



COMPETITION COMMISSION OF INDIA

Case No. 12 of 2017

In Re:

Nagrik Chetna Manch,
A 102, Neel Sadan,
1426, Sadashiv Peth, Pune - 411030, Maharashtra.

Informant

And:

SAAR IT Resources Private Limited
16th Floor, DLH Park, near MTNL Staff Quarters,
SV Road, Goregaon (West), Mumbai 400062,
Maharashtra.

Opposite Party No. 1

CADD Systems and Services Private Limited
104-105, Girnar Tower, 2/5, New Palasia,
Indore 452001, Madhya Pradesh.

Opposite Party No. 2

Pentacle Consultants (I) Private Limited
B/406, Pranik Chamber, Saki Vihar Road
Saki Naka, Andheri (East)
Mumbai-400072, Maharashtra.

Opposite Party No. 3

Pune Municipal Corporation
PMC Main Building, Shivaji Nagar,
Pune – 411005, Maharashtra.

Opposite Party No. 4

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Mr. U. C. Nahta
Member

Ms. Sangeeta Verma
Member



Appearances:

For Informant: Maj. Gen. S. C. N. Jatar

For OP-1: Mr. Vaibhav Gaggar, Ms. Neha Mishra, Ms. Niti Richhariya, Advocates, Mr. Ajay Rao, Director.

For OP-2: Mr. Pankaj Bobra, Managing Director

For OP-3: Mr. Chetan Pathare, Director

For OP-4: None

Order under Section 27 of the Competition Act, 2002

Introduction:

1. The present Information has been filed by Nagrik Chetna Manch (**‘Informant’**), through its President *viz.* Maj. Gen. S. C. N. Jatar (Retd.), under Section 19(1)(a) of the Competition Act, 2002 (**‘Act’**) against SAAR IT Resources Private Limited (**‘OP-1’**), CADD Systems and Services Private Limited (**‘OP-2’**), Pentacle Consultants (I) Private Limited (**‘OP-3’**) and Pune Municipal Corporation (**‘OP-4’/ ‘PMC’**), alleging contravention of the provisions of Section 3 of the Competition Act, 2002 (**‘Act’**). Hereinafter, OP-1, OP-2, OP-3 and OP-4 are collectively referred to as the ‘OPs’.

Profile of the parties:

2. The Informant is stated to be a public charitable trust constituted under the provisions of the Bombay Public Trusts Act, 1960 and is a society registered under the provisions of the Societies Registration Act, 1860. The Informant has, as its members, senior company executives, professionals, social workers, retired defence officers and civil servants *etc.*, who do not have any political affiliation. It is stated to be a socially spirited organization working for public causes.



3. OP-1 is stated to be engaged in providing information technology services like design and development, consultancy, implementation, software marketing and customer care/BPO services. OP-2 is stated to be engaged in the business of software, computers, and parts thereof. OP-3 is stated to be engaged in providing management, business consultant services, consulting engineer services and real-estate agent services. OP-4 is the civic body that is in charge of the civic and infrastructure needs of the residents of metropolis of Pune.

Brief facts and allegations:

4. Pursuant to the judgment dated 20.09.2013, of the Hon'ble High Court of Bombay, in PIL No.93/2009, directions were issued to OP-4 to conduct tree census in accordance with provisions of the Maharashtra (Urban Areas) Protection and Preservation of Trees Act, 1975. Accordingly, OP-4 floated Tender No. 2 and 3 of 2015 (First and Second Tender) on 12.08.2015, for selection of agency for carrying out geo-enabled tree census using Geographical Information System ('GIS') & Global Positioning System ('GPS') Technology, development of tree census application, to operate and manage the census data under the provisions of Maharashtra (Urban Areas) Protection and Preservation of Trees Act, 1975, within the jurisdiction area of OP-4. The Tender No. 2 of 2015 was for zones 1 and 2 of OP-4 while Tender No. 3 of 2015 was for zones 3 and 4. These tenders were cancelled as no bids were received even after grant of three extensions by OP-4. Thereafter, a third tender, being Tender No. 250 of 2015, was floated by OP-4 on 14.10.2015, for procuring the same service. As only one bid was received in response to such tender, the aforesaid tender was also scrapped and Fourth tender being Tender No. 338 of 2015 ('Impugned Tender') was floated on 11.01.2016. As summarised by the Informant, tender details and extension dates of bids floated for tree census are as follows:

Table 1: Tender Details and Extension Dates

Tender No.	Date of Advertisement	Purchase Period for Tender Document	Acceptance Period
2 & 3- 2015	12.08.2015	13.08.2015- 25.08.2015	14.08.2015– 26.08.2015
1 st Extension	26.08.2015	14.09.2015	15.09.2015



2 nd Extension	18.09.2015	19.09.2015- 24.09.2015	19.09.2015- 24.09.2015
3 rd Extension	28.09.2015	29.09.2015- 09.10.2015	29.09.2015- 09.10.2015
250-2015	14.10.2015	15.10.2015- 03.11.2015	16.10.2015- 04.11.2015
338/2015	08.01.2016	11.01.2016- 29.01.2016	12.01.2016- 30.01.2016

5. The Informant submitted that upon scrutinising the information pertaining to the above tenders, it discovered that OP-1 was the pre-determined winner in Tender No. 338 of 2015 and OP-2 and OP-3 were merely acting as proxy bidders. The Informant alleged that the OPs colluded with each other and committed various irregularities in the aforesaid tenders with a view to pre-determine the outcome.
6. The Informant alleged that the collusive bidding took place in three steps. *First*, the OP-4 gauged the capabilities of the potential bidders through a pre-bid meeting for Tender No. 2 and 3 of 2015. This meeting was held on 21.08.2015, and OP-2 and OP-3 did not participate in the pre-bid meeting. The minutes of the pre-bid meeting were also not shared amongst the attendees of the meeting. However, OP-4 accepted four suggestions for modification out of which three were from OP-1. One of the suggestions of OP-1 was to float only one tender for the entire area under OP-4 rather than zone wise. After accepting the said suggestions, Tender No. 2 and 3 was scrapped. Thereafter, Tender No. 250 of 2015 was floated by OP-4 with revised eligibility conditions. This time, the tender was for all the four zones of OP-4. The Informant alleged that the change in scope and terms of the tender was aimed to reduce competition from smaller players who were gauged in the pre-tender meeting held on 21.08.2015. The new tender viz. Tender No. 250 of 2015 included various additional conditions/ revisions that were not discussed during the pre-bid meeting. OP-4 had to cancel Tender No. 250 of 2015 also as the same did not evoke adequate response. It is relevant to note that OP-1, OP-2 and OP-3 did not participate in the above tender.
7. *Second*, the eligibility conditions were further revised in fourth tender floated by OP-4 being Tender No. 338 of 2015 floated on 11.01.2016, to eliminate competition and narrow down the number of bidders thus, leaving only one as the pre-determined



winner and two proxy bidders in the field. As submitted by the Informant, major changes in the fourth tender from the earlier tenders were as under:

- i. The bidder must have an average annual turnover of more than Rs. 20 million for the past three financial years, though the requirement in Tender No. 250 of 2015 was an average annual turnover of more than Rs. 10 million for the past three financial years. In earlier Tenders No. 2 and 3 of 2015 also, the requirement was an average annual turnover of more than Rs. 10 million for the past three financial years ending in March, from tree census related activities. Informant alleged that aforesaid changes were brought deliberately in tender requirement to eliminate smaller units; and
 - ii. Apart from the requirement of taxonomists/ botanists/ horticulturalists, the bidder ought to have 100 permanent employees on its payroll for the last six months. This requirement was not there in the earlier three tenders. The Informant alleged that OP-1 was the only firm having 100 employees as it ran a business process outsourcing unit. The Informant also alleged that this criteria of 100 employees was not rational as there was no requirement that the employees ought to possess any expertise in carrying out tree census.
8. *Lastly*, the Informant alleged that OP-4 ignored the shortfalls in technical bids submitted by OP-2 and OP-3, as they did not give details of similar work undertaken by them although the same was required to be given as per the bid format. Further, as per the tender conditions, the bidders should have had necessary software before bidding and should demonstrate the same at the technical bid stage. However, OP-4 allegedly exempted the requirement for demonstration by OP-2 and OP-3. By ignoring the shortfalls of OP-2 and OP-3, OP-4 ensured that there would be a minimum of three technically qualified bidders as mandated by the tender conditions.
9. The Informant further submitted that OP-1 won Tender No. 338 of 2015, with price quote of Rs. 22.70/- per tree, which was much higher than the estimated rates.



10. In view of the above submissions, the Informant alleged that the conduct of the OPs amounted to collusive bidding, which was in contravention of Section 3(3) of the Act. Further, the Informant *inter alia* requested for an order from the Commission for enquiry by the Director General ('DG') into the tender process of Tender Nos. 2&3 of 2015, 250 of 2015 and 338 of 2015. The Informant also requested the Commission to direct the OPs to discontinue and not to re-enter into such agreement, imposition of penalty against the OPs and to refer the matter to Anti-Corruption Bureau, Maharashtra and CBI *etc.*

Prima-facie consideration by the Commission and directions to the DG:

11. Upon considering the facts and allegations therein, and after hearing the Informant, the Commission passed an order dated 03.10.2017, under Section 26(1) of the Act ('*prima facie* order'), wherein it was observed that,

“OP-2 and OP-3 had neither taken any interest nor any effort to participate in the first three tenders floated by OP-4. It is further noted that the said Opposite Parties allegedly did not have prior experience in tree census related activities and thus, evaded from filling the section of the bid document requiring details of earlier tree census related works undertaken. This seen in conjunction with the alleged revision of the tender conditions to suit OP-1, suggest that OP-1, OP-2 and OP-3 had entered into an anti-competitive agreement resulting in OP-1 being the pre-determined winner in Tender No. 338 of 2016 and the other bidders being mere proxies. The Commission is prima-facie convinced that such agreement is in contravention of Section 3(3)(d) read with Section 3(1) of the Act”.

Accordingly, the Commission directed the DG to cause an investigation into the matter. After a detailed investigation the DG submitted its Investigation Report to the Commission on 20.09.2018.



