



COMPETITION COMMISSION OF INDIA

Reference Case No. 02 of 2014

In Re:

**Chief Materials Manager - I,
Office of the Controller of Stores,
North Western Railway,
Headquarter Office, Near Jawahar Circle,
Malviya Nagar, Jaipur**

Informant

And

**M/s Milton Industries Ltd.
Unit - II, Survey No. 235, Village Oran,
Post Vadvasa, Taluka Prantij,
Distt. Sabarkantha, Gujarat**

Opposite Party No. 1

**M/s Premier Polyfilm Ltd.
40/1A, Site IV, Industrial Area, Sahibabad,
Ghaziabad**

Opposite Party No. 2

**M/s Rado Industries Ltd.
Plot No. 101, Sector -25,
Ballabgarh, Faridabad**

Opposite Party No. 3

**M/s Responsive Ind. Ltd.
Betagaon, Mahagaon Road,
Near Gaushala, Boiser (E), Thane**

Opposite Party No. 4



**M/s RMG Polyvinyl India Ltd.
10/1, Industrial Area, Sikandrabad,
Distt. Bulandshahar**

Opposite Party No. 5

CORAM

**Mr. Ashok Chawla
Chairperson**

**Mr. S. L. Bunker
Member**

**Mr. Sudhir Mital
Member**

**Mr. Augustine Peter
Member**

**Mr. U. C. Nahta
Member**

**Mr. M. S. Sahoo
Member**

Present: Shri Rajiv Ranjan Dwivedi, Advocate along with Shri Suresh Chandra,
Dy. Chief Material Manager-IV, NWR-Jaipur for the Informant Shri
Vijai Pal Jain for OP 1

Shri K.K. Sinha and Shri Praveen Kumar for OP 2

Shri P.C. Gupta and Shri Kailash Gupta for OP 3.



Shri M.M. Sharma and Ms. Deepika Rajpal, Advocate along with Shri Abhishek Agarwal for OP 4.

Shri Alok Dhir, Shri Apoorve Kasol and Shri Vaibhav Tyagi, Advocates along with Shri Arvind Goenka and Shri B.B. Suar for OP 5.

Order under section 26(6) of the Competition Act, 2002

1. The information in the instant case has been filed under section 19(1)(b) of the Competition Act, 2002 (hereinafter referred to as the ‘Act’) by Chief Materials Manager - I, North Western Railway, (hereinafter referred to as the ‘Informant’) against M/s Milton Industries Limited (OP 1), M/s Premier Polyfilm Limited (OP 2), M/s Rado Industries Limited (OP 3), M/s Responsive Industries Limited (OP 4) and M/s RMG Polyvinyl India Limited (OP 5) for allegedly creating a cartel amongst themselves so that only OP 4 participates in the tender process for supply of Fire Retardant Vinyl upholstery fabric leather conforming to Research Designs & Standards Organisation (RDSO) Spec. no. RDSO/2008/CG-07 (“FRF CG-07”), for use in non AC coaches of width size 127 to 132 cms to the Indian Railways. The FRF CG-07 is an important product for passenger amenity with fire safety implications and does not burn easily during fire in Rail coaches.
2. It is submitted that the Informant invited tender bearing no. 70.13.1635-A, opened on 17.07.2013 for supply of Fire Retardant Fabric from Research Designs & Standards Organization (RDSO) approved firms. It is stated that out of the 5 RDSO approved firms, 4 quoted for the tender. OP 4 quoted an all inclusive price of Rs.101.98 per meter, for Bikaner, Jodhpur and Ajmer. The Informant has alleged that the rates quoted by OPs were found to be on the higher side as compared to the rates quoted by them in other railway zones, e.g. OP 4 had quoted a rate of Rs.96.96 per meter in South Eastern Railway (SER) and Rs.94.90 per meter in South Central Railway (SCR). Since OP 4 had quoted lower rates for



other railway zones, it was called for negotiation but it reduced the rate marginally from Rs.101.98 to Rs.101 per meter.

