



COMPETITION COMMISSION OF INDIA
Suo Motu Case No. 04 of 2014

In Re: Formation of cartel in the supply of 14.2 kg LPG cylinders fitted with S. C. valves procured by HPCL through e-Tender No.10000040-HD-121001 dated 04.08.2010

Prathima Industries Pvt. Ltd.
'Prathima' 213, Jubilee Hills,
Road No.1, Film Nagar,
Hyderabad-500096

Opposite Party No. 1

Prestige Fabricators Pvt. Ltd.
30, Jaora Compound, M.Y.H. Road,
Indore-452001, Madhya Pradesh

Opposite Party No. 2

Pankaj Gas Cylinders Ltd.
138, U.G.F., World Trade Centre,
(Bhart Hotel) Babar Road,
New Delhi-110001

Opposite Party No. 3

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Present:

*For Prathima Industries Private
Limited (PRATHIMA INDUSTRIES)
and its officers identified by the DG* : None



सत्यमेव जयते



Order

1. The Commission took *suo motu* cognizance of the matter which related to the alleged cartelization by the manufacturers of 14.2 kg LPG cylinders in response to the e-tender No. 10000040-HD-12001 dated 04.08.2010 (“**Impugned Tender**”). The Impugned Tender was floated by Hindustan Petroleum Corporation Limited (“**HPCL**”) for supply of 36 lakh 14.2 kg LPG cylinders for 18 states and involved 64 bidders, out of which 46 bidders qualified as ‘existing vendors’ and 18 bidders qualified as ‘new vendors’ during the technical evaluation process done by HPCL.
2. The Commission *vide* order dated 25.08.2014, noted that the analysis of price bids submitted by vendors, for each of the 18 states in the Impugned Tender, showed similarity of pattern in price bids. Accordingly, the Commission was of the *prima facie* view that such similar price patterns indicated collusion amongst the bidders to directly or indirectly determine the sale price and that the bidders of the Impugned Tender had contravened provisions of Section 3(3)(d) read with Section 3(1) of the Act. The matter was, thus, referred to the Director General (“**DG**”) for investigation.
3. In the meantime, writ petitions were filed before the Hon’ble High Court of Delhi by five LPG cylinder manufacturers, namely, International Cylinders Ltd., Him Cylinders Ltd., BTP Structural India Pvt. Ltd., Mauria Udyog Ltd. and S.M. Cylinders (“**Writ Petitioners**”) challenging the order dated 25.08.2014, passed by the Commission on the ground that they were already investigated for cartelization by the Commission in *Suo Motu* Case No. 03/2011 and punitive measures were ordered against them. It was contended before the Hon’ble Delhi High Court that it was unreasonable on the Commission’s part to once again direct investigation against them on the same set of allegations. The Hon’ble Delhi High Court *vide* its order dated



19.07.2017, set aside the Commission's order dated 25.08.2014, and remanded the case back to the Commission for fresh consideration.

4. The Commission considered the matter afresh and noted that the main contention of the Writ Petitioners was that the Commission had already inquired into their alleged anti-competitive practices during 2009-2011 for the same product (14.2 kg LPG cylinders) and had passed a detailed order under Section 27 of the Act in *Suo Motu* Case No. 03 of 2011. Thus, the Writ Petitioners could not be subjected to yet another investigation with respect to the Impugned Tender. The Commission found merit in the above stated contention of the Writ Petitioners and observed that apart from them, there were other entities also against whom investigation was ordered in the present matter and found it appropriate not to investigate those entities for the same conduct. The Commission observed that since the conduct of Prathima Industries Pvt. Ltd. ("**Prathima Industries**"), Prestige Fabricators Pvt. Ltd. ("**Prestige Fabricators**") and Pankaj Gas Cylinders Ltd. ("**Pankaj Gas Cylinders**") was not investigated by the DG in *Suo Motu* Case No. 3 of 2011, the Commission vide order dated 22.12.2017, directed the DG to investigate the conduct of said Opposite Parties under Section 26(1) of the Act. The DG was also directed to investigate the role (if any) of the persons who were in-charge of and responsible to the companies for the conduct of their business.
5. The DG pursuant to its investigation submitted the Investigation Report to the Commission on 26.04.2019. The major findings recorded in the Investigation Report are summarised as under:
 - a. 14.2 Kg LPG cylinders are used only for domestic consumers. These cylinders cannot be supplied by the manufacturers in the open market. Further, these cylinders are solely procured by the Oil Marketing Companies ("**OMCs**"). The LPG cylinder