Investigation by the DG:

12. Based on the *prima facie* order dated 03.10.2017, passed by Commission, the following issues were investigated by the DG:
- i) Whether there has been bid rigging by some or all OPs (OP-1, OP-2 and OP-3) in the tenders floated by OP-4 for tree census and therefore, contravention of Section 3(3)(d) read with Section 3(1) of the Act, as alleged by Informant in any of the four tenders is established.
 - ii) If it is established that one or more OPs have violated the provisions of the Act, who are the persons in charge of the affairs or responsible for functioning of the enterprise, in terms of Section 48 of the Act.
13. For the purpose of investigation, the DG relied on information and evidences collected from the Informant, OPs, other municipal bodies and competitors of OP-1. The DG also relied on bid documents and detailed information from OP-4 in respect of impugned tenders, call detail records from Telecom Service Providers ('TSPs'), Internet Protocol ('IP') addresses of computers from where bid documents were submitted, emails and statements of key officials of OPs and third parties, and WhatsApp communications between key persons of OPs and other persons.
14. It has been confirmed by the DG that, OP-4 floated four online tenders viz. Tender No. 2 & 3 of 2015, Tender No. 250 of 2015 and Tender No. 338 of 2015, for selection of an agency to undertake geo-enabled tree census using GIS & GPS technology. Tender No. 2 of 2015 was for Zones 1 and 2 and Tender No. 3 of 2015 was for Zones 3 and 4 of OP-4. These two tenders were cancelled on 12.10.2015, and the next being Tender No. 250 of 2015 was floated on 14.10.2015 for the entire area of OP-4. However, this tender was also cancelled on 06.01.2016, and another Tender No. 338 of 2015 was floated on 11.01.2016, for tree census for the entire area of OP-4.
15. The DG found that Tender No. 2 & 3 of 2015 were cancelled, even though three extensions were given as there were no bidders. Pursuant to cancellation of Tender



No. 2 & 3 of 2015, new Tender No. 250 of 2015 dated 14.10.2015, was floated with modification in some conditions based on OP-4's interaction with potential bidders in the pre-bid meeting held on 21.08.2015. The tender was for entire area under limits of OP-4, rather than zone wise and it did not carry the eligibility criteria for bidders based on 'tree census related turnover', but on 'total turnover'. There were modifications pertaining to pre-qualification criteria of employees. The DG found from the office file noting of OP-4 that an extension in submission was also given upto 18.11.2015 as only two persons had bought the tender form, out of which only one viz, Terracon Ecotech Pvt Ltd submitted the bid. In the meantime, certain objections to bid were also filed by Apex Spatial Tech Solutions Pvt. Ltd., QSEAP Infotech Pvt. Ltd. and OP-1 (all dated 16.11.2015) which mentioned their objections/ suggestions regarding extension of tender date, pre-qualification criterion, *etc.* These objections/suggestions were sent to Vigilance Department of OP-4 and based on the department's advice, Tender No. 250 of 2015 was also cancelled.

16. The DG observed that OP-4 floated Tender No. 338 of 2015 on 11.01.2016 after incorporation of modifications in the Request for Proposal ('RFP') as approved by the Additional Municipal Commissioner (E), and the last date for bid submission was 30.01.2016. OP-1, OP-2 and OP-3, submitted their respective bids on 30.01.2016. However, the DG found that Terracon Ecotech Pvt. Ltd., which had submitted its bid in 3rd tender did not submit its bid. Further, Apex Spatial Tech Solutions Pvt. Ltd., and QSEAP Infotech Pvt. Ltd., which had submitted their objections to third tender, also did not participate in the bidding. All the three OPs, according to OP-4, satisfied the technical criteria. The DG further found that with respect to some eligibility conditions, OP-2 and OP-3, had not given documents *etc.* in support, in the manner required, but OP-4 considered their bids.
17. The DG noted that Tender Cell Department of OP-4 prepared scrutiny sheet dated 22.02.2016 in respect of Pre-qualification criteria in Tender No. 338 of 2015. It was mentioned that all three bidders did not attach demand draft ('DD') of earnest money;



however, the DG found that three bidders had given information about Earnest Money Deposit ('EMD') in their respective bids.

18. The DG analysed that the bidders were required to submit copy of audited Profit & Loss statement for the financial years 2012-13, 2013-14, and 2014-15, Both OP-1 and OP-3, duly submitted the same. However, OP-2 submitted certificate from its Chartered Accountant (CA) showing turnover for three financial years *i.e.* 2012-13, 2013-14, and 2014-15. The DG further noted the Garden Department of OP-4's remarks on scrutiny sheet in respect of OP-2 and OP-3 that "*Can be accepted on C.A. certificate*".
19. It was stated that there was an additional requirement of 100 employees on bidders' payroll for preceding six months. The Garden Department of OP-4, after scrutinising the bid, had made a remark that "*On the basis of HR Certificate can be qualified*". With respect to this requirement in impugned tender, OP-1 and OP-3 submitted certificate signed by their Human Resource (HR) Head and OP-2 gave an undertaking signed by its authorized signatory which was accepted by OP-4. However, as per statements of Mr. Abhishek Sharma, Project Manager, of OP-2, recorded on 02.05.2018 and Mr. Pankaj Bobra, Managing Director ('MD') of OP-2, recorded on 14.05.2018, the company (OP-2) did not have 100 permanent employees on its rolls, which made it apparent that OP-2 did not fulfil the criteria of 100 permanent employees on its payroll during the preceding six months.
20. The Investigation Report stated that in respect of requirement of necessary software being ready before bidding and demonstration at technical stage, Mr. Ashok Ghorpade, Chief Garden Superintendent of Garden Department of OP-4, in his statement dated 27.04.2018, before the DG, stated that documents pertaining to working of software along with technical bids were submitted by bidders, however, only OP-1 gave a demonstration before the Expert Committee. OP-4 accepted OP-2 and OP-3 as eligible bidders, despite no presentation made by them.



21. In respect of the remark of Mr. Ghorpade of OP-4 that all the bidders had not submitted EMD amount and consequent noting dated 09.02.2016 for the same, the DG observed that while filing the online tender, bidders were required to provide serial number of DD for Rs. 6 Lakh in lieu of EMD but were not required to submit the original DD.
22. The DG tabulated the price bids received for Tender No. 338 of 2015 by OP-4 from OP-1, OP-2 & OP-3 and observed that the lowest rate quoted by OP-1 was of Rs. 22.70/- per tree at a total consideration of Rs. 9,08,00,000/-. A recommendation of OP-1 to work with OP-4 was forwarded by Additional Municipal Commissioner (E) of OP-4 to Municipal Secretary of OP-4 and such recommendation was passed *vide* Resolution No. 2446 dated 23.02.2016, in meeting No. 08 of Standing Committee.
23. The DG sought information from the Informant, OPs and third parties to assess whether there was any understanding or agreement amongst OP-1, OP-2 and OP-3 in the tenders floated by OP-4. It was found that OP-1, OP-2 and OP-3 had exchanged vital information directly and indirectly through their directors/officials and third parties. These findings of the DG are summarised in the following paras.

I. Understanding with respect to Demand Drafts for Earnest Money Deposit

24. The DG collected information about EMD deposited by bidders in the Tender No. 338 of 2015 for which bank statements of OP-1, QSEAP Infosec JV and QSEAP Infotech Pvt Ltd. were analysed during Investigation. The DG found that the EMD of Rs. 6,00,000/ each deposited by OP-2 and OP-3 was arranged from the resources of OP-1. The DG observed that OP-1 transferred Rs. 12,20,000/ from its account to bank account of QSEAP Infosec JV with Axis Bank' Sunder Nagar, Mumbai on 29.01.2016. This company is a joint venture ('JV') of OP-1 and QSEAP Infotech Pvt. Ltd. One Mr. Ajay Rao, who is Director of OP-1, was authorized signatory of the bank account of this JV company. Mr. Rao of OP-1, had got two DD each of Rs.6, 00,000/-, prepared on the same day *i.e.* 29.01.2016 and one of these was for submission of bid



of OP-3. This fact made it apparent that officials of OP-1 and OP-3 were aware that DDs were to be utilized for the purposes of EMD for the impugned tender and in this regard, no tenable explanation was forthcoming from the depositions. The DG remarked that the claim of OP-1 that due to some typographical error in one of the DDs, another DD had to be prepared, was not tenable as the amount transferred was of Rs. 12,20,000/ and simultaneous request for two DDs had been made. The two DDs were found to carry number in sequence, *i.e.*, 001952 and 001953, dated 29.01.2016. The DD No. 001952 was cancelled on the next date *i.e.*, 30.01.2016 and the DD No.001953 was cancelled on 02.02.2016, and debits in the bank account were also in the same order. Further, the claim of OP-3 that OP-1 and OP-3 were in negotiation for a joint bid had not been supported by any documentary evidence. Though OP-3 had the financial means, as is evident from its bank account, the EMD was made by OP-1 for it. OP-3 utilized the DD prepared by OP-1 using the account of a third entity namely QSEAP Infosec JV, for submission of its bid.

25. The investigation also analysed the manner in which the DD used by OP-2, in its bid document, had been prepared. The DG found that DD No. 031899 for Rs 6,00,000/-, mentioned by OP-2 in its bid documents was prepared using bank account in the name of QSEAP Infotech Pvt. Ltd with ICICI Bank, Vashi, Maharashtra, to whose account the said amount was transferred by OP-1. The DG noted that DD used for EMD after submission of particulars in the online bid was cancelled on the same date, *i.e.*, 02.02.2016 and the amount thereafter was returned to the account of OP-1 which made it evident that decisions on behalf of all three bidders were taken by OP-1 and other two OPs *viz.* OP-2 and OP-3, were mere proxies. Accordingly, DG concluded that OP-2 and OP-3 were acting as proxies of OP-1 under a collusive arrangement. The three OPs were also confronted with the above finding during their depositions before the DG, but their explanation was not found satisfactory or convincing.

26. Thus, the DD submitted by OP-3 as EMD amount was issued from bank account of QSEAP Infosec JV in Axis Bank, Sunder Nagar, Mumbai. Whereas the DD used by OP-2 as EMD amount was issued from the bank account of QSEAP Infotech Pvt. Ltd.



in ICICI Bank, Vashi, Maharashtra. As regards the DD utilised by OP-1 for submission as EMD, it was revealed in the investigation that this DD was prepared by OP-1 from its own account with ICICI Bank, Malad (W) on 29.01.2019. This DD too was cancelled on 02.02.2016, *i.e.* the same day on which the DD used by OP-2 and OP-3 were cancelled and amount was credited to the Bank accounts from which these were got prepared. The investigation also found that OP-1 had provided copy of already cancelled DD No. 0060301 to OP-4 on 16.02.2016 as proof of EMD amount. Subsequently, after obtaining the Tender, OP-1 had submitted a fresh DD No. 006158 to OP-4 as EMD.

II. Communication between OP-1 and OP-2 during tender period

27. The DG further gathered from the call detail records of Mr. Arun Rao, Director of OP-1 and Mr. Sunil Kapri, Director & CEO of QSEAP Infotech Pvt. Ltd. (JV of OP-1) for the period August, 2015 to November, 2017, that there were frequent communications between Mr. Arun Rao and Mr. Sunil Kapri, particularly in and around the time of preparation of DDs for EMD, cancellation of DD and submissions of bid in the impugned tender in January 2016. It was also found that Mr. Ajay Rao, Director of OP-1 and Mr. Abhishek Sharma, Project Manager of OP-2 were communicating with each other during month of January, 2016 and particularly around the day of submissions of bids in the impugned tender. Further, frequent communications took place between Mr. Arun Rao and Mr. Kapri from 27.01.2016 till 30.01.2016, apart from which only one call detail record was found in March, 2016. With respect to the above, the DG reached the finding that the conversation pattern between Mr. Ajay Rao and Mr. Abhishek Sharma, in particular the one on 30.01.2016, led to a safe presumption that conversation was in relation to submission of bid as there was seldom any conversation between these two persons during the remaining period of available call detail records.