3. The re-tender of tender bearing no.70.13.1635-A was invited with retender No. 70.13.1635-C, opened on 29.11.2013. The rate quoted by OP 4 was all inclusive price of Rs.145 per meter. Since no other supplier participated in the said tender, it was retendered. Retender no.70.13.1635-D was opened on 07.01.2014. Again, only OP 4 participated by quoting all inclusive rate of Rs.141 per meter.
4. The Informant has also cited about ten instances wherein only OP 4 responded to the tenders for supply of Fire Retardant Fabric and none of the other suppliers participated in the process.
5. As per the Informant, OP 4 alongwith all the other OPs seem to have entered into an understanding by creating a cartel so that only OP 4 can secure the tender at the prices quoted by it.
6. The Informant has also highlighted that there is an odd trend in the way in which OP 4 has been quoting uniform freight charges of Rs.10 per meter for each Railway, which cannot be explained in light of differences in distances involved between various consignees of Indian Railways. The Informant has emphasized that rates quoted by OP 4 are not competitive in nature and are exorbitant.
7. The Commission formed a prima facie opinion that there appeared to be a violation of the provisions of section 3 of the Act and directed the Director General (DG) under section 26(1) of the Act to cause an investigation to be made into the matter as well as investigate the role of persons who were in charge of and responsible for the conduct of OPs.



Investigation by the DG

8. The DG in its report had noted that with regard to the allegations of excessive pricing by OPs for supply of FRF CG-07, the reference of indicative costing figure by Railway Board was taken into account as per the Railway Board letter dated 14.2.2007. According to the said letter, the indicated price of FRF CG-16 as on 2007-08 was Rs.225 per meter. Since FRF CG-07 is an improved version of FRF CG-16, the indicated price of FRF CG-07 is estimated to be at least around Rs.200 per linear meter, while the bids submitted by the OPs in various tenders floated by North Western Railway (NWR) were much lower than the above indicated price. Also the rate at which NWR procured FRF CG-07 during the previous years was generally on a higher side or at the same level as the rate quoted in the tender bearing no. 70.13.1635-A, that was opened on 17.07.2013.
9. In this regard, the DG has cited tender no. 70.13.1635 which was opened on 01.08.2012 where OP 1 quoted a rate of Rs.114.99 per linear meter and was awarded the tender. Similarly, with regard to tender no. 70.13.1665 which was opened on 15.05.2013, OP 4 quoted a rate of Rs.101 per linear meter and was awarded the tender. As against this in tender No. 70.13.1635-A, opened on 17.07.2013, OP 4 quoted an all inclusive rate of Rs.101.98 per linear meter which is much lower than the previous quoted price in NWR tenders. Therefore, the DG opined that the contention of the Informant that prices quoted by OPs were excessive was not based on very sound footing. The DG also observed that the product in question had been procured by various zones of Railway in the range of Rs.94.20 to Rs.164.87 per linear meter.
10. The DG had stated that OPs were found to have supplied the product below their variable cost/ marginal cost. During the investigation, all the OPs had stated that though their supply of FRF CG-07 to various Railway zones forms a minuscule part of their turnover (between 0.05% to 5%), they do so only to maintain their RDSO approval status as it is a source of credibility for their other business



segments. Further it was stated by them that non-supply of CG-07 for one year to Railway would get them delisted from RDSO approval.

11. DG has submitted that OP 4, on being asked about the reasons behind quoting different rates in different regions, had stated that it follows an aggressive approach of “best response to best anticipated response” to outbid its competitors and that in some other zones it had even quoted rates higher than Rs.101.98 per linear meter (rate quoted in NWR tender) and had received the contract being L-1 and therefore, adverse inference should not be drawn for quoting a lower figure in different zones of Railway.
12. DG has further submitted that OPs, except OP 4, when asked about the reasons for not quoting in subsequent NWR retenders, stated that they have already quoted a below cost figure even then they were not able to secure the contract, thus there was no further point in quoting bid figure below that price. On the issue of further hike in subsequent rates by OP 4, the DG found that as per the submission of OP 4 there was devaluation of Rupee and hike in petroleum product prices owing to which the manufacturing cost increased thereby resulting in higher prices of FRF CG-07. Although the hike in price quoted by OP 4 is quite steep (more than 40%), the resultant price was below its total cost of production. The DG has also found that other Railway zones and independent purchasers have procured FRF CG-07 at higher prices.
13. With respect to Informant’s allegation regarding OP 4 quoting a uniform freight rate irrespective of the distance being irrational and anti-competitive, the DG has submitted that the allegation was baseless, since OP 1 charged Rs.10 as freight rate in a tender awarded to it for Rs.154 per linear meter in 06.05.2014 and OP 4 charged Rs.5 in a tender awarded to it for Rs.101 per linear meter in July, 2013 but charged Rs.10 for total rate of Rs.145 per linear meter in September, 2013. The DG has also reported that quoting of uniform freight rate is not an anti-competitive practice. In fact, it helps the vendors in maintaining MIS and financial reporting.