manufacturers have to adhere to the regulatory framework related to manufacture of 14.2 Kg LPG cylinders. There is no scope for product differentiation and price differentiation by the sellers. Further, the statutory and licensing requirements do not permit the manufacturers of LPG cylinders to sell their product to any party other than OMCs.

- b. Even after the L-1 price is declared by OMCS, OMCs renegotiate with the LPG cylinder manufacturers to further reduce the quoted L-1 prices during negotiation meetings for rationalisation of prices.
- c. In response to the tender, a total of 46 bidders (excluding the new vendors) had submitted their price bids for supply of LPG cylinders in 18 states. The conduct of Prathima Industries, Prestige Fabricators and Pankaj Gas Cylinders was investigated in terms of order dated 22.12.2017, passed by the Commission. Accordingly, the bid pattern of these OPs was examined in 18 states.
- d. Prathima Industries was found to have participated in the Impugned Tender as an existing vendor and quoted identical prices along with other bidders in the state of Andhra Pradesh, without having a plausible justification for such quotation of prices. Prathima Industries was found to be in contravention of provisions of Section 3(3)(d) read with Section 3(1) of the Act. The investigation also identified certain office bearers of Prathima Industries who were in charge of and responsible for the conduct of the business of Prathima Industries and thus, found them liable under Section 48 of the Act.



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- e. Prestige Fabricators bid in 4 states namely, Madhya Pradesh, Gujarat, Chhattisgarh and Goa. In states of Madhya Pradesh, Gujarat and Goa, PFPL had not quoted identical prices with other bidders. In the state of Chhattisgarh, Prestige Fabricators had quoted identical rate with Omid Engineering. However, this rate was much higher than the L-1 rate and Prestige Fabricators was ranked L-7. Thus, Prestige fabricators did not receive any order for supply of cylinders in Chattisgarh. Further, Prestige Fabricators and Omid Engineering did not have any common agents. Thus, quotation of identical pricing could be said to be a coincidence and not a deliberate act by PFPL.
 - f. Pankaj Gas Cylinders, *vide* its reply dated 27.01.2019 submitted during the course of investigation, that its technical/commercial bid was not accepted by HPCL and, therefore, its price bid was not opened. As Pankaj Gas Cylinders was not a party to the bidding process, it was not investigated any further.
 - g. Other specific findings qua the party(s) are discussed in subsequent paragraphs.
6. The Commission, in its meeting held on 02.07.2019, considered the Investigation Report submitted by the DG and decided to forward copies of the same to Prathima Industries and the persons identified by the DG for the purpose of Section 48 of the Act, for filing their written objections/ suggestions thereto on or before 09.08.2019 and appear for hearing on the Investigation Report on 16.08.2019. Prathima Industries and its officials found liable by the DG under Section 48 were also asked to file copies of their audited financial statements including balance sheets and profit and loss accounts/ Income Tax Returns for the financial years 2015-16, 2016-17 and 2017-18.



7. Prathima Industries submitted its objections to the Investigation Report on 08.08.2019. A summary of objections filed by Prathima Industries is as under:

- a. The Investigation Report submitted by the DG is time barred and it is not possible for parties to recollect and reproduce things which happened about 3186 days back.
- b. Prathima Industries participated in the Impugned Tender as new vendor, however, HPCL is reported to have considered Prathima Industries as an existing vendor. The investigation did not put to Prathima Industries's notice reply of HPCL based on which Prathima Industries was classified as an existing vendor.
- c. HPCL along with BPCL and IOCL have complete control over the demand. The price bid is subject to negotiation with L-1 party and suppliers have no control over the transactions.
- d. Prathima Industries has quoted only for one state, i.e. Andhra Pradesh and their price was not accepted by HPCL and there was no intention to capture the market.
- e. There is neither any appreciable adverse effect on competition nor Prathima Industries can achieve dominant position since the installed capacity is less than 1 % of the total installed capacity and supplies in the market.
- f. Mere identical prices cannot be construed as an evidence of collusion.



