly without any basis. Fall in price in and around June 2013 and subsequent increase thereafter is purely on account of market forces (which included the price undercutting by the new entrants) and should not be seen in isolation. It is also stated that the quoted prices have since declined from September 2014 onwards. The increase in



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price has an economic rationale and is not due to any collusive meeting of mind on part of the OP-7.

4.62 It is argued that identical bid price of OP-7 and OP-6 in tender no. 3102090051 dated 30.07.2009 has a plausible justification. It is explained that the price was based on the last bid price quoted by OP-7 in the previous tender of RCF, Kapurthala bearing no. 3102080456 opened on 05.02.2009. It is stated that in the said tender, OP-7 was given an order for 152 units on the bid price of Rs. 818673.73/-. For the next tender *i.e.*, tender no. 3102090051 opened on 30.07.2009, OP-7 decided to bid again on the same bid price which it had quoted in the earlier tender. It is submitted that quantities contained in the tenders in question are comparable, being 262 in tender opened on 05.02.2009 and 250 in tender opened on 30.07.2009. Further, as OP-7 had already received orders for 152 units in the tender opened on 05.02.2009, any further order received would have ensured that costs of production either remain constant or may even reduce. OP-7 reiterates that cost of production of RMPUs decreases with higher quantities of orders received from Railways. It was, therefore, that it decided to base its bid price in the tender opened on 30.07.2009 on LPR quoted in the previous tender opened on 05.02.2009.

4.63 It is stated that this was not the first time that OP-7 decided to quote its bid price on the basis of LPR. On many occasions in the past, it had quoted the bid price on the basis of LPR. It is also submitted that historical cost of production cannot be the basis for comparing bid prices as the future cost of production remains variable for every order. The cost of production for a future order depends on the number and size of orders received. Further, cost of production is based on actual purchase order of input materials at a given time and is accordingly variable for every order received. OP-7, thus,



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submits that the numerical figure of increase in cost of production cannot be taken as absolute.

4.64 It is argued that comparing the price quoted by OP-7 with the actual costs in the books of account for any particular period would not be correct. It needs to be appreciated that prices take into account the likely costs as there is a considerable gap in the placement of orders and the actual supplies. Historical costs do play a role in determining the bid prices but they are not the sole or principal factor. There are several other relevant factors which are considered in deciding the bid prices. As such, the DG has wrongly relied upon the difference in the costs of production of various vendors as a factor to conclude collusive meeting of minds. It is contended that the costs of production are wholly irrelevant in proving or disproving a cartel/concerted action.

4.65 It is also contended that collusive meeting of minds cannot be pointed at a few players in the market while absolving the rest. The fact that these excluded entities have also quoted prices which are parallel/identical to the bid prices quoted by allegedly collusive bidders is an indication of the fact that the prices quoted by OP-7 are independent and a factor of market realities. OP-7 submits that a deeper analysis of the market conditions would reveal that the unique market conditions do not favour collusive behavior or meeting of minds at all. OP-7 has highlighted certain conditions to substantiate its argument such as low entry barriers, presence of a large number of vendors, procurement policy of the Indian Railways, manner of its implementation by it which does not favour collusion, demand uncertainty, absence of active trade association, cartelisation being not possible due to market structure, no possibility of any compensation mechanism, substantial losses by majority of the vendors, economies of scale and sunk costs. Thus, it is submitted that the factors for collusion are



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conspicuously absent in the instant case and the market structure and conditions are not supportive for collusion.

4.66 It is argued that there is no circumstance emerging from the DG report which seems to indicate that the conduct of the vendors in the market has resulted in eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding. It is further argued that while it is the primary case of OP-7 that the essential ingredients of Section 3(3) (d) have not been met with, it is, however, also submitted (without prejudice) that there is or has been no appreciable adverse effect on competition in this case as well. The bidding process has not resulted in creation of any entry barriers to new entrants or driven existing competitors out of the market or foreclosed any competition in the market. The fact that OP-7 is still incurring losses in the business of RMPUs is a further indication that it is not involved in collusive tendering.

4.67 Lastly, OP-7 submits that the conclusions drawn by the DG in the Report are highly erroneous in law as well as on facts. Several key facts, legal requirements and explanations offered by OP-7 have either escaped the attention of the DG or have been ignored. Most plausible explanations provided by the parties have been cursorily brushed aside without getting into the legal jurisprudence or the factual aspects.

OP-8:

4.68 OP-8 in its submission dated 08.02.2016, states at the outset that there is no finding of any anti-competitive behaviour on the part of OP-8 and in fact, the DG has found no clear cut price coordination or concerted action among Part-II vendors *i.e.* OP-1, OP-8 and OP-9. OP-8 is a Part-II vendor and there being no specific finding by the DG against it, proceedings may be dropped against OP-8.



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4.69 OP- 8 further submits that the reason for increase in prices post July 2013 was predominantly higher input costs. Since during the end of 2013, rupee had devalued against the US dollar substantially, it led to higher input cost and the company had no option but to increase its rates. Further, change in specifications from conventional R-22 refrigerant to R-407C further increased the input cost as R-407C is a high pressure gas and, in some cases, caused leakage of gas and failure of compressor and components leading to additional cost.

