



**COMMISSION OF INDIA
Reference Case No. 06 of 2013**

In Re:

**Deputy Chief Materials Manager,
Rail Coach Factory,
Kapurthala**

Informant

And

1. **M/s Faiveley Transport India Limited
P. B. No. 39, Harita,
Hosur, Tamil Nadu**

Opposite Party 1

2. **M/s Knorr Bremse India Private Limited
14/6, Mathura Road,
Faridabad, Haryana**

Opposite Party 2

CORAM

**Mr. Ashok Chawla
Chairperson**

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

**Mr. Sudhir Mital
Member**

**Mr. Augustine Peter
Member**

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

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



Appearances:

For the Informant: Sh. D. K. Kingra, Deputy Chief Materials Manager, Rail Coach Factory, Kapurthala.

For the Opposite Party 1: Sh. Guru Krishnakumar, Senior Advocate, Ms. Nisha Bagchi, Ms. Sujeeta Srivastava, Ms. Pooja Sharma, Ms. Sneha Iyer, and Sh. S. K. Mongia, Advocates, Sh. N. Mahadevan, Sh. N. S. Prakash, Sh. Shantilal Jain and Sh. Gurudev Singh.

For the Opposite Party 2: Sh. A. N. Haksar, Senior Advocate, Sh. Pawan Sharma, Sh. Anuj Shah, Ms. Chitra Y. Parande, Advocates, Sh. Ajay Gupta, Sh. G. K. Gupta and Sh. R. N. Shukla.

Final Order

The present reference has been filed before the Commission under section 19(1)(b) of the Competition Act, 2002 (hereinafter referred to as '**the Act**') by the Deputy Chief Materials Manager, Rail Coach Factory (RCF), Kapurthala (hereinafter referred to as the '**Informant**') against M/s. Faiveley Transport India Ltd. (**the Opposite Party 1/OP 1**) and M/s. Knorr Bremse India Pvt. Ltd. (**the Opposite Party 2/OP 2**) collectively referred to as 'the Opposite Parties or OPs'. It has been alleged that the Opposite Parties have colluded between themselves and quoted identical prices in various tenders floated by the Informant for supply of Axle Mounted Disc Brake System (AMDBS) required for Linke-Hofmann-Busch (LHB) Design AC and Non-AC coaches and Power Cars. The Informant has alleged that the conduct of OPs is in violation of the provisions of section 3(1) read with section 3(3)(d) of the Act.



2. Brief Facts and Allegations

- 2.1 The Informant is the Deputy Chief Materials Manager, RCF, Kapurthala which is a unit of Indian Railways that manufactures rail coaches. The Informant procures 2 types of AMDBS which is used in LHB Design AC/Non-AC coaches and Power Cars.
- 2.2 OP 1 is stated to be a wholly owned subsidiary of Faiveley Transport Malmo AB, Sweden which has its registered office at Hosur in Tamil Nadu and another unit at Baddi in Himachal Pradesh. It is engaged in the business of manufacturing and supply of a number of products to Indian Railways which includes brake systems, couplers, pantographs *etc.*
- 2.3 OP 2, a wholly owned subsidiary of Knorr Bremse Group of Germany, has its registered office and unit at Palwal, Haryana. It is engaged in the business of manufacturing and supply of a wide range of products to Indian Railways.
- 2.4 It has been submitted that AMDBS is used in LHB Design AC/Non-AC coaches and Power Cars. AMDBS is a critical safety item and is different from the conventional braking system which is used in railway coaches. AMDBS for ALSTOM LHB design AC/Non-AC coaches as per PL 33501427 specification is referred to as **Item 1**. AMDBS for ALSTOM LHB design Power Car coaches as per PL 33501439 specification is referred to as **Item 2**. As per the information, AMDBS is procured by Indian Railways by way of floating open tender. Only two firms i.e. OP 1 and OP 2 have the expertise and technology to manufacture these items. The quantity to be procured is normally split between both OPs as per



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guidelines laid down by the Railway Board to ensure regular and uninterrupted supply.