- g. Fixation of liability of directors individually under Section 48 of the Act cannot be sustained as the penalty under the Act cannot be two fold, i.e both on directors as well as upon the company. The directors have no nexus with the day to day affairs of the company and there is no question of their involvement in formation of cartel.
- h. Reliance has been placed upon the judgment dated 01.10.201 of the Hon'ble Supreme Court in the case of *Rajasthan Cylinders and Containers Ltd. Versus Union of India & Anr.* with other connected cases (Civil Appeal No. 3546 of 2014) to state the judgment is applicable to the present case as well.
8. The Commission notes that Prathima Industries, in its objections to the Investigation Report, submitted that the written submissions be taken as oral arguments on its behalf as well as on behalf of its officers identified by the DG under Section 48 of the Competition Act, 2002 (Act). Accordingly, none appeared on behalf of Prathima Industries and its officers in the final hearing scheduled on 16.08.2019.
9. The Commission has perused the Investigation Report and objections filed by Prathima Industries on 08.08.2019. On consideration of the aforesaid, the following issues arise for determination in the present matter:

Issue 1: Whether Prathima Industries, while bidding for the Impugned Tender acted in contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Act?

Issue 2: If Prathima Industries is found to have contravened the provisions of Section 3(3)(d) read with Section 3(1) of the Act, then who are the persons in charge thereof and responsible for the conduct of business of Prathima Industries under Section 48 of the Act?



10. Before dealing with the merits of the case, the Commission shall first deal with the preliminary issue raised by Prathima Industries in its objections to the Investigation Report that the Investigation Report prepared by the DG is time barred. In this regard, it is pertinent to note the contents of Regulation 20 of the Competition Commission of India (General) Regulations, 2009 (“**General Regulations**”), which provides as under:

“(2) The Commission shall direct the Director General to submit a report within such time as may be specified by the Commission which ordinarily shall not exceed sixty days from the date of receipt of the directions of the Commission.

(3) The Commission may, on an application made by the Director General, giving sufficient reasons extend the time for submission of the report by such period as it may consider reasonable.”

11. Further, Section 26(3) of the Act states that the DG shall submit a report on his findings within such period as may be specified by the Commission. Thus, in terms of the provisions of the Act, as well as the regulations framed thereunder more particularly under Regulation 20(3) of General Regulations, the Commission is empowered to grant appropriate time to the DG to investigate and submit the Investigation Report and there is no period of limitation prescribed for that purpose. Accordingly, the Commission finds no merit in the argument of Prathima Industries, in this regard.

12. Having dealt with the preliminary issue, the Commission proceeds to deal with the issues framed by the Commission.

Issue 1: Whether Prathima Industries, while bidding for the Impugned Tender acted in contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Act?



13. The Commission notes that Prathima Industries submitted its bid only for the state of Andhra Pradesh. There were 30 bidders who had submitted bid in the state of Andhra Pradesh. Details of the bidders which participated for supply of 14.2 Kg cylinders in the State of Andhra Pradesh are provided in the table below:

Table 1

S. No.	Name of Bidder	Quoted Rate
1.	Sahuwala Cylinders Pvt. Ltd.	1192.30
2.	Sahuwala Cylinders Pvt. Ltd. (Unit-II)	1192.30
3.	Andhra Cylinders	1193.00
4.	GDR Cylinders Pvt. Ltd.	1193.00
5.	Hyderabad Cylinders Pvt. Ltd.	1193.00
6.	Balaji Pressure Vessels Ltd.	1193.00
7.	Kurnool Cylinders Pvt. Ltd. (Unit-II)	1193.00
8.	Prathima Industries Pvt. Ltd.	1193.00
9.	R.M. Cylinders Pvt. Ltd.	1193.00
10.	Shri Shakti Cylinders Pvt. Ltd.	1193.00
11.	Sanghvi Cylinders Pvt. Ltd.	1194.00
12.	Tirupati Cylinders Ltd.	1199.00
13.	Tirupati LPG Industries Ltd.	1199.00
14.	Om Containers	1205.00
15.	Super Industries	1206.00
16.	Tee Kay Metals Pvt. Ltd.	1207.00
17.	Hans Gas Appliances Pvt. Ltd.	1235.00
18.	Krishana Cylinders	1240.00
19.	Bhiwadi Cylinders Pvt. Ltd.	1240.00
20.	Him Cylinders Ltd.	1240.00
21.	Omid Engineering Pvt. Ltd.	1241.00
22.	International Cylinders Pvt. Ltd.	1242.00
23.	Carbac Holdings Ltd.	1247.83
24.	Haldia Precision Engineering Pvt. Ltd.	1247.83
25.	Confidence Petroleum India Ltd. (Halol)	1250.00
26.	Gopal Cylinders	1250.00
27.	Konark Cylinders & Containers Pvt. Ltd.	1250.00
28.	Shri Ram Cylinders	1250.00
29.	S.M. Cylinders	1270.00
30.	Jesmajo Industries Fabrication Karnataka Pvt. Ltd.	1300.00



14. The above table elucidates that two bidders namely, Sahuwala Cylinders Private Limited and Sahuwala Cylinders Private Limited (Unit-II) had quoted identical L-1 rate of Rs. 1192.30. These entities are controlled by the same management. L-2 rate of Rs. 1193 was quoted by 8 different bidders, which is also clear from table above (S.No. 3 to 10). The final negotiated L-1 rate was decided at Rs. 1187.83 for placing order on parties by HPCL. After negotiation with L-1 and L-2 bidders, purchase order for supply of LPG cylinders in the state of Andhra Pradesh was awarded to 10 bidders including Prathima Industries.
15. The Commission notes that Prathima Industries, in its reply dated 12.02.2018, submitted during the course of investigation, that prior to 2002, OMCs used to issue purchase order on registration basis proportionate to the production capacity. From the years 2002 to 2009, Prathima Industries did not receive any order from OMCs. Therefore, in the Impugned Tender, it participated as a new vendor. As a new vendor, it was required to submit technical bid only and was not required to quote any price in its price bid, as per terms and conditions of the Impugned Tender. Based on the negotiated price, Prathima Industries received orders for 50,000 cylinders vide purchase order dated 26.11.2010. It was further stated that since no price bid was submitted by it in the Impugned Tender, cost break up of 14.2 kg LPG cylinder with self-closing valve could not be provided to investigation.
16. Investigation, however, revealed that HPCL *vide* its reply dated 17.02.2014 to the DG, informed the DG that Prathima Industries was classified as an existing vendor and quoted price of Rs. 1193.00 for the state of Andhra Pradesh. Further, HPCL submitted that the aforesaid price of Rs 1193.00 was the L-2 rate for which HPCL issued order for supply of 50,000 cylinder to Prathima Industries at the negotiated rate of Rs. 1187.83.



17. The Commission notes that Prathima Industries, in its subsequent reply dated 20.08.2018, stated that no records of price bid submitted by them in relation to the Impugned Tender were available with them. Further, the information which was submitted to the investigation was based on the tender condition and HPCL's offered price. It was stated that it had a blank copy of the tender document based on which reply dated 12.02.2018 was submitted by it.
18. To unearth whether Prathima Industries was an existing vendor or a new vendor in the Impugned Tender, statement of Mr. B.L.N. Murthy, General Manager of Prathima Industries was recorded before the DG. Mr. Murthy, in his deposition before the DG, stated that Prathima Industries participated in the Impugned Tender as a new vendor and was required to only submit technical bid and financial bid as 'zero' in the online system. However, Mr. Murthy stated that due to some technical glitch the online portal was not taking the value of 'zero' and therefore, Prathima Industries quoted the rate of Rs. 1193.00 in Impugned Tender to complete the bidding process. Mr. Murthy was also questioned about the justification for quotation of price of Rs. 1193 by Prathima Industries as well as such price quoted being identical with that of 8 other bidders. The relevant extract of his statement is extracted herein under:

“Q14 On what basis this price Rs. 1193 was quoted in the said tender dated 04.08.2010?”