4.70 It contends that mere price parallelism cannot be termed as anti-competitive. Reference is made to the case, *All India Tyre Dealer Federation v Tyre Manufactures (2013) COMP LR 92 (CCI)* in which the Commission held that price parallelism *per se* may not fall foul of the provisions of the Act and in certain cases price parallelism may be dictated solely by economic reasons and the same is not a violation of the Act if it does not result from concerted action. To elaborate further, OP-8 has referred to other cases such as *Deputy Chief Materials Manager Rail Coach Factory v Faiveley Transport India Ltd. (Ref. Case No. 06/2015)* and *Alleged Cartelization by Steel Producers (RTPE No. 09/2008)* wherein the same principle was applied. Reference has also been made to several other cases in different jurisdictions where price parallelism has been discussed on the same grounds.

4.71 Further, arguing on plus factors, OP-8 refers to the case, *Delhi Development Authority v/s Ram Cement Ltd. (2010) CTJ 17 (COMPAT)* wherein the Hon'ble Competition Appellate Tribunal, has held that in the absence of any direct or circumstantial evidence of cartel and without any evidence that proves any plus factor to bolster the circumstances of price parallelism, it is unsafe to conclude that there is a cartel.



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4.72 It submits that burden of proof lies on the Informant to prove with clear and cogent evidence the presence of an agreement. On its part, it states that there exists no agreement, written or verbal, or any form of concerted activity with respect to it. Therefore, the factors contemplated in Sections 2(b) and 3 of the Act for existence of an agreement are not fulfilled in the present case. A high standard of proof becomes particularly pertinent where the competition authority is not only the investigator and prosecutor but is also the final authority with powers to determine guilt and impose penalty, as is the case under the Act.

4.73 It argues that the DG has found no evidence against OP-8 to establish existence of any anti-competitive agreement between it and the other Part-II vendors. It is submitted that that as per the DG, OP-8 is not part of any cartel nor has it taken any steps for cartelisation. Accordingly, it has not been found guilty of bid rigging by the DG. However, an allegation of price parallelism is leveled against it in the DG report. The only reason given by the DG for not accepting the increase of input cost as a reason for increase in the quoted price is that the explanation furnished is neither cogent nor convincing. No basis for this finding has been given by the DG and the facts mentioned by OP-8 *i.e.* the switching over from conventional refrigerant to R-407C and the hike in the price of the inputs have not been controverted by the DG.

5. **Findings of the Commission:**

5.1 The Commission has perused the material available on record and heard the learned counsel for the OPs. Before advertng to the merits of the cases, Commission deems it appropriate to address the argument raised by OP-4 & OP-6 of being a 'single economic entity'.



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5.2 OPs-4 & 6 have argued that an agreement between enterprises, which are part of the same group or have the same management *etc.* cannot be deemed to be ‘agreement’ for the purpose of Section 3 of the Act as the said entities constitute a ‘single economic entity’ from the economic perspective and cannot arrive at an agreement with itself. The Commission has settled this issue in its order in Ref. Case Nos. 03 & 04 of 2013 (*Delhi Jal Board V. Grasim Industries Ltd. & Ors.*) where it has held that in public procurement, where two or more entities of the same group decide to separately submit bids in the same tender, they have consciously decided to represent themselves to the procurer that they are independent decision making centres and independent options for procurement. Further, the concept of “group” as provided in clause (b) of the Explanation to Section 5 of the Act has not been extended to the proceedings under Section 3. In such circumstances, they are as much competitors of each other as any other bidder. Thus, the argument of ‘single economic entity’ expounded by OP-4 and OP-6 is not acceptable.

5.3 In light of the findings of the DG and the submissions of the OPs thereon, the two issues before the Commission for examination are:

- (i) ***Was the collective increase/ decrease in rates by the OPs found in various tenders during investigation, particularly, the increase in rates observed in tenders opened in or after June 2013 an outcome of collusion amongst the OPs in contravention of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act?***
- (ii) ***Whether the instances of identical or similar pricing by OP-3, OP-4, OP-5, OP-6 and OP-7, as observed during investigation, amount to contravention of the provisions of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act?***



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Issue 1: Was the collective increase/ decrease in rates by the OPs found in various tenders during investigation, particularly, the increase in rates observed in tenders opened in or after June 2013 an outcome of collusion amongst the OPs in contravention of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act?

- 5.4 The Commission notes that the primary allegation raised by the Informant in the instant matter was regarding abnormal increase in rates quoted by the OPs in the tenders opened after June 2013 for Conventional RMPUs and LHB RMPUs *vis-à-vis* LPR quoted by them which is suggestive of collusive bidding and cartel formation by the OPs in contravention of the provisions of Section 3 of the Act.
- 5.5 The DG analysed the rates quoted by all the OPs during the period 2011 to 2014 in the tenders floated by the Informant and by Indian Railways (on pan-India basis) for (a) Conventional Type I RMPUs, (b) Conventional Type II RMPUs, (c) LHB Type I RMPUs and (d) LHB Type II RMPUs.
- 5.6 In the tenders floated by the Informant, as tabulated in the Tables presented at Paragraphs 3.6, 3.8, 3.10 and 3.12, the DG observed:
- (i) an all-round increase in the rates quoted by all the OPs on and after June 2013 (except OP-9 whose quotes were almost consistent over all the tenders); and
 - (ii) though there was variation in the rates quoted by the OPs, the rates of all OPs increased and decreased together over different tenders, which indicated signs of premeditated meeting of mind between such OPs.
- 5.7 As per the DG, this trend of sudden increase in rates in tenders opened in or after June 2013 is visible not only from the tenders floated by the Informant but also from tenders for these items floated by other production units of Indian Railways as well as the various Zonal Railways during the