2.5 It is submitted that the Informant floated a tender for purchase of braking systems for Item 1 and Item 2 which were opened on 01.10.2010 (hereinafter referred to as the '**Regular Tender 1**'). OP 1 and OP 2 were found to be suitable for regular orders as per the conditions laid down in the said tender. OPs quoted different rates for the said tender. After the tender was opened, negotiations took place with OP 2, the lowest acceptable bidder and following rates were offered by OP 2:

a) Item 1 – Rs. 21, 64,111.74 (inclusive of duties and taxes).

b) Item 2 – Rs. 28, 42,682.64 (inclusive of duties and taxes).

2.6 The proposal with recommendations of the Tender Committee was submitted to the Railway Board on 23.05.2011 to obtain the approval of the Competent Authority i.e. Minister of Railways. However, owing to urgent requirement of the items for production of LHB coaches, an Emergency Purchase Tender (hereinafter referred to as '**EP1**') for three months' requirement was opened on 13.06.11. The rates quoted by both OPs for Item 1 and 2 in EP1 were allegedly identical and the Informant claims to have placed the order for 50% of the tender quantity on each of them on the said price for both items.

2.7 Another Emergency Purchase Tender (hereinafter referred to as '**EP2**') was floated and opened on 24.08.2011. It is averred that OPs again quoted identical rates for both the items. The Informant placed orders for 50% quantity to each OP 1 and OP 2 on the quoted price. Thereafter, another emergency purchase tender (hereinafter referred to as '**EP3**') required for three months was opened on 08.12.2011. The rates quoted in EP3 tender



were also alleged to be same/identical. However, the Tender Committee found the alternate offer made by OP 1 in EP3 (i.e. alternate offer with a lower price with indigenisation) to be technically suitable and recommended placing of 60% quantity of order on OP 1 and 40% on OP 2 for Item 1. For Item 2, the rates offered by OPs were same and Tender Committee recommended placing 50% quantity to each OP 1 and OP 2.

- 2.8 Thereafter, a regular tender was floated by the Informant which was opened on 30.01.2012 (hereinafter referred to as '**Regular Tender 2**'). The rates quoted by OP 1 and OP 2 in Regular Tender 2 were:

Description	Firm	Rate/Price quoted (all inclusive)
Item 1	OP 1	Rs. 23,48,708.25
	OP 2	Rs. 23,61,113.53
Item 2	OP 1	Rs. 31,87,779.00
	OP 2	Rs. 32,02,080.29

- 2.9 Further on 21.05.2012, another emergency tender was opened (hereinafter referred to as '**EP4**'). The rates quoted and rates at which orders were placed were as under:

Emergency Tender No. 2405110731 opened on 21.05.2012 (EP4)

Description	Firm	Rate/price quoted (all inclusive)	Rate/price at which orders placed on 06.06.2012 (all inclusive)
Item 1	OP 1	Rs. 23, 48,708.25	Rs. 22,81,685.69 (counter offer made and accepted)
	OP 2	Rs. 23,00,719.95	Rs. 22,81,685.69 (counter offer made & accepted)



Item 2	OP 1	Rs. 31,87,779.00	Rs. 30, 37,292.71 (counter offer made and accepted)
	OP 2	Rs. 30, 37,292.71	Rs. 30, 37,292.71

2.10 Since, the price quoted by OP 1 and Op 2 were identical in the various emergency tenders, the Tender Committee asked OPs on 17.08.2012 to provide details like cost break-up, percentage of imported components and proforma invoice of imported components for both the items i.e. Item 1 and Item 2 for the regular tenders opened on 01.10.2010 and 30.01.2012. OPs, however, did not provide any details to the Informant.

2.11 Another Emergency Purchase Tender (hereinafter referred to as ‘EP5’) was opened on 28.08.2012. The participating firms were specifically required to submit detailed cost break-up, country of origin of imported components, the Original Equipment Manufacturer (OEM) and also proof of percentage of import content, but this information was also not provided by OPs. After negotiations, the lowest bidder for EP5 i.e. OP2 reduced its price to Rs.22,69,365 for Item 1 and Rs.30,19,864 for Item 2. The Informant placed orders on OP 2 and OP 1 for both the items in the ratio of 60:40.