14. The DG's findings that there was no collusion amongst the OPs was on the basis that OPs were fairly independent and even had their offices, factories and business establishments at different locations. It is submitted that OP 2 and OP 5 were only related parties whose directors were from the same family. They also had a number of transactions amongst themselves but were found to be separate establishments, managed by different management and no price coordination or market sharing between them was observed to establish any anti-competitive practice. The DG has also found that apart from the aforementioned two OPs, no transaction or payment was made by the rest of the OPs or their group concerns with the competing companies.
15. The DG, in its investigation, also examined the electronic bids submitted by OPs and found that the IP addresses of the devices and the digital signatures of the uploaders were completely distinct and different and therefore, no proof of any concerted action could be inferred.
16. The DG has found the conduct of the Informant as arbitrary and inconsistent. In support of this, the DG has noted that the Informant had compared the bid figure of Rs.101.98 per linear meter quoted by OP 4 in a tender which was opened on 17.07.2013 with the bid figure of Rs.96.96 per linear meter quoted by OP 4 in SER (tender opened on 06.08.2013) and Rs.94.9 per linear meter in SCR (tender opened on 27.08.2013), which happened much later than the tender opening date of 17.07.2013. According to the DG, the Informant has been silent on previous tenders awarded by them at comparatively higher rates like the tender No. 70.13.1635 opened on 01.08.2012 granted to OP 1 at the rate of Rs.114.99 per meter and tender No. 70.13.1665 opened on 15.05.2013 granted to OP 4 at Rs.101 per meter. In the light of these tenders, the contention of the Informant that the price quotation of Rs.101 per linear meter by OP 4 in tender No. 70.13.1635-A that was opened on 17.07.2013 is on higher side, is completely arbitrary and devoid of any logic. In the opinion of the DG, instead of keeping the tender open and seeking price discovery through another tender, the Informant cancelled the above tender and went for fresh tendering and ultimately had to go for a



contingency purchase by making a counter offer of Rs.154 per linear meter to OP 1 for Jodhpur and Ajmer consignees which was Rs.53 per linear meter more than the price originally offered by OP 4.

17. The DG has concluded that the allegations of the Informant that there is a cartel amongst OPs who were supplying FRF CG-07 at an excessive price is not substantiated by any cogent material. In fact, OP 2 has complained to RDSO that the price quoted by OP 4 is below running cost of the production which is not at all sustainable. The above objections of OP 2 have also been recorded in the minutes of the meeting with OPs and RDSO held on 10.12.2013. Therefore, the DG has concluded that no cartel or cartel like behavior amongst OPs could be inferred.

Consideration of the DG report by the Commission

18. The Commission, in its ordinary meeting held on 08.04.2015, considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their replies/ objections thereto. The Commission also directed the OPs to submit their audited balance sheet and profit and loss account/ turnover for the last three financial years. All the parties were heard by the Commission on 28.05.2015.

Replies/ Objections/ Submissions of the Parties

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

Replies/ Objections/ Submissions of Informant:

20. The Objections to the DG's Report were filed by the Informant on 08.05.2015. As opposed to the findings of the DG, the Informant has submitted that there exists cartelization amongst RDSO approved suppliers as well as abuse of dominant



position by OP 4. The Informant has also refuted the findings of the DG that as per Railway Board letter dated 14.02.2007, FRF CG-07 was an improved version of FRF CG-16 and therefore the price of FRF CG-07 should have been at least Rs.200 per linear meter. It is submitted that the letter dated 14.02.2007 was issued by RDSO at the time of introduction of the upgraded material and hence the rates quoted by the OPs could not be compared with the price as published by the Railway Board in 2007. Further it has been submitted that with increase in competition, prices have stabilized around Rs.100 per linear meter as is apparent from the purchases made from 2010 to 2012.