III. Exchange of Messages between OP-1 and OP-2

28. The DG, in the Investigation Report, placed on record, screenshots of conversation between Late Preetam Singh Rathore, MD of Apex Spatial Tech Solutions Pvt. Ltd ('ASTSPL') and Mr. Ajay Rao of OP-1 gathered from the handset of Late Preetam Singh Rathore. The screenshots of this conversation from the handset of Late Preetam Singh Rathore were produced before the DG by Ms. Darshana Singh Rathore, Business Executive of ASTSPL and daughter of Late Preetam Singh Rathore *vide* email dated 25.05.2018. The DG observed that such call detail records details and screenshots show that there was an understanding between key officials of OP-1 and Late Preetam Singh Rathore in relation to submission of bids by OP-2. There were additional messages found between Mr. Pankaj Bobra, MD of OP-2 and Late Preetam Singh Rathore, wherein latter had sought financial statements and ITR for the years 2012-13, 2013-14 and 2014-15 from OP-2 for submission to OP-4 in the impugned tender, and the same documents were required in the impugned tender. Mr. Pankaj Bobra had also admitted that Late Preetam Singh Rathore was the link person for facilitating the bidding in the impugned tender. Further, Mr. Ajay Rao of OP-1 and Mr. Pankaj Bobra, of OP-2 during deposition have admitted of their acquaintance with Late Preetam Singh Rathore. A snapshot from mobile phone of Late Preetam Singh Rathore shows the link between OP-1 and OP-2. However, Mr Pankaj Bobra and Mr Ajay Rao denied knowing each other. The date of the chat was crucial as it was on 29.01.2019, *i.e.*, one day prior to opening of financial bid in the impugned tender.

IV. Common Internet Protocol Address used by OP-1 and OP-3

29. The DG further gathered bidding documents from OP-4 and examined the Internet Protocol (IP) addresses from where the bids were submitted online. OP-4 submitted details *vide* email dated 02.01.2018. The investigation attempted to determine the location of the IP from the respective internet service provider ('ISP') and noticed that the IP used by OP-3 to file its bid for Tender No. 338-2015 belonged to OP-1 and was located at the office premises of OP-1. The Investigation found that OP-3 used the



internet connection owned by OP-1 located at its office. Therefore, it is possible that the bid of OP-3 was submitted by OP-1.

V. Similarity in various documents of OP-1, OP-2 and OP-3 submitted to OP-4

30. In matter of documentation submitted by bidders (OP-1, OP-2, and OP-3) in the impugned tender, the DG found similarities in various documents filed by OP-1, OP-2 and OP-3, such as date format used in document. Also, OP-2 and OP-3 had written “338-2016 dated” in same style without any space, and in case of OP-1 and OP-3 the paragraph alignment was exactly same, first paragraph was not ‘justified’ aligned while other two were ‘justified’ aligned, in addition to same font, font size of populated fields, alignment and line spacing. The DG also observed from additional documents, use of bold letters in ‘Subject’ while it was not in bold form in RFP and marking of a diagonal line in same style by OP-1 and OP-2 in the bids submitted by them.
31. The DG also found that the three bidders had mentioned Tender Number as 338 of 2016 (*instead of 2015*) in the Pre-Qualification Cover Letter, Format of Statement of Deviation from RFP requirements and Self-Declaration-No Blacklisting document and all of the said OPs used Tender Number as 338-2015 in Commercial Proposal Cover Letter and Undertaking of bidders. Also, while OP-3 mentioned the impugned tender number as 338-2016 in Pre-Qualification Cover Letter and Statement of Deviation from RFP requirements, it mentioned the Tender No. as 338-2015 in Commercial Proposal Cover Letter. Accordingly, the DG remarked that as all these letters were dated 20.01.2016 with same inconsistencies, which indicates that OP-2 and OP-3 copied the details filled by OP-1, in their respective bids.
32. The DG also made an attempt to ascertain if there was any prior association amongst the three bidders, and found from the statements of Mr. Chetan Pathare (Director of OP-3), Mr. Arun Rao, and Mr. Ajay Rao (Directors of OP-1) that Mr. Chetan Pathare knew Mr. Arun Rao since 2014 and it was already on record that OP-1 and OP-3



admitted to being in discussion regarding bidding in the impugned tender and OP-1 had provided the DD for EMD of OP-3 in the impugned tender. Also, OP-1 had prior association with QSEAP Infotech Pvt. Ltd. and its key person Mr. Sunil Kapri, in addition to acquaintance with Late Preetam Singh Rathore, who was definitely acting as a link between OP-1 and OP-2.

33. In respect of finalization of bid, it was found by the DG that Mr. Ajay Rao, Director, OP-1 was the sole person who filled the price quote in the bid, after finalizing the rate with Mr. Arun Rao. The statement of Mr. Arun Rao proved that there had been discussion between OP-1 and OP-3 to bid together and the rate to be quoted in the impugned tender. In case of OP-2 it was seen that Mr. Pankaj Bobra had discussed the rate with Late Preetam Singh Rathore from ASTSPL and the latter had also assisted him in filing the tender documents.
34. The DG, in light of above evidences and statement of key persons involved in the bidding in Tender No. 338 of 2015 of OP-4, concluded that OP-1, OP-2 and OP-3 acted in furtherance of the *inter-se* collusive arrangement of bid-rigging and thus violated the provisions of Section 3(3)(d) read with Section 3(1) of the Act.
35. Based on the evidences gathered, the DG also identified persons concerned who are liable under provisions of Section 48(1) of the Act for the aforementioned contraventions:
 - i) Mr. Arun Rao, Director, OP-1
 - ii) Mr. Ajay Rao, Director, OP-2
 - iii) Mr. Pankaj Bobra, MD, OP-2
 - iv) Mr. Chetan Pathare, Director, OP-3

The above mentioned persons were found to be responsible for the affairs & conduct of the respective OPs at the time of the contravention and had not been able to prove that the contraventions occurred without their knowledge or that they had taken adequate precautions to obviate anti-competitive activities in their respective organisations. Therefore, in light of the evidences and examination of statements given



by these officials, the DG found them liable under the provisions of Section 48(2) as well.

36. The DG also examined other allegations levelled by the Informant in relation to the tender floated by the OP-4 and that Tender-3 and 4 were designed to favour OP-1. However, as per the Investigation Report, the same has not been established on the basis of evidences collected during investigation. The findings on Informant's allegation with regard to conduct of OP-4 and modification of criteria in subsequent tenders are summarized in following paragraphs.
37. The DG investigated the allegation of the Informant pertaining to requirement of average annual turnover of Rs. 10 million from Tree Census activities in Tender no(s) 2 & 3 of 2015 and 250 of 2015, which was allegedly modified on demand of OP-1 as it did not qualify in RFP of aforementioned tenders. The DG investigated the pre-qualification criteria of the aforementioned tenders, and the submission of OP-1, subsequently in pre-bid meeting dated 21.08.2015 that average annual turnover was very less as per the value and scope of project and it should have been at least Rs. 50 million to get quality competition.
38. Investigation compared the pre-qualification criteria of RFPs in Tender nos. 2 & 3 of 2015, 250 of 2015 and 338 of 2015 related to average turnover of the company, which are summarized in table below:

Table No. 2: Average Annual Turnover criteria of RFP

Tender no. 2 and 3 of 2015	Tender no. 250-2015	Tender no. 338-2015
The Bidder should have an average annual turnover of more than Rs. 1,00,00,000/- for past 3 financial years ending March 2015 for each year from Tree Census related activities.	The bidder should have an average annual turnover of more than Rs. 1,00,00,000/- for past 3 financial years ending March 2015 for each year.	The bidder should have an average annual turnover of more than Rs. 2,00,00,000/- for past 3 financial years ending March 2015 for each year.



39. The DG noted that OP-4 in RFP of Tender No. 250 of 2015, changed criteria to average annual turnover not specific to tree census activities and in Tender No. 338 of 2015 average annual turnover criteria was increased from Rs. 10 million to Rs. 20 million or more. The DG also noted that there was no bidder for Tender No. 2&3 of 2015 when turnover criteria was specific to Tree census activities, and in the year 2015 there was only one entity with average turnover of Rs. 10 million from tree census activities in preceding three financial years. Also, M/s Lotus Environment, in pre-bid meeting, had suggested that as tree census was part of Environmental Impact Assessment (EIA) and planning, it was difficult to bifurcate turnover of Tree Census alone and turnover criteria should therefore, not be restricted to income from Tree Census related activities. The DG observed that as OP-4 did not have any bidder in Tender No. 2 & 3 of 2015, the criteria was relaxed in order to attract more bidders. Further, in response to Tender No.250 of 2015, two companies, viz, QSEAP Infotech Pvt. Ltd. and ASTSPL had raised objections that the turnover requirement in the aforesaid tender was not in line with CVC guidelines; this was confirmed by Vigilance Department of OP-4. Therefore, the DG observed that it cannot be said that OP-4 changed the turnover requirement in the tenders for tree census on the demand of or in order to benefit any particular bidder/OP.
40. The Informant had also alleged that OP-4 used the lower figure of 38,60,055 trees to work out the project estimate and consequently the quantum of EMD and turnover criteria for contractors which resulted in a lower estimate and benefited the pre-determined winner. The DG found that a lower EMD requirement in Tender No. 338 of 2015 had benefited all potential bidders and not a particular bidder. Also, such reduction was made upon feedback received from its Vigilance Department on 11.09.2015. It was further alleged by the Informant that in order to favour OP-1, OP-4 incorporated the condition that a bidder should have 100 additional permanent employees on pay roll for last six months. OP-4 *vide* email dated 25.08.2015, stated that since tender pertained to all 4 zones, the requirement of manpower was higher to complete work in time. Further such condition was made standard in all tenders of



Property Tax department, Advertisement Board department, Water Supply department etc. It was also stated that as Terracon Pvt. Ltd. had not participated in Tender No.338 of 2015 for tree census published by OP-4, therefore, there was no question of its disqualification. Mr. Ashok Ghorpade, Chief Garden Superintendent, of OP-4 in his statement dated 27.04.2018, stated that this condition was added by Mr. Rajendra Jagtap, then Addl. Municipal Commissioner while approving issue of Tender No. 338 of 2015, and also corroborated by records produced by OP-4 in this matter. Mr. Rajendra Jagtap, in his emails to the DG, dated 02.07.2018 and 25.07.2018 explained that as OP-4 was issuing a tender for 04 zones, it was reasonable to have at least 25 employees per zone so that work was carried on simultaneously without any delay. Therefore, the DG observed that the aforesaid condition was not added to benefit any particular bidder and was rather a manpower assessment required for completion of work under the tender.

41. It was alleged by the Informant that OP-4 fixed the rate for tree census work without checking the market rate and had awarded the work at a much higher rate than the internal estimated rate. The Informant stated that OP-4 had estimated the rate for tree census as Rs. 15 per tree without checking rates prevalent in other municipal corporations, and finally awarded the tender at Rs. 22.70 per tree to OP-1. The investigation sought clarification from OP-4 in this regard and also collected data from other municipal bodies in Maharashtra to assess the prevalent rate for tree census activities. OP-4 in its response stated that it had examined the rates for trees approved in other municipal corporations in Maharashtra and that further maintenance period was not included in contracts of such corporations. The standing committee of OP-4 accepted the rate of Rs.22.70 per tree. The DG also cited the comparative rate table of tree census by different municipal corporations/councils, as submitted by OP-4 *vide* email dated 20.07.2018. Mr. Ashok Ghorpade, Chief Garden Superintendent, of OP-4 in his statement dated 27.04.2018, stated that GIS/ GPS Tree census tender was a new type of tender being undertaken in the country and hence market information or bench mark was not available to make a comparison.