2.12 Based on the above facts, the Informant alleged that OPs have colluded between themselves for three consecutive emergency tenders i.e. EP1, EP2 and EP3 for purchase of Item 1 and Item 2 in the year 2011. The Informant alleged that OPs created a cartel and shared the quantity for supply of these items, taking undue advantage of the limited competition as well as the fact that railway coaches cannot be manufactured without the brake system. The Informant has further submitted that OP 1 and OP 2



never submitted the information solicited by it *i.e.*, cost break-up, justification for quoted rates, Price Variation Clause (PVC), submission of *pro-forma* invoice for imported component of the product *etc.* which made it difficult for the Informant to assess the reasonableness of the rates quoted by OPs in the tenders.

2.13 As such, the Informant has alleged that the cartel of OPs has reduced competition and violated the provisions of section 3(3)(d) read with section 3(1) of the Act.

3. DG's Investigation and Findings

3.1 The Commission *vide* its *prima facie* order dated 29.11.2013, passed under section 26(1) of the Act, directed the DG to investigate the case and submit a report. Accordingly, the DG submitted its investigation report on 03.03.2015.

3.2 The primary allegation was that OPs have indulged in collusive bidding for supply of Item 1 and Item 2 to the Informant in EP1, EP2 and EP3. It was further alleged that OPs refused to reduce the price of the items during regular purchase but reduced and quoted identical price in emergency tenders. Despite requests made by the Informant, OPs did not provide information related to the cost break-up, extent of imports *etc.* During investigation, the DG sought details about the tenders floated during previous years, prices quoted by the OPs and status of previous tenders. The Informant provided details of tenders from the year 2005 *vide* letter dated 11.11.2014. The findings and observations of the DG are briefly discussed in the succeeding paragraphs.



- 3.3 To investigate the allegations, the DG examined as to whether OPs have indulged in collusive bidding in tenders floated by the Informant for supply of Item 1 and Item 2, thus violating the provisions of section 3(1) read with section 3(3)(d) of the Act.
- 3.4 The DG observed that the conventional bogies/coaches of passenger trains were designed for speed upto 110 km/h and used Bogie Mounted Tread Brake System (BMTBS) in which the brakes are fitted on every wheel of the train including the locomotive and the brake blocks press against the wheels to stop it. Around 1995, locomotives with speed more than 110 km/h were introduced in India and for these locomotives, LHB design coaches were initially imported from Germany. As compared to BMTBS, in AMDBS used in LHB coaches, a brake system is mounted on the axle and instead of the wheel it is the brake that squeezes the disc attached with the wheel, similar to the disc brakes in two wheelers and cars. The German LHB coaches came fitted with AMDBS of Knorr Bremse (Germany). Gradually, Indian Railways started manufacturing these LHB coaches in India under technology transfer and OP 2 supplied the brake system to Indian Railways as a sole supplier. Around the year 2000, OP 1 also became eligible to participate in the tenders for brake systems. The LHB coaches use axle mounted disc brake system which is not substitutable with other brake systems.
- 3.5 The DG opined that the relevant product market is the market of manufacturing and supply of AMDBS for Item 1 and Item 2. The technology used in LHB, which is used for high speed trains like Rajdhani, Shatabdi and Duranto, is different from braking system used in conventional coaches. The product design is duly approved by the Research Design and Standard Organization (RDSO) of Indian Railways.



3.6 While analysing the size of AMDBS market in India, the DG considered the procurement of the AMDBS by Indian Railways which is as under:

Year	Item 1	Item 2	Tender value (in Rs. Cr.)
2005	147	19	40.82
2007	86	13	19.56
2008	130	23	32.27
2009	201	28	49.80
2010	325	47	87.95
2011	449	60	113.72
2012	638	88	171.56
2013	176	17	44.97
2014	197	0	45.07

3.7 The DG also looked into the procurement system of Indian Railways. It was observed that Informant is the largest manufacturer of LHB coaches for Indian Railways. The AMDBS, for Item 1 and Item 2, are being supplied by OPs. The Informant floats following types of tenders:-

- (a) Single Tender – For PAC/PSU/ Emergency procurement
- (b) Limited Tender- Where estimated value of purchase is up to Rs.10 Lakhs.
- (c) Advertised Tender – Where estimated value of purchase is above Rs 10 Lakhs
 - i) Global Tender
 - ii) Indigenous Tender
- (d) Special Limited Tender - For urgent procurement up to Rs.5 Crores.