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period 2011 to 2014. After scrutinizing all India bid figures of OPs in the tenders of Indian Railways for these four items, the DG concluded that there was a tacit understanding between the OPs pursuant to which they increased/ decreased their quotations collectively and around same time in the RMPU tenders floated by production units of Indian Railways (including the Informant) and zonal divisions. Noting a collusive increase in tender bids by OPs for various types of RMPUs after June 2013, the DG inferred that there was a well-planned and concerted action by OPs to rig the RMPU tender process of Indian Railways. The DG also highlighted various instances of identical and/ or almost identical bidding by few OPs to indicate that those OPs had joined hands to manipulate the tender bids which distorted the *inter-se* competition amongst the OPs in the RMPU tenders floated by Indian Railways.

5.8 Apart from examining the tenders, the DG found other instances that pointed towards collusion to rig the bids:

- (i) OP-1 sent a letter dated 12.08.2009 to the Informant informing about the alleged cartel formation between OP-6 and OP-7 in tender dated 30.07.2009 for LHB variant RMPU where they both had quoted identical rates of Rs. 7,87,151.66. The Technical Committee considered the complaint and concluded that the identical quote was mere coincidence since LPR of the items was already known to them. However, the DG was not convinced and observed that since the manufacturing cost of the product of both OP-6 and OP-7 was not identical, the identical rates to the last paisa in the bids appeared fallacious.
- (ii) There was sharing of office space and other facilities including the same IP address (through which tender documents were submitted) by OP-5 and OP-7. It was also found that OP-5 and OP-7 are sister



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concerns and, hence, there was clear possibility of price coordination between the two.

(iii) Similarly, OP-4 and OP-6 were also found to have the same management.

5.9 After examination of various pan-India tenders for the years 2011 to 2014 in the aforesaid manner, the DG found no clear cut price coordination or concerted action amongst Part II vendors *i.e.* OP-1, OP-8 and OP-9. However, the DG concluded that the bids submitted by Part I vendors *i.e.* OP-3, OP-4, OP-5, OP-6 and OP-7 indicated tacit understanding amongst them to quote identical rates and increase/ decrease the rates at the same time, in contravention of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act.

5.10 The Commission notes that, with respect to the observation of the DG regarding collective increase and decrease in bid rates, the OPs have contended that the same occurred due to market conditions. It was argued that since any change in market conditions would be felt equally by all the suppliers, the rates increased or decreased during the period accordingly for all and reading collusion amongst such parties is completely unfounded. Further, in an oligopolistic market, there is a strong likelihood that each player will be aware of the actions of other players and has the right to adapt intelligently to the existing condition and anticipate the conduct of their competitors in the market. Lastly, it was also submitted by the OPs that there is no evidence to prove that there was any form of exchange of information or communication between the OPs.

5.11 In order to explain the increase in bid rates, the OPs have cited various reasons including change in specification of the refrigerant, recoupment of capital invested in research and development, losses incurred in business,



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increase/ fluctuation in exchange rate, hike in price of micro-processors, transportation cost, raw materials costs and other factors. In addition, it is stated that, in and around 2011, OP-3 had set a pattern of quoting rates below cost resulting in the other OPs following the trend and quoting lower rates to win the tenders. However, the same was not found to be sustainable as they started incurring losses. Resultantly, in the subsequent tenders they decided to quote rates that were commercially viable for them. For decrease in the bid rates, some OPs have submitted that it was done to liquidate the raw materials and to keep the labour force gainfully employed.

5.12 The Commission observes that the rates quoted by the OPs in tenders issued by the Informant and other production units or Zonal Railways substantiates the finding of collective increase/ decrease in rates by the OPs in the tenders floated during the years 2011 to 2014 and increase in rates in tenders opened on or after June 2013. This behavior of the OPs may appear to be an outcome of collusion amongst them. However, to establish contravention under the provisions of Section 3(3) of the Act, there has to be some evidence of agreement or arrangement amongst the contravening OPs that unequivocally demonstrates that the conduct exhibited by such parallel movement in pricing was an outcome of collusion. In the absence of such direct evidence, it becomes imperative to know the prices of the products prevailing at the time of the issue of tender and cost implication due to change in refrigerant before a conclusion can be drawn that this behavior was a product of collusion.

5.13 In this backdrop, the Commission notes that one of the reasons given by the OPs for the sudden increase in bid rates for tenders due on or after June 2013 is the change in the specification of the refrigerant from R-22 to R-407C. In this regard, the DG has referred to letter of RDSO dated 15.12.2011, where it stated that there is an expectation that there will be a



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reduction in the price of LHB RMPU with the implementation of the specification. Further, upon the DG asking whether change in refrigerant necessitates change in design of the RMPU unit, Shri R.A. Jamali, Director (PS & EMU), RDSO, in his deposition dated 12.05.2015, *inter alia* stated that after the revision there was a minor change in the equipment of RMPU as three components were changed. These submissions indicate that the cost of RMPUs was expected to decrease after the change in specification.