42. The Informant had also contended that decision of OP-4 to float one tender for its 4 zones was an attempt to eliminate smaller companies since one tender covered all 4 zones of OP-4's area, thereby eliminating real competition and causing restricted participation in the bid process, which was against Section 3(3) of the Act. The Chief Garden Superintendent, OP-4 *vide* letter dated 13.10.2015 addressed to its Deputy Engineer conveyed that control on work, getting two different rates and possibilities of other difficulties were apprehended, due to which issuance of a single tender was decided. The Investigation also found a suggestion from OP-1 in the pre-bid meeting dated 21.08.2015, wherein it was stated that a combined tender will smoothen process work completion by integration of the final data in one single software. It would lead to reduction in overall cost and maintenance of quality and monitoring and tracking of progress easily. M/s Lotus Environment, Pune *vide* email dated 20.08.2015, had pointed out that if two tenders were floated for awarding work to two agencies to complete work faster, then lowest quoted agency in Tender-1 should be disqualified for Tender-2 before opening financial bid. The DG observed that the Informant had not cited any example of any other municipal body where work had been divided in multiple tenders, and the procurer was the best judge to see its requirement which is why no external interference was required. Therefore, no competition issue was made out against OP-4 in the investigation report in this regard.
43. The Informant had further alleged that OP-4 had only granted extensions for tree census in Tender No. 2 & 3 of 2015. The DG found this allegation to be incorrect as extension was also granted in 3rd Tender *i.e.* 250 of 2015. The Informant further alleged that OP-1 had access to draft RFP of Tender No. 338 of 2015 as OP-1 had approved participation in such tender in its Board meeting dated 30.10.2015 while the advertisement for tender was released by OP-4 only on 11.01.2016. Mr. Arun Rao, Director, OP-1 when confronted by the DG on this aspect submitted that a copy of resolution dated 30.10.2015 was submitted in the Tender No. 338 of 2015 in which only tender number had been changed in the scanned copy of Board Resolution dated 30.10.2015, however no copy of relevant page was produced. The DG concluded that



it was a lapse in documentation by OP-1 and nothing regarding collusive conduct could be made out in this regard.

44. The Informant had alleged that OP-4 had exempted software demonstration by OP-2 and OP-3. Mr. Ashok Ghorpade, Chief Garden Superintendent of OP-4, in his statement dated 26.04.2018, stated that three bidders had submitted documents depicting the working of the software along with their technical bids, based on which he certified the software as ready and working at technical stage evaluation. Upon finalization of tender, the successful bidder demonstrated the software in a meeting where Expert Committee and Department officials were present.
45. However, the DG found in the scrutiny sheet of Garden Department for Tender No. 338 of 2015 that all three bidders had done the presentation at technical bid stage and therefore, qualified for the tender. Moreover, the DG did not find this allegation of Informant relevant to the main issue of collusion among bidders. Other allegations such as delay by OP-4 in implementation of order passed by the Hon'ble High Court of Bombay, that OP-4 modified contract terms *vis-à-vis* RFP and that OP-4 did not circulate minutes of pre-bid meeting due to malafide intention *etc.* were also not found to be relevant to the issue of bid rigging.

Objection/Suggestion to the DG Report:

46. *Vide* order dated 23.01.2019 of the Commission, copies of the Investigation Report dated 20.09.2018, were forwarded to the Informant, OPs and individuals identified by the DG under Section 48 (1) and 48(2) of the Act, and they were directed to file their respective suggestions/objections, if any, latest by 28.02.2019, with an advance copy to the Informant. The Informant was also directed to file its written submissions, if any, to such Investigation Report, by 14.03.2019, with an advance copy to each of the OPs and individuals aforementioned. The Commission further directed OP-1, OP-2 and OP-3 to file copies of their audited financial statements including balance sheet(s) and profit & loss account(s) for the last 3 financial years *i.e.* 2015-16, 2016-17 and



2017-18. The individuals named above were also directed to file their income details including copies of the income tax returns for the last 3 financial years *i.e.* 2015-16, 2016-17 and 2017-18. Further, the parties and said individuals were directed to appear before the Commission for final hearing on the Investigation Report on 27.03.2019.

47. Subsequently, OP-1 *vide* application dated 27.02.2019 and OP-3 *vide* application dated 27.02.2019, requested the Commission to grant extension of time by eight weeks *i.e.*, till 31.03.2019, for filing the objections/suggestions to the Investigation Report. The Commission considered the aforesaid applications on 07.03.2019 and granted time to the parties for submissions of objections/suggestions, if any, to the Investigation Report latest by 31.03.2019 and fixed final hearing on 25.04.2019.
48. In compliance of the order dated 23.01.2019 and 07.03.2019, passed by the Commission, OP-1, OP-2 and OP-3 filed their respective objection/suggestion to the DG Report on 01.04.2019, 27.02.2019 and 29.03.2019, respectively. OP-2 and OP-3 also submitted copies of their respective ITRs and balance sheets for the Assessment Year 2016-17, 2017-18 & 2018-19. The Informant submitted its objections to DG Report on 11.04.2019, *vide* its letter dated 08.04.2019. The Informant also mentioned in its reply that it did not receive any suggestion/ objection from any of OPs and thus, it was not in a position to send any comments on OPs submissions. Thereafter, the Informant upon receipt of submissions of OP-1, submitted its further reply to the objections/comment of OP-1 on 23.04.2019. Subsequently, OP-4 also filed its brief reply *vide* its letter dated 15.05.2019. Details of the replies submitted by OPs and individuals are summarised as under:

Submissions of OP-1:

49. OP-1 submitted in its objection to the Investigation Report that the DG noted that while submitting the impugned Tender online, bidders were required to provide serial number of a DD for Rs. 6,00,000/ in respect of EMD. This EMD for OP-2 and OP-3



had been arranged by OP-1 and for the same the bank accounts of two enterprises associated with each other namely, QSEAP Infotech Pvt. Ltd. ("QIPL") and QSEAP Infosec JV had been used. OP-1 denied this conclusion arrived at by the DG and furnished explanation on this issue as follows:

50. OP-1 stated that QIPL is a company located in Navi Mumbai and Pune and one of its directors, Mr. Praveen is a friend of Mr. Arun Rao, a director of OP-1 and QIPL was one of the vendors of OP-1 and thereafter in 2015, QIPL and OP-1 proposed to form a JV by the name of QIJV. OP-1 further stated that there existed a business relationship between these parties, as OP-1 had outsourced few projects to QILP. Furthermore, it was submitted that the OP-1 and Late Preetam Singh Rathore, former Managing Director of Apex Spatial Tech Solutions Pvt. Ltd, were working together since 2012-2016, and they bagged their first tender in 2013, floated by Tree Authority of the Municipal Corporation of Greater Mumbai ("MCGM") and since then Late Preetam Singh Rathore had been a constant guide to OP-1 in the field of trees census. Therefore, OP-1 stated that owing to the nature of relationship, the interaction between the directors of OP-1 and Late Preetam Singh Rathore had been one of professional co-operation.
51. OP-1 averred that the impugned Tender was floated on 11.01.2016, and OPs were under the impression that the DD with respect to the same was required to be submitted physically to OP-4 on the date of the submission of the bid. Late Preetam Singh Rathore, who had collaborated with OP-2, which is a company based in Indore, for participating in Impugned Tender, contacted Mr. Arun Rao of OP-1 for helping with arranging the DD for OP-2 as the DD was to be submitted physically. Owing to its business relationship, OP-1 arranged for the DD by requesting QIPL for the same. As regards crediting of Rs. 6,00,000/- back to the account of OP-1 on 03.02.2016, OP-1 submitted that since the OPs were under the impression that the DD for the impugned tender had to be submitted physically, upon presenting the same to OP-4, it declined to take the DD at that time and informed that the DD would be required at the time of



opening the bids. Therefore, as there was no immediate requirement of the DD by OP-4, Late Rathore decided to pay back the amount of Rs.6,00,000/- to OP-1.

52. As regards the internet protocol addresses used by OP-1 and OP-3 for filing their respective tenders, it was submitted that initially, OP-1 and OP-3 decided to participate in the impugned Tender through a JV. The JV negotiations between OP-1 and OP-3 continued till 29.01.2016, *i.e.*, till a day before the last day of submission of the bids, *i.e.*, 30.01.2016, but due to certain reasons, the JV could not materialize and OP-1 and OP-3 decided to submit their respective bids independently and as a matter of business co-operation, OP-3's bid was submitted from the office of OP-1 and thus, the internet protocol address used by OP-3 for filing of the tender was that of OP-1.
53. OP-1 stated that this chain of events had not been accepted by the DG and the DG concluded that OP-1 arranged the DD for OP-2 and thus the two entered into collusive activities which was wholly unfounded and vehemently denied by OP-1. Further, OP-1 submitted that even if the DG found OPs to be in agreement with each other thereby restricting competition, the same ought to be assessed "*in the economic context in which the agreement is to be applied*". OP-1 stated that the DG abysmally failed to prove the existence of an 'agreement' between the OPs and in the absence of any precise and consistent evidence establishing the existence of an 'agreement' it could not be held that the OP-1 had contravened Section 3(3)(d) of the Act. Furthermore, OP-1 relied on a number of cases wherein it was held that existence of an 'agreement' must be proved in an unequivocal, precise and coherent manner to establish infringement of Section 3(3) of the Competition Act.
54. OP-1 stated that Abcprocure which provides e-tender related solutions to its customers, provided the platform connecting various bidders with OP-4 and ensured that the price bids for the impugned Tender were determined in a competitive manner. Therefore, there was no possibility that OP-1, with the presence of an independent e-tender expert, could have engaged in collusive activities with the other OPs. OP-1



stated that by failing to examine Abcprocure, the DG had not discharged the evidentiary burden as was required in proving contravention on part of the said OP. Otherwise, it would have been clear that there was no possibility for bidder participating in e-tenders to collude and rig the bid since they were under surveillance of an expert, and also the fact that they did not physically assemble at one place further reduces the possibility of them engaging in any concerted activity.

55. As regards, the allegation of passing the board resolution dated 30.10.2015, three months prior to when the impugned Tender was floated, it was submitted that OP-1 had originally prepared the Board Resolution for Tender No. 250 of 2015, which was floated on 14.10.2015 and was eventually cancelled. Later upon the impugned Tender being floated, while submitting the requisite documents for the impugned Tender, OP-1 uploaded the board resolution dated 30.10.2015, by changing the tender number but as a mistake, did not change the date of the board resolution. However, DG had given this mistake of OP-1 color of a collusive act and had rejected the explanation forwarded in this regard by OP-1. Therefore, it was stated that mistake of OP-1 to upload the said board resolution without correcting the date must not be considered as an act of collusion on the part of OP-1.
56. OP-1 also stated that the DG failed to prove Appreciable Adverse Effect on Competition ('AAEC') on account of the alleged anti-competitive conduct of OPs in the present matter. Further, OP-1 contended on the basis of findings in previous cases that while inquiring into any alleged conduct, whether by the Commission or by the DG, and determining whether any agreement has any AAEC under Section 3, factors enumerated under Section 19(3) must be taken into consideration. Furthermore, OP-1 averred that an assessment of the factors under Section 19 (3) of the Act showed that DG failed to prove that there was an AAEC as a result of the alleged conduct.
57. OP-1 submitted that DG, without appreciating the market conditions, concluded that OP-1 colluded with other bidders which was baseless and unfounded. Further, OP-1 had stated that tree census was conducted mostly by government local bodies and the



major chunk of revenue by OPs was generated through such tenders and there were only handful of procurers of the services of conducting tree census and therefore what appeared to be a collusion was nothing but a result of market dynamics wherein the competitors in order to survive in the said market are bound to incidentally interact in some manner or the other. OP-1 also referred to the Hon'ble Supreme Court's decision dated 01.10.2018, *In Re: Rajasthan Cylinders and Containers Limited Vs. Union of India*, and submitted that the DG failed to appreciate the market conditions and concluded that OP-1 colluded with other bidders which was completely baseless and unfounded.