21. As regards to the findings of the DG that all OPs/ suppliers have been supplying FRF CG-07 to Indian Railway at below the total cost, it has been submitted by the Informant that the DG report has failed to state as to whether all RDSO approved sources were exporting these items also below their total cost or not. The firms were supplying fabric to Indian Railway since 2010 for approx. Rs.100 per linear meter. It is further submitted that the DG has not examined the extent of differences in rates between export product and railway product so as to be definite that OPs could cover losses.
22. It has been contended that the DG has failed to consider the fact that all the OPs have chosen to increase the rate and have increased the rates simultaneously. Such practices could have been resorted only when the suppliers act in collusion. The DG is alleged to have wrongly accepted the contention of OP 4 that it quoted lower rates to secure the order from the Indian Railway. The Informant has also submitted that OP 4 had quoted lower rates between March 2013 and September 2013 as compared to the rates quoted by it for NWR during the same period. It is averred that the acceptance of this contention of OP 4 that it quoted lower prices in order to outbid its competitors, points that the supplier firm is abusing its dominant position.
23. Further, with regard to the allegation of the actions taken by the Informant being arbitrary and suggestive of favoritism, the Informant has submitted that the



decision of purchase in Railway being a collective decision was based on the suitable recommendations given by the Tender Committee. Hence, as per the submission of the Informant such allegations are incorrect and in bad taste. Further, the Informant has submitted that in the investigation report of the DG, it has been mentioned that the tender no. 70.13.1635 was opened on 29.11.2013 but was not decided since only one offer was received which was found to be exorbitant. With regard to tender No. 70.13.1635-D (opened on 07.01.2014), the Informant has submitted that it was not decided because of high rates obtained as well as a slight change in the specification of the item being procured. Due to the revised description in the tender notice, firms quoted lower rates as the specifications were relaxed in terms of inspection parameter. As such, it was decided to retender the case with revised description. The Informant has submitted that the OPs colluded amongst themselves and as such quoted higher rates in the retender. As by this time, the stock had almost exhausted, Railway decided to purchase 3 months quantity with remarks that this purchase rate should not be treated as representative rate in future tenders. Therefore, the conclusion of the DG regarding arbitrary behavior by the Informant is incorrect.

24. Lastly, the Informant has submitted that due to repeated increase in quoted rate, without justified cost break-up, it decided to report the matter before the Commission.

Replies/ Objections/ Submissions of OP 1

25. OP 1 has agreed with the findings of the DG to the extent that the conduct of the Informant shows complete arbitrariness and favoritism in selecting the vendor for supply of FRF CG-07. OP 1 has highlighted that the rates quoted by it in the tender no. 70.13.1635-E were quite competitive and that it had secured the tender because of the lowest rate quoted by it. It has submitted that its conduct was *bonafide* and fair. OP 1 has also highlighted that with regard to other tenders in 2014, it had quoted different rates in other railway zones.



Replies/ Objections/ Submissions of OP 2

26. OP 2 is in agreement with the findings of the DG that there is no cartel or cartel like behavior amongst the vendors. Further, OP 2 has reiterated the submissions made before the DG regarding the unsustainable low price quoted by OP 4 for supply of FRF CG-07 and chose not to submit any further objections/submissions.

Replies/ Objections/ Submissions of OP 3

27. OP 3 has reiterated its submissions made before the DG and has chosen not to submit any further objections/ submissions.

Replies/ Objections/ Submissions of OP 4

28. OP 4, by its submissions dated 11.05.2015, has agreed with the findings of the DG that there is no cartel or cartel like behavior amongst the vendors. OP 4 has also filed additional submissions on 26.05.2015 with regard to the objections filed by the Informant to the DG report. OP 4 has submitted that the objections filed by the Informant are full of contradictions and are intended to justify the improper conduct/ practices adopted by it. The contention of the Informant that market price of FRF CG-07 has stabilized around Rs.100 per linear meter has been denied by OP 4. It has submitted that the same material was supplied to other railway zones at comparatively higher rates during the same period. Further, OP 4 has submitted that the rate of Rs.225 per linear meter mentioned in Railway Board letter dated 14.02.2007 was not an indicator of market rate but only an approximate rate. The presumption of collusion merely because of simultaneous increase and decrease in rates is also baseless since CG-07 is a petroleum based product and that its price is affected by change in prices of its main components. The Informant has been alleged to have made statements wrongly without realizing the market dynamics and the fluctuations which highlight competition in



markets. The fact that OP 4 has been the lowest bidder in most of the tenders does not lead to an inference of abuse of its dominant position.