5.14 However, the DG noted from of the deposition of Shri R.A. Jamali, as well as the responses of RDSO that the railway authorities had not carried out any estimation of cost implication of change in refrigerant or cost analysis in respect of RMPUs. During the investigation it was found that the Informant had written a letter in April 2014 to RDSO requesting that the actual costing of RMPUs may be worked out. On being questioned by the DG whether RDSO had done any cost estimation of RMPU (both conventional and LHB) either with R-22 refrigerant or with R407C refrigerant, Shri R.A Jamali submitted that as per his knowledge, RDSO had not done any cost estimation of RMPU with either refrigerants. He further stated that though a request had been received from the Informant for cost estimation of RMPUs, as per his knowledge, this had not been done by RDSO as on date. In addition, the DG also referred to a letter dated 12.05.2015 submitted by RDSO to it which stated that RDSO did not have the cost break-up of all types of RMPUs to production units and Zonal Railways and that it was a research and technical organization and did not have any such mandate to calculate the cost of any product.

5.15 The DG had sought an estimate of the cost implication of change from all OPs. It is noted from the investigation report that Shri Chandra Prakash Sharma, Managing Director of OP-1, in his statement before the DG, stated that the implication of change in refrigerant from R-22 to R-407C was about 30%. Shri Sandeep Dakshini, retainer with OP-2, in his statement,



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stated that the increase in cost was about 7-8%. Shri Sandeep Goel of OP-3 stated that there was considerable increase on account of change in specification but he was unable to give any exact estimation of the changes in cost on that account; while OP-4's CEO and Director-Marketing, Shri Nagarajan Sridharan stated that the total cost escalation was about 15%. Shri Ronsher Singh Sidhu of OP-5 stated that the approximate increase was 15%, OP-6's increase is about 15%, OP-7's cost increased by about Rs. 1,04,660, OP-8's by approx. 26-30% (without including commissioning and maintenance cost) and for OP-9, the increase was stated to be about 15-20%.

5.16 On the basis of these submissions, DG concluded that change of refrigerant led to a definite increase in cost of RMPU. As neither RDSO nor any other railway has calculated the cost implication due to change of refrigerant, all the OPs have made changes as per RDSO's revised specifications with changed refrigerant, but the scale of cost increase is varied from party to party. Consequently, the OPs increased their tender quotes in subsequent tenders floated by the Indian Railways according to their respective price calculations taking into consideration direct and indirect costs, development costs, design capacity, economies of scale and procurement costs of components from the RDSO approved vendors. However, the Commission is unable to accept this conclusion.

5.17 Without any cost analysis done by the Railways or the Informant, it cannot be blindly accepted that there should have been a reduction in prices due to change in the refrigerant. In fact, RDSO letter dated 15.12.2011 only states that '*it is expected that there will be a reduction in price of LHB RPMU upon implementation of this specification.*' Therefore, there is no assurance of price reduction. Further, in absence of cost analysis, no estimate of the appropriate tender price for various types of RMPUs was prepared.



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- 5.18 While assessing whether rates quoted by the OPs were exorbitant, the DG looked at the cost structure of the OPs and the rates at which orders were placed and noted that in some instances, rates quoted by OPs were excessive in the conventional category in the latter part of 2013 but not so pronounced in the LHB category. However, the Commission affirms DG's observation that in the absence of cost estimation, it is difficult to assess the standard cost of all types of RMPUs. DG acknowledges that standard cost estimation of RMPUs would have helped the procurers as a price yardstick to decide upon the appropriate tender price while awarding a contract. In addition, it is also gathered from the investigation report that RMPU units manufactured as per RDSO specifications is a specialized product procured only by the Indian Railways. Since these units are not supplied to any other party, no price comparison can also be made. Since the cost implications of change in refrigerant and the prices prevailing in the market at the time of issue of tenders are not known, it cannot be concluded with certainty that the price increase after on or after June 2013 was due to prior meeting of minds between the OPs.
- 5.19 Apart from change in specification of refrigerant, the OPs have cited other reasons such as increase in input costs for cost escalation. The DG has stated that these reasons were neither cogent nor convincing; however, there is no analysis presented in the report in this regard. The Commission is unable to further examine the reasons as no evidence to that effect is available on record.
- 5.20 Moreover, the Commission finds that the Informant had placed order for LHB Type I RMPU at Rs. 6,60,000 as far back as 2004. The DG concluded that OP-3 had brought down the rates in November 2011 by slashing its bids only with the intention of cornering railway tenders and thereafter, the Informant referred to that quote for considering subsequent tenders and



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terming the quotes as being exorbitant. The Commission is in agreement with the conclusion drawn by the DG. In the absence of any cost analysis done by the Informant, a bald allegation levelled by the Informant that the minimum L-1 rate of Rs. 7,00,000 quoted by the Part-I vendors for LHB Type I RMPU in the tender opened on 15.10.2013 was exorbitant, does not hold much water.

5.21 In view of the foregoing, the Commission observes that though the Informant has levelled allegation of collusion amongst the OPs, there is not enough evidence to show that the collective increase or decrease in rates by the OPs in the tender floated by the Informant and other production units or Zonal Railways during the years 2011 to 2014 and the increase in rates in tenders opened on or after June 2013 was an outcome of collusion amongst the OPs. The matter is compounded by the fact that neither the Informant *i.e.* RCF Kapurthala nor RDSO nor any other railways authority had estimated the cost of RMPU with refrigerant R-22 or R-407C and no price comparison can be made as the products are specifically manufactured for the Railways. As a result, the Commission cannot deny that there may be other plausible reasons, such as change in refrigerant, devaluation of rupee vis-à-vis US Dollar, higher input costs, etc. which could explain the prices offered by the OPs in different tenders. Having said that, it must be noted that there are factors which are conducive to cartel formation such as high market concentration with few RDSO approved vendors, single buyer - Railways, homogenous product, *etc.* But the Commission is of the view that in the absence of cogent evidence, the collective increase or decrease in rates during the years 2011 to 2014 and the increase in rates in or after June 2013 by itself do not establish a case of contravention of the provisions of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act.