58. OP-1 also stated that based on the call details of Mr. Arun Rao and Mr. Ajay Rao of OP-1, the DG inferred that these alleged calls were for rigging the Impugned Tender. However, the calls between Mr. Ajay Rao of OP-1 and Mr. Abhishek Sharma of OP-2 were made on receiving a request from Late Rathore for technically helping Mr. Abhishek Sharma in filing the tender documents for the impugned Tender. Owing to the past business relations between OP-1 and Late Rathore, Mr. Ajay Rao honoured the request and helped Mr. Abhishek Sharma in the tender submission. Therefore, it could not be said that OP-1 colluded with OP-2. OP-1 further stated that Call Detail Records ('**CDRs**') relied upon by the DG were not supported by a certificate under Section 65B of the Evidence Act and the provisions of Information Technology Act, 2000 ("**IT Act**") and thus could not be relied upon as evidence against OP-1.
59. It was stated by OP-1 that the DG had examined the alleged CDRs of certain individuals of OP-1 and of other OPs and concluded that the conversations were in relation to the impugned Tender whereas no inference of collusion could be drawn from the limited number of calls that had been analysed by the DG. The DG limited its examination by cherry picking limited number of call detail records. Further, the DG failed to demonstrate that the OPs, even otherwise, communicated on a regular basis and not just around the time of the tender. The DG wrongly reached a conclusion that there existed a pattern with respect to the calls made by these individuals between



December 2015 to March 2016, to prove that they colluded to rig the impugned Tender.

60. OP-1 also averred that the Informant had approached the Commission with unclean hands and was only furthering the interest of one Terracon Ecotech Pvt. Ltd. ("**Terracon**") who considered OP-1 as its main competitor and was threatened by its existence. The Informant made certain allegations only on account of the fact that Terracon could not participate in the impugned tender.
61. OP-1 stated that the conduct of the Informant was completely unethical as it was approaching various fora to target OP-1 and was constantly creating circumstances to trap OP-1 under the clutches of various laws. The Informant had complained about OP-1 before Chief Secretary, Maharashtra and before OP-4 on many occasions, but the matters were closed. Therefore, OP-1 stated that the present Information filed by Informant was nothing but an instance of forum shopping.
62. OP-1 submitted that Tender No. 250 of 2015 was floated before Diwali on 14.10.2015, and its pre bid meeting was attended by OP-1 and QIPL and due to bank holidays and the vacation in the respective offices of OP-1 and QIPL it was impossible to get the DD prepared on time to be submitted with the bids. Thus, OP-1 and QIPL sought extension of the said Tender from OP-4 *vide* their respective letters. As regards the email dated 12.11.2015, sent by Mr. Arun Rao of OP-1, it was submitted that the same was sent merely to help QIPL with the format of the letter and there was no collusion among OP-1 and QIPL. Further, the said email dated 12.11.2015, was with respect to extension sought *vis-à-vis*. Tender No. 250 of 2015 and not with respect to the impugned Tender in question. However, DG failed to appreciate this professional co-operation between them and prejudicially held OP-1 to be colluding with QIPL.
63. It was further submitted that in the event the Commission decides to impose penalty on OP-1, the quantum of penalty should be determined based on the relevant turnover arising out of the impugned tender and should not be based on the total



turnover of OP-1. Further, OP-1 submitted during the hearing that if the Commission is inclined to levy the penalty, the Commission should consider mitigating factors while calculating the penalty such as OP-1 is not a habitual offender, it is new in this business and it cooperated with the DG's investigation at all stages.

64. Subsequently, OP-1 submitted an application dated 06.05.2019, requesting the Commission that in light of judgment of the Hon'ble High Court of Delhi in the case of *Mahindra Electric Mobility Limited and Another Versus Competition Commission of India* (Judgment dated 10.04.2019 in Writ Petition No. 11467 of 2018), the final hearing scheduled on 08.05.2019 in the present matter be deferred till the appointment of judicial member.

Submission of OP-2:

65. OP-2 submitted that it was only a party to Tender No. 338 of 2015, which was awarded to OP-1 and was not a party to Tender No. 2 & 3 of 2015. OP-2 further stated that there was no collusion amongst OP-2 and other bidders and it was never a proxy bidder. Furthermore, OP-2 stated that if, as alleged by the Informant, OP-2 was not eligible for the process of bidding, it was the duty of OP-4 to look into this issue and to verify the eligibility of OP-2; that no adverse inference should be drawn against OP-2 for any shortcoming on the part of OP-4.
66. OP-2 stated that it had never prepared the Board Resolution prior to the release of RFP dated 11.01.2016. It was stated in this regard that mentioning Tender ID No. 338/2015, in the cover letter for PQ bid and statement of deviations was nothing but a mere coincidence and attracts no suspicion. OP-2 also submitted that this allegation of the Informant was not supported by evidence and thus, must be disregarded. Furthermore, the cover letters, font type, size and formatting done by OP-2 in the bid process was also a coincidence but the Informant has presented the same in such a manner so as to misguide the investigation. The commonalties, as have been projected by the Informant, are being done with some or the other ulterior motive and Informant has



wrongly submitted that it is a deliberate action on the part of OP-2 to collude with other participants and so also with OP-4.

67. OP-2 averred that it had submitted a certificate showing the turnover for 3 years, *i.e.* 2012-13, 2013-14, and 2014-15 and as far as requirement of having 100 employees on its payroll for the previous six months was concerned, it submitted that the Garden Department of OP-4 made a remark at the time of making scrutiny and therefore, there was absolutely nothing wrong on the part of OP-2. OP-2 had no malafide in submitting the said details. Furthermore, OP-2 submitted that it was for OP-4 to take a decision as to eligibility of OP-2 in the bid process. Since OP-2 had no role to play in the scrutiny of the bid documents for prequalification criteria, no responsibility could be attributed to it in this regard and further no adverse reference could be drawn against it.
68. OP-2 further stated that there was no understanding amongst OP-2 and the other co-bidders in respect of the tenders floated by OP-4 for tree census. OP-2 further stated that as far as the allegations of exchanging vital information between OP-1, OP-2 & OP-3 was concerned, the DG committed an error in reaching a conclusion based on certain alleged chat messages between OP-2 and Late Pritam Singh Rathore. It was submitted that Late Pritam Singh Rathore approached OP-2 with a proposal to participate in the impugned tender. It was also stated that Apex Spatial Tech Solutions Pvt. Ltd. headed by Late Pritam Singh Rathore, had worked in collaboration with OP-2 in the past and would continue to do so and, therefore, the approach advised by Late Pritam Singh Rathore should not be viewed with any suspicion.
69. OP-2 denied that OP-1 arranged EMD for OP-2. It stated that Mr. Pankaj Bobra, Managing Director of OP-2 came to know about QSEAP only at the time of OP-4's tree census work through a friend Late Pritam Singh Rathore and an informal understanding was arrived at with QSEAP that some sub-contract work would be allotted to them in case the tender was awarded to OP-2 and DD for EMD was arranged by Late Pritam Singh Rathore because there was very little time left to



complete the bid formalities. Therefore, the findings arrived at by the DG in its report were completely misplaced.

70. OP-2 stated that the DD mentioned by OP-2 in its bid documents was prepared by QSEAP using its ICICI Bank account and OP-2 was unaware as to how and when OP-1 transferred money into the account of QSEAP. It was also stated that OP-2 was unaware of the fact that QSEAP had used such amount to get the DD prepared which was used by OP-2 in bid documents. Furthermore, OP-2 submitted that even if it was assumed for a moment that QSEAP used the money transferred by OP-1 into its account and prepared the DD which was to be utilized by OP-2 for EMD amount, the same cannot be read and used as evidence to establish that OP-2 had been benefited by OP-1. Therefore, the finding arrived at by the DG in its report is completely based on surmises and conjectures.
71. OP-2 stated that a telephonic conversation between OP-1 and OP-3 is neither indicative of anything against OP-2 nor does it establish anything adverse against OP-2. It was stated that it was completely wrong and erroneous on the part of the DG to opine in its report that Late Pritam Singh Rathore was an admitted accomplice of OP-2. In the absence of the statement/testimony of Late Pritam Singh Rathore no adverse inference can be drawn against OP-2.
72. Further, OP-2 submitted that it was not accorded an opportunity to clarify as to under what circumstances Mr. Abhishek Sharma, Project Manager of OP-2 came in contact *via* telephonic conversation with Mr. Ajay Rao of OP-1 and whether the same was done by Mr. Abhishek Sharma with the consent of Mr. Pankaj Bobra of OP-2 because, Abhishek Sharma at the relevant point of time was working as project manager with OP-2 and was responsible for software development and other incidental works. However, this situation was not put before Mr. Abhishek Sharma at the time of recording of his statement, therefore, in the absence of any evidence to this effect that Mr. Abhishek Sharma had received the consent of Mr. Pankaj Bobra



to communicate with Mr. Rao of OP-1, the same cannot be used as evidence against OP-2.

73. In so far as the text message exchanged between Mr. Pankaj Bobra of OP-2 and Late Pritam Singh Rathore is concerned, OP-2 submitted that Late Pritam Singh Rathore was a known friend of Mr. Pankaj Bobra of OP-2 and Late Pritam Singh Rathore had himself approached OP-2 and had shared the information with respect to the tree census work, therefore, there was no malafide on the part of OP-2 to be in touch with Late Pritam Singh Rathore. Furthermore, Mr. Pankaj Bobra of OP-2 in his statements made during the investigation has stated that OP-2 had executed projects in collaboration with the company of Late Pritam Singh Rathore and continues to do, therefore, no adverse inference should be drawn on the basis of the exchange of the chat messages between Mr. Pankaj Bobra and Late Pritam Singh Rathore.
74. OP-2 also submitted that it was completely unaware as to circumstances under which Late Pritam Singh Rathore referred and forwarded the mobile number of Mr. Abhishek Sharma of OP-2 to Mr. Ajay Rao of OP-1. OP-2 has averred that sharing of mobile number of Mr. Abhishek Sharma of OP-2 with OP-1 by Late Pritam Singh Rathore, did not establish any link between OP-1 and OP-2. Therefore, the finding arrived at by the DG in its report in this regard is erroneous and is not sustainable.
75. OP-2 further contended that the similarities in the bid document submitted by OP-2 with the bid document submitted by OP-1 & OP-3, is indicative of nothing but a mere coincidence and it does not establish prior meeting of minds between OP-2 and other co-bidders. It was stated that, Mr. Pankaj Bobra of OP-2 had also submitted during investigation that while filing the bid on his system with his own digital signature, Late Pritam Singh Rathore assisted him in filing of tender documents. It was also stated that the similarities which in themselves were negligible enough, cannot establish a collusion between OP-2 with other co-bidders; any such finding based on the negligible similarities in the bid document is nothing more than a mere suspicion not founded on any proof and it is a settled position of law that suspicion howsoever



strong, cannot replace proof. Therefore, the finding arrived at by the DG in its report is unsustainable.