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- 3.8 Procurement by the Informant is through e-tendering, in which the approved/ regular vendors are allowed to participate and upload their offers on the railway website on or before the due date. After the closing of tender, the tenderers can access the result on the same day after quotes by various tenderers are opened and displayed on the website and therefore, prices quoted by the competitors are known to each other. The result in the form of tabulation sheet is available to the tenderers who participated in the bidding.
- 3.9 The DG has mentioned in the report that in Railway Tenders, in general, and in tenders floated by the Informant for AMDBS for both the Items, certain conditions are imposed on the prospective participants. Some of the important conditions are:
- i) **Procurement from Approved Sources:** Indian Railways generally procure critical and safety equipment /items certified by the agencies such as RDSO, Production Units (PUs), Central Organization for Railway Electrification (CORE) at Allahabad) *etc.* These approving agencies periodically publish list of vendors. The list of vendors approved by these agencies is divided into initial and regular categories. The firms in the initial category possess requisite infrastructure but their capability to produce the quality material consistently giving satisfactory service life in the field is yet to be established. The firms in the regular category possess requisite infrastructure to produce quality equipment consistently coupled with regular monitoring of quality. Bulk of supply order i.e. 75% to 85% is given to the vendors in regular category. In the present case, OP 1 and OP 2 were regular suppliers and had been supplying Item 1 and 2 to the Informant from the year 2000 onwards. In an attempt to increase its supply



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base from other sources, the Informant incorporated certain conditions for new firms who were keen to participate in the tender process.

- ii) **Quantity Variation Clause:** The Informant and Indian Railways usually put 'Quantity Option Clause' in their tenders which generally provide that variation is allowed to the extent of +/- 30% till the completion of contractual delivery period of one year. If there is an upward trend in the price post-contract, then Railways resort to +30% option clause and if there is a downward trend in price then Railways resort to -30% during the delivery period.
- iii) **Supply orders placed on more than one Supplier:** In order to ensure regular and uninterrupted supply of safety and critical equipments required for the production of the coaches, the quantity to be procured is usually split between the regular suppliers. As per the Central Vigilance Commission (CVC) guidelines issued *vide* circular No. 4/3/07 dated 03.03.2007, in cases where the organizations decide in advance to have more than one supplier, the ratio of splitting the quantity must be disclosed in the tender itself. Accordingly, in the railway tenders, the ratio of quantity to be split is pre-decided on the basis of rate differentials of L1 and L2. The CVC guidelines further provide that there should be no post-tender negotiations with L1, except in certain exceptional situations like procurement of proprietary items, items with limited source of supply and items where there is suspicion of cartel.
- iv) **In-house Mechanism to deal with Cartel:** The DG had further pointed out that Indian Railways have devised a special mechanism for dealing with cartels in procurement tenders. The documents provided by the Informant revealed that the Railway Board received a large number of



references from Railways/Production Units regarding cartel formation by approved vendors and consequent substantial increase in rates quoted in tenders. In most of the cases, the participants were not willing to negotiate the prices. Railway Board *vide* letter No 2001/RS (G)/779/4 dated 05.08.2002 issued certain guidelines to its Zones and Production Units for dealing with cartels.