Replies/ Objections/ Submissions of OP 5

29. OP 5 has submitted that OP 4 has been engaged in predatory pricing by quoting rates below cost for supplying FRF CG-07 in order to oust its competitors and it has also raised these concerns with RDSO requesting it to take remedial steps. As a result of such practices adopted by OP 4, OP 5 had decided not to participate in the tender, so as to save its tender fees and efforts. It is submitted that as a result of such practices adopted by OP 4, more than 95% of the tenders floated by the Informant were awarded to OP 4.

Analysis

30. On a careful perusal of the information, report of the DG and the replies/ objections/ submissions filed by the parties, in the present case, the issue as to whether the provisions of section 3 of the Act have been contravened or not, arises for consideration and determination.
31. It is noted that while passing the directions under section 26(1) of the Act, the Commission, as highlighted above, specifically recorded its opinion that the conduct of OPs was indicative of existence of a *prima facie* contravention of the provisions of section 3(3) of the Act and directed the DG to cause an investigation to be made into the matter. However, as per the provisions contained in section 3(3) of the Act, any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation



of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition (AAEC).

32. It has been observed that since the prohibition on participating in anti-competitive agreements and the penalties imposed are well known, it is often common practice for such activities and agreements to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be kept to a minimum by the parties. In the event of discovery by the competition agency of any evidence explicitly showing unlawful conduct between traders, such as the communication/ information exchanged, it is normally only fragmentary and sparse, so it is often necessary to reconstruct certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an agreement.
33. It has been noted that for establishing any contravention of section 3(3) of the Act, some evidence of agreement between the OPs which determines prices, limits and controls provision of services etc. has to be shown.
34. In the present matter, though the Informant has very strenuously highlighted the conduct of the OPs to be in contravention of provisions of section 3(3) of the Act, no cogent evidence has been made available which can establish the contravention of section 3(1) read with section 3(3) of the Act. Accordingly, the DG has reported that no evidence of any cartel or cartel like behaviour as stated under section 3(3) of the Act was detected during the investigation process. The Commission observes that the allegations leveled by the Informant have not been found substantiated by the DG.



35. With regard to the allegations of any *quid pro quo* for the alleged cartel amongst OPs, the Commission notes that OPs, who are based in different locations in India for their business for supply of FRF CG-07 to Indian Railway, were selected through a rigorous process. The Commission, further, notes from the DG report that they are independent and have no relation with each other except OP 5 and OP 2 who are members of the same family but their companies are run by different managements and are established at different locations. The Commission, further, observes that no price coordination or market sharing amongst the OPs could be established as no evidence of any inter-related transaction or payments were found amongst them.
36. It is noted that the examination of electronic bids submitted by OPs reveals that the bids have originated from different IP addresses with distinctively different digital signatures for each OP. This also supports the view that there was no concerted action or coordinated behaviour by OPs in the instant case for supply of FRF CG-07 to the Informant.
37. With regard to the allegations as regards higher and exorbitant price being quoted by OPs for supply of FRF CG-07, the Commission notes that all OPs were supplying FRF CG-07 below their total cost (barely managing to cover their average variable cost/ marginal cost) so as to retain their RDSO certification which renders them more competitive for business purposes like exports. Further, certain external events like increase in the price of petroleum products (which are used as the main input for manufacture of FRF CG-07) and devaluation of the domestic currency 'Rupee' have also contributed towards increase in the price submitted for the bid by OPs. Therefore, the Commission is of the view that the allegation of higher and exorbitant price quoted by OPs for supply of FRF CG-07 is not tenable.
38. The Commission observes that the decision of OP 4 to quote lower price for the supply of FRF CG-07 is based on its business decisions to compete with its competitors. Given such business rationale any adverse inference from quoting



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low prices by OP 4 for the supply of FRF CG-07 in other railway zones cannot be plausibly drawn. Moreover, the DG has also found the conduct of the Informant as inconsistent and arbitrary.

39. In light of the above analysis, the Commission finds that based on the evidence and material available on record no contravention of the provisions of section 3(1) read with 3(3) of the Act by OPs is established in the instant matter. Accordingly, the matter is closed under the provisions of section 26(6) of the Act.
40. The Secretary is directed to inform the parties accordingly.

Sd/-

(Ashok Chawla)
Chairperson

Sd/-

(S. L. Bunker)
Member

Sd/-

(Sudhir Mital)
Member

Sd/-

(Augustine Peter)
Member

Sd/-

(U. C. Nahta)
Member

Sd/-

(M. S. Sahoo)
Member

New Delhi

Date: 01.07.2015

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