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Issue 2: Whether the instances of identical or similar pricing by OP-3, OP-4, OP-5, OP-6 and OP-7, as observed during investigation, amount to contravention of the provisions of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act?

5.22 The DG, after examining on pan-India basis the rates quoted by the OPs in the tenders for Conventional Type I RMPUs, Conventional Type II RMPUs, LHB Type I RMPUs and LHB Type II RMPUs, observed instances of identical and similar pricing by five OPs in four sets i.e. (i) amongst OP-6 & OP-7, (ii) amongst OP-5 & OP-7, (iii) amongst OP-4 & OP-6 and (iv) amongst OP-3, OP-5 & OP-7 and came to a conclusion of contravention of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act only against these OPs who are Part I vendors. These findings have been brought out in Paragraph 3.24(d), (e), (f) and (g) above.

5.23 The concerned OPs have argued that mere identical pricing is not enough to establish a case of cartel formation and the instances of identical or similar pricing observed by the DG do not show that the rates have been quoted by them in collusion. It is averred that the tenders are filed regularly by the OPs almost on a monthly basis; therefore, it is inevitable that rates of one or two OPs may match on few occasions as the LPRs of previous tenders are easily known to all the bidders. Further, quoting rates based on LPR is a normal and common industry practice. It was also pointed out that on certain occasions, even Indian Railways had itself requested them to maintain the LPR. Therefore, it was not surprising if different suppliers quoted similar rates based on LPR in particular tenders.

5.24 The OPs further argued that the cost structure cannot be considered as a proxy for standard cost of production of a given unit because the cost of



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production in the given market is variable and is dependent on various factors including the number of orders received from the Railways and the number of orders in hand. Therefore, bid price cannot be a function of historical cost structure alone, but in fact has to be anticipated every time a bid is submitted. It is also contended that there are various dynamics at play while bidding for a tender and a rule cannot be laid down that companies only bid in accordance with their cost structures.

5.25 With respect to the instance of collusion between OP- 6 and OP- 7, OP-6 in its response has argued that the reasoning of the DG that OP-6 could have assumed that OP-7 would quote the same rate and that, therefore, it should have quoted a lower rate by one rupee to win the tender, is erroneous as the Indian Railways exercises its monopsony power and brings down the rates by negotiation. As a result, the bidders generally tend to quote higher and it was quite probable for OP-6 to assume at that time that OP-7 would have quoted a higher price than what it had previously quoted and thereby, quote LPR in order to win the tender. OP-7 has also denied any collusion with OP-6 and argued that identical rates with OP-6 was mere coincidence and it had quoted the rate based on LPR. It is also submitted that OP-7 has quoted bids based on LPR on several occasions and not just once.

5.26 As regards the finding that identical and similar pricing by OP-4 and OP-6 was a result of collusion amongst them, the concerned OPs have contended that they had placed their bids independently and did not collude among themselves in any manner. Also, it is submitted that the DG has failed to consider what benefit, if any, would accrue if both colluded with each other considering that there were several other competitors who bid



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for the RMPU tenders of the Indian Railways. Even if they had colluded with each other and increased the bid prices, it would not yield any benefit as the other competitors would quote lower and win all the bids.

5.27 OP-5 and OP-7 have not denied that that they have partners and the directors belonging to the same family. However, it is argued that merely because of this reason, it cannot be assumed there was a meeting of minds between the two OPs. They have stated that their businesses are at arm's length and sharing of basic facilities like reception, internet, common area, conference room, electricity, water, *etc.* does not show any meeting of mind for bid rigging. OP-5 and OP-7 have submitted that all their decisions relating to management and control including pricing decisions are completely separate and independent.

5.28 The Commission notes that the law is well settled that price parallelism *per se* is not sufficient to establish collusion. However, it is also to be kept in mind that in peculiar market conditions such as few enterprises, stringently standardized product, predictable demand, *etc.*, price parallelism coupled with some plus factors may indicate that the conduct of the OPs in quoting identical/ similar price bids was collusive. Therefore, it is important to understand the behavior of the market participants in the context of the market and its conditions before arriving at any finding.

5.29 It is noted that Indian Railways is the only buyer for the RMPUs in India. Indian Railways has stated that RMPU for LHB AC Coaches and Conventional AC Coaches are critical for the production of coaches and, therefore, they are procured only from the suppliers who qualify the criteria laid down by the Railway Board. According to the Railway Board, these items are to be procured only from RDSO approved vendors. Every



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vendor goes through technical scrutiny under RDSO and thereafter, RDSO comes out with a list of approved vendors who are eligible to apply for Railways tenders. This whole process indicates that there is high market concentration with only few players (*i.e* the approved vendors) to supply the subject items to the Railways, which is also the only consumer in the market. Furthermore, since the products to be procured have to be RDSO approved only, it means that the products are homogenous.