3.10 After looking into the conditions imposed by the Railways on the prospective participants in the tenders, the DG examined each and every tender *i.e.* regular as well as emergency tenders floated by the Informant. For the sake of brevity, the details of the tenders and prices quoted by the Opposite Parties for each item in each tender are discussed in a concise manner as provided below:

	Item 1		Item 2		Observations / Remarks
	OP 1	OP 2	OP 1	OP 2	
EP1 dated 13.06.2011	Rs. 21,64,111.74	Rs. 21,64,111.74	Rs. 28,42,682.64	Rs. 28,42,682.64	Same prices quoted
EP2 dated 24.08.2011	Rs. 21,64,111.74	Rs. 21,64,111.74	Rs. 28,42,682.64	Rs. 28,42,682.64	Same prices quoted
EP3 dated 08.12.2011	Rs. 21,64,111.74 (Alternative offer with more indigenization Rs. 21,35,730.24)	Rs. 21,64,111.74	Rs. 28,42,682.64	Rs. 28,42,682.64	Same prices quoted. After negotiations, both parties agreed to offer @ rate of Rs. 21,35,730.24



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- 3.11 The DG has pointed out that OPs were the only two eligible and regular suppliers for Item 1 and Item 2. Both the items procured by the Informant were critical safety equipment and were essential for manufacturing of railway coaches. DG opined that apparently OPs took undue advantage of limited competition in the market and formed a cartel to share quantities procured by the Informant. The DG further deduced the existence of cartel between the OPs by their conduct *i.e.* refusal of OPs to reduce the price of items offered in the regular tenders but simultaneously reducing and quoting identical prices in EP1, EP2 and EP3, sharing of quantities and non-furnishing of information to the Informant on import content and OEM, cost break-up, *pro-forma* invoices of import content, PVC *etc.*
- 3.12 The DG has further noted that due to the peculiar features of the Item 1 and Item 2 involved in the present case, the market was conducive for cartelisation. The process of bid rigging gets facilitated when certain supporting factors like market conditions, small number of suppliers, entry barriers, identical products, lack of substitutes *etc.* are present.
- 3.13 On the basis of foregoing, the DG opined that OP 1 and OP 2 indulged in bid rigging by quoting identical rates in three successive emergency tenders in the year 2011 floated by the Informant. The DG found the conduct of OP 1 and OP 2 to be in contravention of section 3(3)(d) read with section 3(1) of the Act.



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4. Reply/Objections of the Parties

4.1 Reply/objections of OP 1 in response to the DG report

4.1.1 OP 1 stated in its submissions that for manufacture and supply of AMDBS for Item 1 and Item 2 to the Informant, there are no RDSO approved vendors except OP 1 and OP 2.

4.1.2 It was further stated that Indian Railways is the sole buyer for these two items and OPs are at a receiving end in the tender process. OP 1 has stated that even though tenders are floated to procure the brake systems, in practice, the tenders were only to identify the lowest bidder. Further, Indian Railways being the sole monopolistic buyer of these brake systems were alleged to have immense bargaining capacity.

4.1.3 It was alleged that the tender process is used only as price discovery mechanism to find out the lowest bidder with which Indian Railways further negotiates the price. Neither is the lowest bidder awarded the supply for full tender quantity nor is the price quoted by such lowest bidder accepted without further negotiation. Therefore, it was urged that there is no sanctity of the price quoted in such tenders.

4.1.4 It was further contended that there being only two suppliers for Item 1 and Item 2, namely OP 1 and OP 2, both the bidders were aware that they will get at least 30%-40% of tender quantity and lowest bidder would not get orders above 60-70% of tender quantity. Even before issuance of a tender, discussions are held between Railways and OPs who do not have any say in the final prices offered by the Railways after negotiation.



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4.1.5 As regards the allegations of cartelization, OP 1 has stated that no such inference of collusion can be drawn between the two Opposite Parties. The prices quoted by OP 1 in EP1 for both items was claimed to be done at the informal suggestion of the Informant. OP 1 submitted that since the purpose of emergency tenders is to meet the immediate intermediate demand between regular tenders, the officials of the Informant informally communicated to OP 1 to quote the negotiated rate of Regular Tender 1 so that the unnecessary delay in conducting negotiation can be avoided. It was further submitted that the minutes of Tender Committee meetings with respect to EP1, EP2 and EP3 did not contain any allegations of cartelization which further shows that there was an informal understanding between Informant and OP 1. OP 1 further highlighted that in fact the Tender Committee recommended the rates quoted by OP 1 and OP 2 to the Railway Board as reasonable and competitive. It was also alleged that allegations of collusion by OP 1 and OP 2 were raised in September 2012 only as an after-thought, when the Opposite Parties refused to furnish costing details to the Informant. OP 1 submitted that providing cost details may expose the same to its competitors, leading to serious harm to its business.