76. It was submitted that OP-2 through its MD, Mr. Pankaj Bobra, was never engaged in any regular contact with OP-1 and the telephonic conversation that took place between Mr. Abhishek Sharma of OP-2 and Mr. Arun Rao of OP-1 was never disclosed by Mr. Abhishek Sharma to Mr. Pankaj Bobra, MD of OP-2 and the consent of Mr. Pankaj Bobra cannot be inferred *ipso facto*. Therefore, OP-2 has not contravened any provision contained in Section 3(3)(d) read with 3(1) of the Act, and Mr. Pankaj Bobra, MD of OP-2 is not responsible under the provisions of Section 48 of the Act.

Submissions of OP-3:

77. At the outset, OP-3 submitted that it was not associated with OP-1 in submission of bid in the current project nor was it associated with OP-1 in any previous projects. OP-3 further submitted that OP-1 and OP-3 were supposed to bid together as consortium partners but ultimately did not arrive at a consensus on the financial arrangements to bid for the said tender and therefore, decided to bid independently. OP-3 submitted that the said explanation can be proved considering the date and time of the submission of bid *i.e.* 29.01.2016 (a day before the last date of submission) at 10:42 AM, which was misinterpreted as 22.42 hours in the investigation report of the DG which differs in time by a day and half (*i.e.*, 36 hours) from the date and time of submission of bid by OP-1. Thus, OP-3 submitted that this fact substantially proved that its bid was submitted quite in advance of OP-1 which clarified any doubt which was left over.
78. With regard to Informant's allegation that OP-3 was a proxy bidder, OP-3 submitted that it had bid independently for the impugned tender and wanted to qualify safely in order to complete the said project without the intervention of OP-1. OP-3 also submitted that it had been working in infrastructure sector on various other projects,



independently and also as joint venture/consortium, since many years. OP-3 averred that it had never indulged in activities that would adversely affect competition and would violate the provisions of any statute of law in force or cause loss to public funds. Thus, OP-3 denied the allegation that it was a proxy bidder in the said tender and submitted that it had not contravened any of the provisions of the Act and there was no agreement between OP-1 and OP-3.

79. As regards allegation of the Informant that OP-3 did not submit the software before bidding and demonstrated the same at the technical bid stage, OP-3 submitted that the work plan and the application was explained to the client (OP-4) through a Power Point Presentation ('PPT'). OP-3 also annexed a copy of the PPT with its reply. It further mentioned that OP-4's exemption to OP-3 from the demonstration was completely OP-4's discretion and it had no arrangement with OP-4 in respect of such exemption. OP-3 also claimed that in case of a cartel, it would have been easier for OP-4 to have a presentation of three parties and then discard the bid of OP-3, if the bid was meant for a specific bidder.
80. Further, OP-3 submitted that there was no compulsion of attending a pre-bid meeting as the queries of pre-bid meeting were uploaded on the website for everyone to have a look. OP-3 had completed the Topography and GPS survey for the entire area including trees in the respective area in May 2015, but was yet to identify the trees by their classification in May-June 2015. Further, OP-3 had appointed a horticulturist to complete the survey, which took around 4-5 months to complete the work, so till August 2015, OP-3 was yet to complete the Tree census survey and hence was not in the race. It was only in November-December, 2015 when OP-3 had a clear picture of the Goregaon- Mulund Link Road (GMLR) project, that it was ready to bid for the project.
81. In view of the above submissions, OP-3 denied all the allegations made by the Informant and submitted that OP-3 and its officers were never involved in any activity



of bid rigging or collusive bidding that would adversely affect competition in India under Section 3 of the Act.

Submission of OP-4

82. OP-4 *vide* its reply dated 15.05.2019, submitted that it accepts the finding of the DG in the Investigation Report. It has adhered to all summons sent by the DG and that OP-4 had no involvement in bid rigging. Also the tenders were floated online keeping in place a committee that involved PricewaterhouseCoopers (PWC) as consultant. OP-4 further submitted that it followed all guidelines of tender and abided by all parameters set by Hon'ble High Court of Bombay that helped in carrying out Geo-enabled Tree Census of 40,09,623 trees using GIS & GPS Technology within the jurisdiction of OP-4 till date.

Submission of Informant:

83. The Informant submitted mainly in respect of the Investigation Report pertaining to the 'other major allegations made by Informant' which *inter alia* focused on collusion amongst OP-4 and other OPs. Informant submitted that collusion between OP-4 and OP-1 through OP-2 and OP-3 in Tender No. 338 of 2015, caused financial loss of over Rs 6,00,00,000/- to OP-4, as this collusion resulted in higher price for tree census. The Informant submitted that unilateral and unreasonable insertion of condition of "100 permanent employees on the pay roll of the company for 6 months" by OP-4 was to ensure that OP-1 wins the bid as no other prospective bidders had 100 employees and this was never a requirement in earlier tenders. Also, OP-4 jointly with OP-1 decided to qualify the proxy bidders *i.e.*, OP-2 and OP-3 who did not fulfil pre-qualification criterion including the said condition of 100 employees. Further, the Informant submitted that this condition eliminated Terracon from bidding in Tender No. 338 of 2015, which quoted Rs. 7.65/- per tree in earlier tender, with the same scope of work as was mentioned in Tender No. 338 of 2015. Due to elimination of Terracon from bidding process, OP-1 won the tender with quote of Rs 22.70/- per tree, thus the public



exchequer paid extra money equals to Rs 15.05/- per tree (*i.e.*, Rs. 22.70 minus Rs 7.65/-). If this amount were multiplied by the number of trees to be counted (40 Lakhs), it would come to Rs. 6,02,00,000/- loss to public exchequer which was on account of price fixing.

84. The Informant also submitted its response to OP-1's objection to Investigation Report on 23.04.2019. At the outset, the Informant submitted that OP-1 formulated its objections to the DG Report with a basic flaw of presuming that the cartel formed by it along with OP-2, OP-3 and OP-4 is a standard cartel of producers, sellers, distributors, traders or service providers formed to limit, control or attempt to control the production, distribution, sale or price of goods or provision of services. The Informant averred that the present matter was a case of a 'Non-Standard Cartel' as the proxy bidders, OP-2 and OP-3 were never in the business of the tree census and had at no occasion, before or after Tender No. 338 of 2015, taken part in any tree census tendering process, hence, were not eligible to be classified as members of a 'classic cartel'.
85. The Informant submitted that OP-4's act of shortlisting proxy bidders who did not satisfy the technical criteria, killed competition and ensured imposition of very high rate of choice of OP-1 in collusion with OP-4, enabling windfall profits to OP-1 and such "charity or friendship" was outlandish. The Informant averred that this system could possibility be of compensation, by sharing a fixed percentage of profits of successful bidder not only with unsuccessful proxy bidders but also with officials and office-bearers of OP-4 connected with approving the bids.
86. Informant stated that OP-1's allegation of malafide intention on part of the Informant is without foundation and based on wild imagination. Furthermore, the Informant claimed that this was the second case of collusive bidding in tenders of OP-4 that Informant brought to the Commission's notice. Informant stressed that it endeavours to bring transparency in governance and had launched two cases in the Hon'ble Supreme Court, four in Hon'ble High Court and two in Hon'ble National Green



Tribunal (NGT) in public interest and majority of them pertain to environmental issues. The Informant also submitted that it had filed an information before the Commission in the year 2015, viz. Case No. 50/2015, alleging bid rigging/ collusion in Tenders floated by the Pune Municipal Corporation during the period December 2014 to March 2015 for “Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s). The Commission *vide* its order dated 01.05.2018 found violation of provision of Section 3(3)(d) of the Act, in this matter against the OPs who were involved in the said case.

87. As regards allegation by OP-1 that Informant had submitted the information which was devoid of any basis in facts or law, the Informant submitted that it had supported each statement with documentary evidence which had been upheld both by the Commission and the DG through *prima facie* order and Investigation Report, respectively. The only difference between Informant’s submission and findings of the DG was with respect to composition of cartel as the Investigation did not find OP-4 liable under Section 3 of the Act, as being part of the cartel.
88. The Informant also stated that Terracon’s quote was confidential till the DG recorded it in the DG report dated 20.09.2018, however, Terracon’s participation was not secret as the tender process was online and open to public. As the Informant was earlier unaware of the existing competition between OP-1 and Terracon, it did not mention this motive for OP-1 to eliminate competition especially from Terracon. Nonetheless, OP-4’s condition of “100 permanent employees on the pay roll of the company for 6 months” removed the last vestige of competition in the impugned Tender No. 338 of 2015 and Terracon was prevented from participating in the said Tender process.
89. The Informant denied any knowledge of trade war between Terracon and OP-1 and vehemently denied that the present case is at the behest of Terracon. Furthermore, the Informant whilst denying the allegation of forum shopping, submitted that if the concerned authorities had taken cognizance of the Informant’s complaints, the



exchequer would not have faced a loss of close to Rs. 6,00,00,000/- and the tree census task would have been awarded to a competent company.

90. The Informant also submitted details of an email dated 22.01.2017 sent by it to Commissioner of OP-4, after the “hearing” on 21.04.2017, for irregularities committed in processing the tree census in Tender No. 338 of 2015. The Informant further claimed that it had given ample time and opportunity to OP-1 and OP-4 to mend procedural and other irregularities and that there was no delay of any kind after informing Commissioner of OP-4 to complete the “hearing process” by 15.02.2018. Thereafter, the Informant filed its complaint with the Commission within six weeks of this deadline.
91. Informant averred that OP-1 totally ignored the Investigation Report which conclusively brought out non-compliances with the tender terms and conditions by all the OPs. Informant further claimed that as only OP-1 could only participate in the final tender, it was proof enough to show creation of entry barriers in the market and that OP-1 has tried to divert the issues in hand.

Analysis by the Commission:

92. Before dealing with the merits of the case, the Commission shall first deal with the preliminary issue raised by OP-1. During the course of proceeding, the parties submitted that final hearing be not conducted in the matter by the Commission, in the absence of a judicial member being part of such hearing, in light of the judgment of the Hon’ble High Court of Delhi in the case of *Mahindra Electric Mobility Limited and Another Versus Competition Commission of India* (Judgment dated 10.04.2019 in Writ Petition No. 11467 of 2018). (‘Mahindra Case’).
93. The Commission in this regard places reliance on the order of the Hon’ble High Court of Delhi in W.P.(C) No. 6661/2019 (CADD Systems and Services Pvt. Ltd. case) wherein it has been held that the import of judgment in Mahindra Case cited above cannot be that the working of Commission be brought to a standstill until the judicial



member is appointed in the Commission. The Hon'ble Court did not interdict the functioning of the Commission pending such appointment. The Hon'ble Court also observed that as per Section 15 of the Act, orders passed by the Commission cannot be called in question on account of any vacancy or any defect in the constitution of the Commission. Further, the Hon'ble Supreme Court, vide its order dated 10.09.2018, passed in *K.R.Tamizhmani and Others v. The State of Tamil Nadu and Others* [M.A No.2217 of 2018 in T.C.(C) No.137/2015], clarified that '*till such time a reconstitution of the tribunal does not take place arising from a retirement of a member from the legal field, the existing Tribunal will decide all the cases*'. Therefore the Commission does not find merit in the objections raised by OP-1.