5.30 Further, it is observed that since there is only one buyer in the market and limited set of suppliers who have been participating in the tenders floated by the buyer, the buyer has no choice but to procure from those limited suppliers. In this context, the possibility that the buyers collectively agree to sell the product or services at a pre-decided rate rather than competing with each other becomes high. Moreover, in a concentrated industry, it cannot be disregarded that the market players find it easier to maintain agreements amongst themselves and have better incentives to do so rather than deviating from the same. Therefore, keeping in view these market conditions, it is herewith examined whether the conduct of the OPs in quoting identical or similar rates in tenders floated by the Informant and other production units or zonal railways can be considered an outcome of collusion.

5.31 In the instant case, the Commission notes that on the examination of tenders on pan India basis the DG has found identical or similar pricing by five OPs in four sets. Identical pricing by OP-6 & OP-7 and OP-4 & OP-6 has been found in one tender each and by OP-5 & OP-7 and OP-3, OP-5 & OP-7 has been found in two tenders each. In addition, the DG has found several instances of similar pricing amongst OP-4 & OP-6, OP-5 & OP-7



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and OP-3, OP-5 & OP-7. The Commission observes that such conclusion of similar pricing has been arrived at by the DG by referring to certain tenders where the difference between the quotes of these OPs is in the range of Rs. 2500 or less.

5.32 Dealing first with the issue of similar pricing, the Commission notes that there is one tender *i.e.* tender no. 3102120097 dated 25.06.2013 floated by the Informant (which was later dropped), where each of OP-3 to OP-7 have quoted similar rates which fell within a narrow band of Rs. 4,97,080 to Rs. 4,98,900. On careful perusal of the bids in various other tenders examined by the DG, it is observed that, if the rates quoted by the OPs are compared on the parameter used by the DG *i.e.* difference of Rs. 2500 between quotes, then such similar rates have been quoted not only in tenders identified by the DG but in several other tenders also. Further, such similarity in rates is not restricted to the four sets of OPs identified by the DG but also exists amongst other pairs of OPs. Also, there are several instances, where even the OPs, against whom no contravention has been found by the DG *i.e.* OP-1, OP-2, OP-8 and OP-9 have quoted prices in the same range as OP-3 to OP-7. Thus, merely on the basis of similarity of rates, derived from the parameter identified by the DG, no particular price pattern emerges which indicates that OP-3 to OP-7 colluded to the exclusion of other OPs.

5.33 In addition to the issue of quoting prices in close range, the DG has found instances of identical pricing by two or more OPs, amongst OP-3 to OP-7, in certain tenders. However, the DG found no single tender where all the five OPs have quoted identical rates. The DG has referred to strikingly similar rates quoted by all five OPs in tenders for RMPUs opened in 2007 and 2008 to indicate that these parties had formed a cartel prior to May



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2009. But the Commission finds that these instances do not establish continuance of cartel after 20.05.2009. In this case, there is no instance of identical pricing by all the five OPs in any tenders during the period of investigation. In the absence of any such tender, there is no conclusive evidence that establishes an agreement or meeting of minds amongst all five of them together to collude and rig the tenders for RMPUs floated by the Indian Railways in the said period especially given the fact that OPs other than OP-3 to OP-7 have also quoted similar prices in various tenders. However, it must be clarified that Explanation to Section 3(3) of the Act provides that bid rigging even includes an agreement which has the effect of reducing competition for bids or adversely affecting or manipulating the process of bidding. Therefore, the Commission observes that even if a subset of bidders collude amongst themselves, it would be a violation of Section 3(3)(d) of the Act if such conduct *inter alia* reduces competition. Thus, in this context, it becomes important to examine whether OP-6 & OP-7, OP-4 & OP-6, OP-5 & OP-7 and OP-3, OP-5 & OP-7, as a subset of bidders, colluded so as to reduce competition or manipulate the process of bidding in the tenders for RMPUs floated by the Indian Railways.

5.34 With respect to the finding of collusion between OP- 6 and OP- 7, the DG has arrived at the conclusion based on identical prices quoted in one tender opened by the Informant on 30.07.2009. OP-7 stated that it repeated the price it had quoted in the previous tender opened on 05.02.2009 where it won the contract. OP-6 stated that it got the price hint from the LPR. However, the DG observed that since only OP-6 and OP-7 were the Part I vendors, either of them could have quoted a price lower than the one quoted in the previous tender so as to get almost 100% of the contract. The Commission finds that there is one instance of identical pricing. However, no plus factors have been identified to support the finding of collusive behavior. Further, the justification given by this set of OPs have not been



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refuted by the DG. Rather, the DG has only proposed a theory of how OP-6 and OP-7 should have ideally behaved in the tender opened on 30.07.2009 to get almost 100% of the contract; which cannot be considered to be plus factor. Therefore, in the absence of sufficient evidence, the Commission is unable to conclude that OP-6 and OP-7 have contravened the provisions of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act.