4.1.6 OP 1 also mentioned that in spite of having an in-built mechanism to counter/detect cartel behaviour in the tender process in the form of Clause 12 in the General Conditions of Contract, Indian Railways did not take recourse to such mechanism. Clause 12 categorically states that if any cartel is detected, the offer of the contravening bidder may be rejected. Had Indian Railways or Tender Committee suspected collusive bidding by OP 1 and OP 2, they should have rejected their bids in EP1, EP2 and EP3.



- 4.1.7 It was also contended that the market is highly competitive with two suppliers i.e. OPs and one buyer i.e. the Informant. OP 1 further submitted that the Tender Committee which finalized Emergency Tender 1 was fully conversant with the factual background and did not raise any objection on identical prices quoted by OPs. The Tender Committee is claimed to have made following verbal suggestions/recommendations to OP 1 before the opening of EP1:
- i) That OP 1 should proceed with material procurement and manufacturing of the disc brakes in anticipation of EP1 so that the time for delivery after placement of order could be minimized.
 - ii) That the Informant decided to distribute the tender quantity on 50:50 basis so as to simultaneously obtain supply on urgent basis.
 - iii) That OP 1 should quote the same price as has been negotiated between the Informant and OP 2 on 12.05.2011 in respect of Regular Tender 1 referred to the Railway Board since that would obscure possibility of time wastage in price negotiations.
- 4.1.8 OP 1 submitted that in view of the abovesaid recommendations, it modified its quote on 13.06.2011 for both the items. OP 1 has also highlighted that, although an emergency tender takes three to six months, in case of EP1, EP2 and EP3 the process was expedited for which relevant recommendations were informally given by the Informant. OP 1 and OP 2 were given only 7 days time to give an offer, decision on the tender was taken within 16 days and the delivery period was to start immediately and supplies to be completed in three equal monthly lots. OP 1 further submitted that it is evident that the entire process of inviting tenders had virtually lost its character of inviting independent price bids from the suppliers. The submission of bids was a mechanical formality requiring no



application of mind/calculations. It was contended that the element of secrecy is largely absent in such tenders as the interest of Railways is primarily the uninterrupted availability of spares/parts and the quoted price is subject to negotiations and final price determined by the Railways.

4.1.9 OP 1 has submitted that there is no direct evidence to prove any kind of collusion between OP 1 and OP 2. OP 1 has placed reliance on few decisions of the Competition Appellate Tribunal regarding cases of bid rigging.

4.1.10 On the basis of the above, OP 1 requested that the findings of the DG be dismissed as incorrect and baseless.

4.2 Reply/objections of OP 2 in response to the DG report

4.2.1 OP 2 has submitted that the present case is a case of oligopoly wherein there are only two suppliers, supplying products which are identical in nature and are perfect substitutes for each other. It was urged that in such cases, price parallelism can occur between firms even though they have not colluded. OP 2 also submitted that the reason for filing of the present reference by the Informant was the refusal on the part of OPs to submit confidential information on cost break-up to the Informant. OP 2 submitted that costing of a product is confidential business information and there is a risk of disclosure to the competitors. It was contended that OPs had removed the price variation clause not because of any collusion but because of the informal suggestion given by the Informant. OP 2 has further stated that the present reference has been filed by the Informant so as to obtain cost details of OP 2 and has been initiated in bad faith.