Ans We have quoted this rate based upon the plus and minus of the existing selling price on which we were supplying to OMCs at that time.

Q15 It has been observed from the bids submitted by you in HPCL tender No. 10000040-HD-12001 dated 04.08.2010 that for the state of Andhra Pradesh you had quoted rate of Rs. 1193.00 which is identical to rates quoted by M/s R.M. Cylinders, Balaji Pressure Vessel, M/s Kurnool Cylinders, Shri Shakti Cylinders, GDR Cylinders, Andhra Cylinders, and Hyderabad Cylinders. Since in answer to Q14 above, you have stated that price of Rs. 1193 was calculated based on plus and minus of the existing



selling price at that time, can you explain how your price was identical to 7 other bidders?

Ans. I do not have any idea.”

19. Upon perusal of the statement of Mr. Murthy, the investigation found that Mr. Murthy could not explain the reasons for quotation of identical prices with other bidders. The investigation also revealed that Mr. Murthy did not file a complaint before HPCL that they could not input zero as price bid due to technical glitch. Further, investigation brought out that no complaint was filed by any new vendors in the Impugned Tender. The investigation revealed that if Prathima Industries could not input zero value in price bid then it could have quoted any other random price other than Rs. 1193 in order to upload their bid. On the contrary, Prathima Industries quoted price which is identical with other parties, which cannot be a mere coincidence as it is identical with the bid price of the other existing vendors who bid same price in the state of Andhra Pradesh. Based on above Prathima Industries was found by the investigation to be an existing vendor.
20. The investigation found that rest of the bidders, who quoted identical rates in the Impugned Tender as Prathima Industries also could not justify the same, in their replies filed during the course of investigation. The investigation, however, did not examine their conduct since their conduct was already investigated in *Suo-Motu* case No. 3 of 2011.
21. The DG also found that almost every LPG cylinder manufacturer engaged a liaisioning agent at Mumbai to liaise with OMCs, though there was no written agreement between the manufacturer and agent but these agents are authorized by LPG cylinder manufacturers to act on their behalf. Such agents also often acted as common agents to several manufacturers. The investigation revealed that there were 3 common agents for 8 bidders which quoted identical prices for the state of Andhra Pradesh.



22. Investigation also brought out that at the time of floating tenders, HPCL indicated state-wise prevailing price of 14.2 kg LPG Cylinder, which were called NDP/Net Cost to HPCL. This was declared in the tender on the basis of raw material prices for cylinders. Plant/state wise monthly escalation /descalation was provided to the vendor in line with the formula outlined in the tender document. Upon examination of NDP rates, it was found that NDP rates as declared by HPCL did not have any bearing on the bid rates as quoted by bidders. In the state of Andhra Pradesh, NDP rate for the month of June, 2010 was Rs. 1187.83 and for August, 2010, it was Rs. 1177.83. However, identical rate which was quoted by 10 bidders was Rs. 1193, which did not match with the NDP Rate. Thus, the DG found that bidders, who quoted identical bid price for Andhra Pradesh, quoted in consultation with each other and not independently.
23. Prathima Industries, in its objections to the Investigation Report, reiterated its stand taken by it before the investigation, that it was a new vendor and not an existing vendor. It has been submitted that HPCL considered Prathima Industries to be an existing vendor, however, copy of letter of HPCL was not supplied to them. Further, no opportunity of cross-examination was also provided to them.
24. Upon consideration of the findings of the investigation and objections filed by Prathima Industries on the issue of whether Prathima Industries was an existing vendor or new vendor, the Commission notes that HPCL in its letter dated 17.02.2014 given to investigation clearly indicated that Prathima Industries was an existing vendor. The document relied upon by the DG to come to this conclusion forms part of the Investigation Report as Annexure 18, which was duly served upon and it was given an opportunity to controvert the findings of investigation including the HPCL's letter dated 17.02.2014, in its objections. The Commission finds that no such objections have been



made by Prathima Industries to the letter dated 17.0.2018 of HPCL in its objections dated 08.08.2019. The Commission thus observes that there are strong indications which remain unrebutted by Prathima Industries that it participated in the Impugned Tender as an existing vendor and not a new vendor, notwithstanding its claim that it had supplied 29,198 cylinders in the year 2009-10 and therefore could not be classified as an existing vendor.