94. Having dealt with the preliminary issue, the Commission proceeds to deal with the case on merits.
95. Based on evidence collected by the DG in the Investigation Report, the Commission observes that there was a tacit understanding between OP-1 and OP-2 as well as between OP-1 and OP-3, pursuant to which OP-2 and OP-3 merely acted as proxy bidders or cover bidders for OP-1. Lack of proper scrutiny by OP-4 ensured that OP-2 and OP-3 could qualify in the technical round and be in the reckoning so as to benefit OP-1, to get the tender. If OP-2 and OP-3 were not eligible bidders, then the tendering process itself would have failed with there being no participants other than OP-1, which would have remained the lone bidder. Further, OP-1 by arranging the DD towards EMD for both OP-2 and OP-3, from its own coffers, and by facilitating submission of online bid of OP-3 from the computer systems located in its own office, ensured that sufficient number of bidders are available to participate in the tender. Also based on the evidence gathered by investigation, showing similarities observed in documentation, it can be strongly inferred that even the documentation for the bids was arranged by OP-1 and OP-2 as well as by OP-1 and OP-3, in concert with each other. The Commission also observes from the call detail records and screenshots of messages as contained in the Investigation Report that there was an understanding



between key officials of OP-1 and Late Preetam Singh Rathore, MD of ASTSPL in relation to submission of bids by OP-2.

96. The Commission notes that in the present case, OPs have not been able to counter the evidence against them in the Investigation Report, but have sought to take evasive objections to such report. It has not been denied in any manner that amount for EMD was arranged for OP-2 and OP-3, by OP-1, when, admittedly, both OP-2 and OP-3, had their own independent source of funds.
97. OP-1 contended that the DG has failed to show that alleged conduct of OP-1 created barriers to new entrants in the market. OP-1 further contended that quote of each of the OPs was independent as can be seen by the difference in such quotes. The Commission observes that mere possibility that there were other players is not a ground of defence to state that there are no barriers to entry. Explanation to Section 3(3) of the Act makes it clear that bid rigging even includes an agreement that has the effect of reducing competition for bids or adversely affecting or manipulating the process of bidding. Undoubtedly owing to the collusive conduct of the OP-1, OP-2 and OP-3, the process of bidding was manipulated and as such there is violation of the provisions of Section 3(3)(d) of the Act.
98. With respect to the submissions made by OP-3 that it was in constant touch with OP-1 and that the two OPs were trying to form a JV to bid in common, the Commission finds that such submission is merely an afterthought as no provisions have been found in Tender conditions, whereby any joint bid was specifically allowed through a JV. The Commission observes that even if the contentions of OP-3 were to be accepted that it placed its online bid at 10.42 AM on 29.01.2016, which was earlier in time than the bid placed by OP-1, by about 36 hours, OP-3 has not been able to satisfy as to why it used the same IP address of OP-1 to place its bid. This was when as per OP-3, *inter se* talks between them to form a JV to participate in the tender had failed on 29.01.2016. Further, the Commission notes, based on findings in the Investigation Report that OP-3 is an entity engaged in providing management, business consultant



service *etc*, running its business with full-fledged infrastructure and participating in tender for the past few years. In such a scenario it is not acceptable as to why OP-3 had to use the infrastructure of OP-1 to place its bid, instead of using its own infrastructure.

99. OP-1 has averred that no analysis of AAEC in India has been carried out by the DG to establish the alleged collusive conduct. In this regard, OP-1 has referred to the judgment of the Hon'ble Supreme Court in the case of *Competition Commission of India Vs. Coordination Committee of Artistes and Technicians of West Bengal Film and Television and Ors* ((2017) 5 SCC 17), (“Coordination Committee of WB Case”) wherein it has been observed that while inquiring into any alleged contravention, whether by the Commission or by the DG, determination of AAEC must be taken into consideration. In addition, OP-1 also referred to few past decisions of Commission, submitting that the DG should demonstrate as to how AAEC is caused by the alleged act of OP-1.
100. To deal with the aforementioned submission of OP-1, it is pertinent to take into account the relevant extract of “*Coordination Committee of WB Case*” (*supra*) in which the Hon'ble Supreme Court has dealt with agreements falling under Section 3(3) and has observed as under:-

“As can be seen from the bare reading of the aforesaid provision, sub-section (1) of Section 3 puts an embargo on an enterprise or association of enterprises or person or association of persons from entering into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of services which causes or is likely to cause an appreciable adverse effect on competition within India. Thus, agreements in respect of distribution or provisions of services, if they have adverse effect on competition, are prohibited and treated as void by virtue of sub-section (2). Sub-section (3), with which we are directly concerned, stipulates four kinds of agreements which are presumed to have appreciable adverse effect on competition. Therefore, if a particular



agreement comes in any of the said categories, it is per se treated as adversely affecting the competition to an appreciable extent and comes within the mischief of sub-section (1). There is no further need to have actual proof as to whether it has caused appreciable effect on competition. Proviso thereto, however, exempts certain kinds of agreements, meaning thereby if a particular case falls under the proviso, then such a presumption would not be applicable.”

Thus, it is clear from the above that if, the collusive conduct of the OPs falls within the provisions of Section 3(3) of the Act, it is presumed to have AAEC and no further analysis is required. Under the scheme of the Act, bid rigging or collusive bidding shall be presumed to have AAEC on competition if the case falls under Section 3(3)(a) – (d). Once such presumption is raised against the OPs in a matter, it is for them to rebut the same. In the present case, OP-1, OP-2 & OP-3 in the face of clinching and irrefutable evidence against them, have not been able to discharge the onus which lay upon them to rebut such presumptions. As aforementioned OPs have not been able to disprove the clear evidence that exists against them. Rather the thrust of OP-1 has been to exhibit shortcomings in the investigation report claiming that the DG has failed to examine the factors under Section 19(3) of the Act, and has not established AAEC. Hence, the Commission rejects the contention of OP that no analysis of AAEC has been carried out by the DG.

101. The Commission notes that the Hon’ble Supreme Court in its judgment in *Rajasthan Cylinders and Containers Ltd. v. Union of India and Another* (CA No. 3546 of 2014), has discussed the stage when the factors under Section 19(3) are required to be considered by the Commission in respect of agreements falling under Section 3(3) of the Act. The relevant excerpt from the judgment is produced below:

“73) We may also state at this stage that Section 19(3) of the Act mentions the factors which are to be examined by the CCI while determining whether an agreement has an appreciable adverse effect on competition under Section 3. However, this inquiry would be needed in those cases which are not covered by clauses (a) to (d) of sub-section (3) of Section 3. Reason is simple. As already



pointed out above, the agreements of nature mentioned in sub-section (3) are presumed to have an appreciable effect and, therefore, no further exercise is needed by the CCI once a finding is arrived at that a particular agreement fell in any of the aforesaid four categories. We may hasten to add, however, that agreements mentioned in Section 3(3) raise a presumption that such agreements shall have an appreciable adverse effect on competition. It follows, as a fortiori, that the presumption is rebuttable as these agreements are not treated as conclusive proof of the fact that it would result in appreciable adverse effect on competition. What follows is that once the CCI finds that case is covered by one or more of the clauses mentioned in sub-section (3) of Section 3, it need not undertake any further enquiry and burden would shift upon such enterprises or persons etc. to rebut the said presumption by leading adequate evidence. In case such an evidence is led, which dispels the presumption, then the CCI shall take into consideration the factors mentioned in Section 19 of the Act and to see as to whether all or any of these factors are established. If the evidence collected by the CCI leads to one or more or all factors mentioned in Section 19(3), it would again be treated as an agreement which may cause or is likely to cause an appreciable adverse effect of competition, thereby compelling the CCI to take further remedial action in this behalf as provided under the Act. That, according to us, is the broad scheme when Sections 3 and 19 are to be read in conjunction.”

102. Thus, the Commission notes that the applicability of factors under Section 19(3) arise for consideration by the Commission, only when the parties covered under Section 3(3) of the Act lead adequate evidence to rebut the presumption that exists against them under Section 3(3) of the Act.

103. The threshold of applicability of factors under Section 19(3) of the Act and for the Commission to thereafter examine from the prism of “*rule of reason*” as opposed to “*per se*” rule, requires that the party charged with has to give some evidence which is adequate enough to dispel the presumption against it. This requirement has to be satisfied before the Commission can be called upon to examine the conduct further



under Section 19(3) of the Act. Thus, invocation of factors under Section 19(3) is not axiomatic in case of conduct falling under Section 3(3) of the Act.

104. The Commission observes that in its defence the OPs, other than making some perfunctory remarks against the evidence, have not been able to give any evidence much less any adequate evidence to rebut the presumption that exists against them under Section 3(3) of the Act.
105. The Commission further observes that even if the factors under Section 19(3) of the Act, were to be examined, OP-1, has not been able to demonstrate as to how its impugned conduct has resulted in accrual of benefits to consumers or made improvements in production or distribution of goods/service in question or promotion of any technical, scientific and economic development by means of production or distribution of goods or provision of services. With regard to submission of OP-1, that there are no barriers to new entrants in the market, based on its conduct, the Commission observes that manipulation in the bidding process itself thwarts provision of goods and services by credible players, who lose out in the absence of conditions which foster competition. The whole tendering process itself, which has been impugned by the Informant, cannot be said to be without any blemish when OP-2 itself admitted that it may not have been eligible to submit the bid in the first place based on technical parameters, but it was for the OP-4 to have checked on its eligibility.
106. The Commission also notes that the Informant has submitted the collusion between OP-4 and OP-4 through OP-2 and OP-3 in Tender No. 338-2015 caused a huge financial loss of over Rs 6,00,00,000/- to OP-4 in the terms of higher price for tree census. The Informant has also submitted that this collusion amongst the OPs resulted in higher price to OP-4 due to elimination of Terracon from bidding process which quoted Rs 7.65/- per tree in Tender No. 250-2015 which was ultimately scrapped. *Per contra*, OP-1 has sought to justify the prices quoted by it, as being considerably low as compared to prices quoted by OP-2 and OP-3. The Commission observes that based on evidence such a comparison is not justified as OP-2 and OP-3 cannot be said to



have acted independently in submitting their bids, but they acted at the behest and instance of OP-1.

107. OP-1 has also relied on the decision of the Commission in Reference Case No. 07 of 2013, i.e., *In Re: Chief Materials Manager-I, and M/s Rajasthan Transformers and Switchgears and Ors*, wherein the DG examined the rates quoted by the bidders in the tenders floated by North Western Railways as well as in tenders floated in other railway zones during the relevant period on the basis of various factors viz., pattern of bidding, identical/similar pricing, abstinence from participating in tenders, relationship of key persons, cross shareholdings, use of common IP address etc. However, the Commission observed in the aforementioned case that mere quoting of identical/similar prices was not sufficient to establish that the bidders formed a cartel as there was neither any evidence of anti-competitive agreement nor any circumstantial evidence to establish tacit collusion amongst bidders. Therefore, no case of contravention was made out in the fact and circumstances of the said case. The Commission observes that, in the present case, no parallel can be drawn by OP-1 with the aforementioned decision of the Commission, as the evidence submitted by the DG after examination of Impugned Tender, reveals a discernible pattern, which points towards existence of an agreement or meeting of minds amongst the bidders to collude in the tender process.
108. The Commission also observes that in the year 2015, the Informant herein viz. Nagrik Chetna Manch had filed an information viz. *In Re Nagrik Chetna Manch and Fortified Security Solutions & Ors. (Case No. 50/2015)*, alleging bid rigging/ collusion in Tender nos. 34, 35, 44, 62 and 63 of 2014 floated by OP-4 during the period December 2014 to March 2015 for “Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s). The Commission after hearing the parties in the said case, had concluded that there was meeting of minds and co-ordination between various individuals which included proprietor/ partners/ directors of the OP firms in the said case to rig the bids by



submitting proxy/ cover bids to enable one company to emerge as L1 bidder in all the five bids in the said case.