5.35 With respect to OP-4 and OP-6, the Commission observes that the DG has found one instance of identical pricing by these two OPs in Tender No. 45115005 opened on 12.05.2011 floated by SER for Conventional Type I RMPU, where both OPs quoted an identical rate of Rs. 4,17,000. The DG has supported this finding of meeting of minds amongst OP-4 and OP-6 on the fact that these are sister concerns headed by the same Chairman and Managing Director and run by the same management, but OP-4 and OP-6 have claimed that the rates quoted by them are independent decisions of the firms. In order to assess the contention of the OPs, the Commission perused the rates quoted by both the OPs in various tenders and observes the following:

- a. in tender no. 11115018 opened on 27.04.2011 floated by SR, (which is the tender prior to tender no 45115005 opened on 12.05.2011 where they quoted identical price), OP-4 had quoted a rate of Rs. 4,18,000 whereas OP-6 had quoted a rate of Rs. 4,55,000. The L1 rate quoted in this tender was Rs. 3,97,400.
- b. In tender no 45115005 floated by SER opened on 12.05.2011, both OP-4 and OP-6 quoted Rs. 4,17,000. OP-6 quoted a rate which was Rs.1000 less than OP-4's rate in the previous tender (tender no. 11115018). Thus, it appears that rather than being guided by LPR, the



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- rates of OP-6 seem to be influenced by those of OP-4, raising suspicions that their pricing decision is not independent.
- c. However, when the rates quoted by these OPs in other tenders are compared, the behavior of OP-4 and OP-6 varied from one tender to the other. While in several tenders OP-4 and OP-6 have quoted similar rates, there were several other tenders where there was no such similarity.
 - d. Further, there is no analysis in the investigation report on the final outcome of the tenders such as the winner amongst the bidders, the quantities awarded, the final price, etc. For example, in Tender No. 45115005 opened on 12.05.2011, OP-4 and OP-6 were not the only Part-I bidders; there were three other Part-I bidders, two of whom had quoted rates below the identical rate quoted by these two OPs. In the absence of any information on the bidders who were finally awarded the tender and the quantities awarded, it is not possible to ascertain the objective or the consequence of the collusive behavior.

As a result, though it appears that there may be meeting of mind between OP-4 & OP-6, in light of the facts and circumstances, due to lack of sufficient data, the Commission is unable to conclude with certainty that these OPs had quoted prices in collusion with each other in contravention of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act.

5.36 With respect to OP-5 and OP-7, the DG found two instances of identical pricing i.e. in tender no. 3102100167 opened on 03.01.2011 (floated by the Informant for LHB type I RMPU) and tender no. 08101459 opened on 21.01.2011 (floated by ICF for Conventional Type I RMPU). In the tender floated by ICF, the difference between the rate quoted by OP-3 and the identical rate quoted by OP-5 and OP-7 was merely 0.92 paise. Based on



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the examination of bids in the aforesaid two tenders and the rates quoted by the three OPs i.e. OP-3, OP-5 and OP-7, in two other tenders i.e. tender no. 3001102001 opened on 18.01.2011 (floated by RCF/ RBL for LHB Type I RMPU) where OP-3 and OP-7 quoted identical prices and tender no. 11100580 opened on 21.01.2011 (floated by SR for Conventional Type I RMPU) where OP-3 and OP-5 quoted identical prices, and considering similarity in their rates in other tenders, the DG found contravention against this set of three OPs. In addition, the DG noted certain circumstances that support the finding of collusion amongst these OPs: the partners of OP-5 and the directors of OP-7 belong to the same family and OP-5 shares certain basic facilities like common areas, security guard, reception, high speed internet, etc. with OP-7. The bids were also uploaded and submitted by OP-5 using the same IP address as OP -7. Further, with respect to the connection of OP-3 with OP-5 & OP-7, the DG observed that the fact that OP-3, OP-5 and OP-7 had quoted almost similar or identical bids, despite widely varying cost-structure and different business establishment was indicative of collusion amongst them.

5.37 At the outset, the Commission finds that the identical/similar pricing along with the relations between OP-5 & OP-7 raise suspicion of collusion. However, out of the eighty-nine (89) all India tenders analysed in the investigation report, the DG has found only four instances of identical/similar pricing. Since the products are homogenous, the plea taken by the OPs that in these limited number of tenders, the similarity was an outcome of coincidence cannot be overruled. Further, the rates quoted by the bidders in previous tenders and the LPR are often known in tenders floated by Indian Railways. Therefore, based on these sporadic instances of identical/similar pricing of homogenous product coupled with the bidders' knowledge of prices quoted in previous tenders, it cannot be said with certainty that similarity in rates despite different business establishments



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shows meeting of minds. In addition, the Commission notes that the DG has come to a conclusion of collusion amongst OP-3, OP-5 and OP-7 because despite varying cost-structure and different business establishments, they quoted almost similar or identical bids. However, the DG points out in the investigation report that OP-3 has not clarified the date/period to which the cost provided by it relates. Further, procurement schedule submitted by OP-3 stretched over 22 months making an unlikely proposition that to manufacture even one unit of RMPU OP-3 would take 22 months. As a result, DG himself concluded that the costing figures furnished by OP-3 were not reliable. Therefore, in light of these inconsistencies, the conclusions drawn by the DG cannot be agreed to for finding contravention against OPs-3, 5 and 7. Lastly, as in the case of OPs-4 & 6, there is no analysis in the investigation report on the final outcome of the tenders. For example, in Tender no. 11100580 opened on 21.01.2011 where OP-3, OP-5 and OP-7 have quoted identical/similar rates, OP-4 had quoted the lowest rate. However, there is no information on the bidders who were finally awarded the tender and the quantities awarded. As a result, neither the intention behind nor the consequence of the collusive behavior can be ascertained. The Commission finds that the DG has only made a mere observation of limited cases of quoting identical/similar prices without carrying out any further analysis on the consequence of such conduct and is, therefore, unable to accept the conclusion of contravention found against OP-3, OP-5 & OP-7.