25. As regards quotation of identical prices by Prathima Industries, the Commission notes that Prathima Industries quoted price bid of Rs. 1193/ in the Impugned Tender which was identical with the bid of Andhra Cylinders, GDR Cylinders Pvt. Ltd., Hyderabad Cylinders Pvt. Ltd., Balaji Pressure Vessels Ltd., Kurnool Cylinders Pvt. Ltd. (Unit-II), R.M. Cylinders Pvt. Ltd. and Shri Shakti Cylinders Pvt. Ltd. On being questioned as to why identical prices were quoted by Prathima Industries, the authorised representative of said company stated that the rate was based upon the existing selling price on which they were supplying to OMCs at that time. The Commission notes that the investigation revealed that the existing rate in the month of June was Rs. 1187.83 and for August, 2010, it was Rs. 1177.83, whereas the rate quoted by Prathima Industries along with other aforementioned bidders was 1193/. Thus, representative of Prathima Industries could not justify before the DG the quotation of identical prices by it in the Impugned Tender along with other bidders. In its objections to the Investigation Report, Prathima Industries has contended that mere quotation of identical prices could not be construed as evidence of collusion. Other factors have to be considered. It has also been contended that final price is decided by HPCL and suppliers/LPG cylinder manufacturers have no say in fixation of prices, notwithstanding the bids submitted by the manufacturers. It has stated that HPCL has admitted in its reply that there is excess capacity created by manufacturers, OMCs are the only customers who purchase LPG cylinders in India and the price is regulated by HPCL through internal estimates and



negotiations. The judgment of the Hon'ble Supreme Court in the case of *Rajasthan Cylinders and Containers Ltd. Versus Union of India & Anr.* with other connected cases (Civil Appeal No. 3546 of 2014) has also been referred to, wherein it has been held that despite presence of identical prices, exchange of information among bidders, pre-bid meetings prior to tender, active association, it was found that there was no evidence of cartelisation in such a case, as the nature of market was an oligopsony.

26. The Commission observes that investigation reveals that prices quoted by Prathima Industries were identical to prices quoted by certain other bidders. As stated above, the rates quoted by the eight bidders including Prathima Industries are not based on the NDP rates. Further, the quotation of identical rates does not appear to be a mere coincidence but raises a strong suspicion of cartelisation between the said bidders. In the present case, the Commission notes that views of HPCL were sought by the DG during the course of investigation. The Commission further notes the submission that for finalising the L-1 rate, HPCL negotiates with the bidders. Thus, notwithstanding the quotation of prices by bidders, it is the procurer i.e. HPCL which decides the price at which the tender has to be awarded in this kind of a market viz. monopsony/oligopsony. This factual position and nature of market according to Prathima Industries has been well recognised in the judgment passed by the Hon'ble Supreme Court in Rajasthan Cylinders case. The Commission in the facts and circumstances decides not to proceed against Prathima Industries in this matter.

Issue 2: If Prathima Industries is found to have contravened the provisions of Section 3(3)(d) read with Section 3(1) of the Act, then who are the persons in charge thereof and responsible for the conduct of business of Prathima Industries under Section 48 of the Act?



सत्यमेव जयते



27. The DG found (a) Ch. Ramu (Director), (b) Mrs. B. Usharani (Director), Mrs. Savitri (Director) and Mr. B.L.N. Murthy, General Manager to be liable under Section 48 (1) of the Act.
28. In view of the discussions in the foregoing paras, as the Commission in the facts and circumstances of the present case has decided not to proceed against Prathima Industries, consequently no question of liability of the officers of the said party arises in the present case.
29. The Secretary is, hereby, directed to inform the parties accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi
Date: 15/11/2019