109. The Commission, having regard to the facts and material on record, notes that the facts of this case are similar to the facts of Case No. 50/2015. Further the Commission in its aforementioned decision had made some observations in relation to the procurement process by Pune Municipal Corporation (OP-4 herein) which are germane to the present proceedings as well and is extracted below:

“89. With respect to the role of OP-3, it is noted that the DG has found evidence, which shows that OP-3 failed to detect cartelisation in its own tenders. Evidence such as uploading of one of the tenders by OP-2 from the IP address of OP-3, call data records of communication between some of the officials of OP-3 with the L1 bidder and other systemic failures on part of OP-3 indicate that the conduct of OP-3 may have facilitated bid-rigging in these five tenders.

90. It is clear from investigation that OP-3 did not exercise due diligence while scrutinizing the bid documents. Even though there were several apparent indications of collusion like same IP addresses, common proprietor/ director, same office address, consecutive serial number for DDs etc., these were not taken into consideration by OP-3 while determining the eligibility of the bidders. Further, in Tender no. 62 and 63, OP-5 was considered an eligible bidder despite the fact that it neither had requisite experience in solid waste management, as required under tender conditions, nor had been authorized to supply composting machines by any manufacturer. Thus, there are glaring acts of omission and commission on part of OP-3, which intentionally or otherwise aided the bidders in cartelisation. However, this conduct cannot be said to be in contravention of the provision of Section 3(3)(d) of the Act and, thus, OP-3 cannot be held liable under the provisions of Section 3 of the Act.”



110. With respect to the role of OP-4, the Commission notes that the DG has found enough evidence, which shows that OP-4 failed to detect cartelisation in its own tender process. Shortlisting proxy bidders who did not satisfy the technical criteria, and other systemic failures on the part of OP-4 indicate that the conduct of OP-4 may have facilitated bid-rigging in this impugned tender. The Investigation Report shows that even though there were several apparent indications of collusion like common IP addresses, similarity of mistakes in document submitted by parties in support of their bid *etc.*, these were not taken into consideration by OP-4 while examining the bid. This lack of due diligence while scrutinising bid documents may have aided the bidders in cartelisation. However, OP-4 being a procurer, the conduct of OP-4 need not be examined under the provisions of Section 3 of the Act, in the present matter.
111. So far as the individual liability of the person(s)/ officer(s) under Section 48 of the Act is concerned, the Commission notes that the DG has identified: (i) Mr. Arun Rao, Director OP-1, (ii) Mr. Ajay Rao, Director of OP-1, (iii) Mr. Pankaj Bobra, Managing Director of OP-2, and (iv) Mr. Chetan Pathare, Director of OP-3 liable under the provisions of Section 48(1) and 48(2) of the Act. The role and liability of these individuals are discussed below:

(i) Mr. Arun Rao, Director, OP-1

The DG found Mr. Arun Rao responsible for the affairs and conduct of OP-1, as he being one of the directors of OP-1, was in-charge of all functions, particularly related to marketing, business development and liaising with external parties. Moreover, Mr Arun Rao was unable to demonstrate that the contraventions occurred without his knowledge. Thus, the DG found him liable under Section 48 (1) of the Act. Further, Investigation found that Mr Arun Rao got a DD prepared through Mr Sunil Kapri, Director, QSEAP Infotech Pvt Ltd. from the funds transferred from OP-1 which was provided to OP-2 to submit as EMD. He was actively involved in preparation and submission of bids by OP-1. Thus, Mr. Arun Rao was also found responsible for cartelisation and found to be liable by the DG under Section 48(2) of the Act. The



Commission is in agreement with the DG as the investigation found sufficient evidences to establish active participation and collusive arrangement by Mr Arun Rao in the present case. Thus, Mr Arun Rao is guilty under Section 48 (1) and 48 (2) of the Act, for his active involvement in the anti-competitive conduct of OP-1.

(ii) Mr Ajay Rao, Director, OP-1

As per the statement taken by the DG, Mr Ajay Rao, Director of OP-1 was looking after day to day operations in the Company which includes office management, bank transactions and HR functions. Therefore, Mr. Ajay Rao was found responsible by the DG for the affairs and conduct of OP-1 and held liable under Section 48 (1) of the Act as he has not been able to prove that the contraventions occurred without his knowledge or that he had taken adequate precautions to obviate anti-competitive activities by OP-1. Further, investigation found that Mr. Ajay Rao had frequent telephonic conversations with Mr. Abhishek Sharma of OP-2 who was involved in bidding process in the impugned tender. The DG also found that Mr Ajay Rao provided the bid documents in soft form to OP-3 for filing the impugned tender. Moreover, his phone number was mentioned by OP-3 in its tender form. Thus, he was actively involved in preparation and submission of bid of OP-1. The Commission finds these evidences enough to hold Mr. Ajay Rao liable under Section 48 (1) as well as 48(2) of the Act, for his active involvement in the anti-competitive conduct of OP-1.

(iii) Mr. Pankaj Bobra, Managing Director of OP-2

Mr Pankaj Bobra being the Managing Director of OP-2 accepted before the DG that he was over all in charge of all the functions of OP-2 which includes filing of bid document under his digital signature, and the DG held that Mr. Pankaj Bobra is liable under Section 48 (1) of the Act as he has not been able to prove that the contraventions occurred without his knowledge or that he had taken adequate precautions to obviate anti-competitive activities by OP-2. Further, Mr. Bobra, admitted that he filed bid for OP-2 in the impugned tender wherein the bid documents had glaring similarities with



the bid documents of OP-1. He also submitted that he got DD prepared from OP-1 to submit as EMD in the impugned tender. The investigation also found evidences of phone messages between Mr. Bobra and Late Preetam Singh Rathore, link person between OP-1 and OP-2, wherein Mr Bobra was asked to provide certain documents required for the impugned tender. Agreeing with the DG, in the light of the above evidences, the Commission holds Mr Bobra guilty under Section 48(1) as well as 48 (2) of the Act, for his active involvement in the anti-competitive conduct of OP-2.

(iv) Mr. Chetan Pathare, Director of OP-3

In his statement on oath before the DG, Mr. Chetan Pathare, Director of OP-3 accepted that he was over all in charge of business development related to infrastructure projects in which tree census project fall, and for filing of bid document under his digital signature. Therefore, the DG found Mr. Pathare to be liable under Section 48 (1) of the Act as he has not able to prove that the contraventions occurred without his knowledge or that he had taken adequate precautions to obviate anti-competitive activities by OP-3. Further, investigation found that Mr. Chetan Pathare submitted two DDs at different stages of impugned tender as EMD in the bid of OP-3. Investigation also found similarities in tender form including phone number of Director of OP-1 mentioned in the bid documents of OP-3. The Commission notes that Mr. Pathare was actively and directly involved in preparation and submission of bid of OP-3, which was collusive in nature. The Commission is therefore, in agreement with the findings of the DG in relation to role of Mr. Pathare in bid rigging and finds him liable under Section 48(1) as well as 48 (2) of the Act.

Order

112. In view of the findings recorded by the Commission, OP-1, OP-2, and OP-3 are directed to cease and desist from indulging in such anti-competitive conducts which have been found to be in contravention of the provisions of the Act.



113. As regards the penalty to be imposed under Section 27 (b) of the Act, the Commission finds that OP-1, OP-2, and OP-3 entered into an arrangement to rig the bids pertaining to Tender No. 338 of 2015 floated by OP-4 for ‘ Selection of agency for carrying out geo-enabled tree census using GIS & GPS Technology’, as brought out hereinabove, and are, hence, responsible for infringement of the provisions of Section 3(3)(d) read with Section 3(1) of the Act and are liable to be penalised.
114. With regard to the submission of OP-1 that if the Commission decides to impose penalty on OP-1, the quantum of penalty should be determined based on turnover arising out of the impugned tender and should not be based on total turnover, the Commission does not find any merit in the said submission as very narrow interpretation of relevant turnover has been made by the said OP. Further, OP-1 submitted that mitigating factors submitted by it should be taken into account while imposing penalty, if any, on it. In this regard, the Commission notes that meticulous planning and execution was done by OP-1 at each stage in coordination with OP-2 and OP-3 to submit the bid and bag the tender by all means. This conduct of OP-1 demonstrates that it has scant regard for the public procurement process and the manner in which it rigged the tender suggests that OP-1 had acted with malafide intention from the very beginning. The Commission thus dismisses the plea of OP-1. OP-2 and OP-3 have not cited any specific mitigating factor in their defences.
115. Thus, considering the facts and circumstances of the present case, the Commission decides to impose penalty on OP-1, OP-2 and OP-3 under Section 27(b) of the Act by taking into consideration the financial statements filed by the said OPs at the rate of 10 % of the average turnover for three financial years *viz*, 2015-16, 2016-17, and 2017-18, through revenue from operations. The same is set out below in respect of OP-1, OP-2 and OP-3:



(Amount in Rs. Crore)

S. No	Opposite Parties	Turnover for FY 2015-16	Turnover for FY 2016-17	Turnover for FY 2017-18	Average Turnover for 3 Years	10 % of average Turnover (approx.)
1.	SAAR IT Resources Pvt. Ltd. (OP-1)	13.31	10.38	14.16	12.61	1.26
2.	CADD Systems and Services Pvt. Ltd. (OP-2)	1.01	1.05	1.18	1.08	0.11
3.	Pentacle Consultants (I) Pvt. Ltd. (OP-3)	9.48	16.47	14.05	13.33	1.33

116. As the Commission has already held that the impugned acts/conduct of OP-1, OP-2 and OP-3 are in contravention of the provisions of Section 3(1) read with section 3(3)(d) of the Act, the liability of the persons in-charge of such OPs flows vicariously from the provisions of section 48 of the Act. In terms of the provision of Section 48 of the Act are concerned, the Commission has found Mr. Arun Rao, Director of OP-1, Mr. Ajay Rao, Director of OP-1, Mr. Pankaj Bobra, MD of OP-2, and Mr. Chetan Pathare, Director of OP-3 liable under Section 48 (1) as well as 48(2) of the Act.

117. Resultantly, considering the totality of the facts and circumstances of the present case, the Commission decides to impose penalty on these four individuals in terms of Section 27 (b) of the Act at the rate of 10 % of average of their income for last three preceding financial years as follows:

(Amount in Rs.)

S. No	Individuals	Income for FY 2015-16	Income for FY 2016-17	Income for FY 2017-18	Average Income for 3 Years	10 % of Average Income
1.	Mr. Arun Rao, Director of OP-1	15,48,905	15,87,137	40,71,701	24,02,581	2,40,258
2.	Mr. Ajay Rao, Director of OP-1	10,07,883	13,15,417	27,55,653	16,92,984	1,69,298
3.	Mr. Pankaj Bobra, MD of OP-2	7,23,554	7,64,484	9,10,735	7,99,591	79,959
4.	Mr. Chetan Pathare, Director of OP-3	4,85,400	6,66,133	5,88,300	5,79,944	57,994



118. The Commission directs the parties to deposit the respective penalty amount within 60 days of receipt of the order.

119. Secretary is directed to communicate the order to the parties, accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(U. C. Nahta)
Member

Sd/-
(Sangeeta Verma)
Member

New Delhi
Dated: 02.08.2019