5.38 Parallel behaviour of competitors can be a result of intelligent market adaptation in an oligopolistic market. It is illegal when such conduct was on the basis of information exchanged between the competitors, the object of which is to influence the market. Price competition in a market encourages an efficient supply of output/services by companies. Any



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company is free to change/revise its prices taking into consideration the foreseeable conduct of its competitors. However, it does not mean that it co-operates with its competitors, in any manner whatsoever, in order to determine a coordinated course of action. Therefore, it becomes important to analyse if collusion is the only plausible explanation to the conduct of the OPs.

5.39 In the instant case, the Commission observes that there is no doubt that identical/ similar rates give rise to a suspicion that the OPs have formed a cartel even though the same may not be conclusive proof of cartel. The suspicion is further strengthened if similar conduct continues on more than one occasion and there is no economic rationale to support such behaviour. One of the reasons cited by some OPs for identical/ similar pricing is that they refer to LPRs since the Informant follows a policy of referring to it while deciding any tender. However, it can be seen that most of the rates quoted were not in proximity of the L1 rates quoted in previous tenders. Further, no consistent pattern emerges to reveal that the identical or similar rates were also a result of quoting prices as per previous L1 rate. The suspicion is buttressed further when considered in conjunction with other evidence showing relationship between certain sets of OPs such as OP-4 & OP-6 and OP-5 & OP-7 who share either the common management or factory, premises, internet, *etc.* Thus, it cannot be said with certainty that these OPs have never discussed the tenders in detail or that no exchange of information took place between them.

5.40 However, arriving at a finding of contravention based merely on suspicion emanating from identical or similar pricing coupled with evidence of possibility of exchange of information is fraught with its own pitfalls. In the instant case, the Commission notes that while there is no direct



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evidence of the anti-competitive agreement or arrangement amongst the four sets of OPs identified by the OPs, there is also hardly any persuasive circumstantial evidence to establish that they even tacitly colluded. Though the DG has found few instances of identical / similar pricing by different sets of these OPs, the investigation report falls short of providing clarity as to how such pricing was an outcome of collusion. The conclusion has been drawn by the DG primarily on the basis that since the OPs have varying cost structure and different business establishments, they could not have quoted identical or similar prices. Further, there is no data on the final outcome of these tenders. Considering that, the identical/ similar pricing did not necessarily result in such OPs emerging as L1 in the concerned tenders, the aim or objective for identical/ similar pricing is also not evident. Hence, no assessment can be done on the benefit accrued to the OPs by such conduct or allocation of market amongst the OPs in terms of geography, product, *etc.*

5.41 It is possible that there was bid rotation amongst the OPs in terms of who emerges as L1 bidder. However, in the instant case, even if the lowest bidder is assumed to be the L1 bidder, no pattern of bid rotation is evident from the pattern of bidding. Further, in absence of data on capacity of the OPs, it cannot be deduced from tender quantity whether there was bid rotation in terms of quantity. Moreover, since some tenders provide for division of quantity when all or most of the approved firms quote equal rates and a cartel is suspected, bid rotation on this basis may not be possible.

5.42 The Commission notes that, with respect to quantity, the DG has observed in the report that Part I vendors had cornered 90 % of the tendered quantity in the financial years 2011-12 to 2013-2014. However, considering that as



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per RDSO policy a minimum of 75% and upto a maximum of 100% of the tendered quantity can be awarded to Part-I vendors, such finding is also inconclusive with respect to cartelisation.

5.43 Another possibility that emanates from identical or similar pricing by the four sets of OPs is that there may be an attempt to reduce competition, with an aim to achieve overall increase in rates of the RMPUs. However, apart from the pattern of bidding there is no other evidence to establish meeting of minds amongst the said OPs to attain this objective. Further, in respect of overall increase in rates, it has already been observed that the pattern of increase/ decrease in rates is exhibited in the market not only by OPs 3- 7 but by all the OPs. Thus, it cannot be said that only OPs 3-7 have colluded to cause increase in rates of RMPUs. Further, as discussed in detail above, it cannot be denied that there may be other plausible reasons such as change in specification of refrigerant, higher input costs, etc. which could explain the prices offered by the bidders in the tenders.

5.44 Thus, based on the foregoing discussion, the Commission observes that the identical and similar pricing by different sets amongst OP-3 to OP-7 observed in some tenders out of the eighty nine (89) tenders floated by the Informant and other production units or Zonal Railways of the Indian Railways during the years 2011 to 2014, the collective increase/ decrease in rates by the said OPs in various tenders and other factors such as the common management of OP-4 and OP-6 and same partners and directors in OP-5 and OP-7 raise suspicion of collusion. However, in the absence of sufficient cogent evidence, it cannot be conclusively said that OP-3, OP-4, OP-5, OP-6 and OP-7 have contravened the provisions of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act to the exclusion of all OPs.



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5.45 In conclusion, the Commission is of the view that no case of contravention of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act is made out in the present case. Accordingly, the matter is closed

5.46 The Secretary is directed to inform the parties accordingly.

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

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

**Sd/-
(Augustine Peter)
Member**

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

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

**New Delhi
Dated: 28/11/2017**