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- 4.2.2 It was contended that the price in EPs 1, 2 and 3 were identical not because of any collusion between OP 1 and OP 2. The products of OP 1 and OP 2 are substitutable in such a manner that in a train, in one coach, brakes manufactured by OP 1 can be used and in another coach, brakes manufactured by OP 2 can be used. As such, once the products are identical and its price has been discovered, the price of different suppliers cannot vary substantially. In the present case, prices quoted by OP 2 during 28.12.2005 to 13.05.2013 *i.e.* a period of 8 years reduced from Rs.20,60,586 to Rs.18,61,838 which goes against anti-competitive behaviour.
- 4.2.3 On the procedural aspect, OP 2 has further stated that it was not aware of the allegations against it and the DG also did not provide OP 2 with any material collected against it. It was submitted that there is no particular trend by which OP 1 and OP 2 have been lowest bidders and the DG has wrongly construed that OPs have resorted to bid rotation. It is stated that had the OPs been actually indulging in the practice of bid-rigging, they would not have quoted the same price.
- 4.2.4 OP 2 has also specifically pointed out that officials of Indian Railways had informally asked OP 1 and OP 2 to quote identical prices and the same prices were not due to any collusion between them.
- 4.2.5 OP 2 has asserted that costs are wholly irrelevant in proving or disproving a cartel because the margin of profits are beyond the domain of competition law (except in the case where a party is in a dominant position) and stated that the DG has wrongly relied upon such difference in the costs of the bidders as a plus factor to conclude collusion. OP 2 urged that such a stand has already been rejected by the Hon'ble



Competition Appellate Tribunal in the case of ‘*Director General (Investigation and Registration) vs. M/s. Escorts Ltd. Ors.*’ [2014] 126 SCL 262 (CAT) wherein it was held that difference in cost may not be taken as a plus factor in case of parallel pricing to conclude cartelisation.

4.2.6 One of the most crucial allegations in the DG report against OPs is that in EP1, OP 1 withdrew the quoted price after having quoted a different price initially and then subsequently quoted the same price that was quoted by OP 2. This was conceived by the DG as a result of coordinated behaviour between OP 1 and OP 2. In this regard, OP 2 has submitted that it never shared its quotes with OP 1 even for EP1. Further, OP 2 has claimed that only through the DG report, it came to know that the identical pricing by OP 1 in EP1 was because of an informal suggestion by the Informant. OP 1 has categorically submitted that it was asked by the Informant to revise its bid for items 1 and 2 because the Informant was in urgent requirement of the product and if there were different quotations, the Informant would have to initiate negotiation process which would have delayed the supplies. OP 2 requested that it should be given an opportunity to cross-examine OP 1’s witness and the witness of the Informant before the Commission accepts the findings of the DG report. Further, it was contended that even as per the statements already recorded by the DG and the material in the DG report, it is not proved that the Informant did not inform OP 1 about the price for items 1 and 2 or that the Informant did not ask OP 1 to revise its quote to the aforesaid amounts.

4.2.7 Sh. Govind Kumar Gupta, General Manager (Marketing & Services) of OP 2 in his affidavit, has stated that he took all due care to prevent leakage of any information with regard to bids made by OP 2. He further stated that very few employees of OP 2 were involved in the bidding process and



that he himself conducted an inquiry when he found that OP 1 revised its bid in EP1 few hours after OP 2 had submitted its bid. It was later found that the information was leaked not by any of the officials of OP 2 but by the Informant.

5. Issues and Analysis

5.1 The Commission has perused the material available on record and heard the Informant and the counsels on behalf of OPs. On careful consideration of the matter, the Commission is of the opinion that in order to arrive at a decision, the following issues needs to be determined:

Issue 1: Whether OPs have colluded to fix the prices and rig the bids in EP1, EP2 and EP3 floated by the Informant in contravention of the provisions of section 3(1) read with section 3(3)(d) of the Act?

5.2 The Commission has noted the fact that OPs had submitted identical/similar price bids in response to the EPs 1, 2 and 3 floated and opened by the Informant on 13.06.2011, 24.08.2011 and 08.12.2011, respectively. Needless to mention that AMDBS is a vital braking equipment used in LHB Design AC/Non-AC coaches and Power Cars, procured by Indian Railways and the Informant by way of open tenders. Only two firms, i.e., OP 1 and OP 2 are RDSO approved vendors/manufacturers which have the expertise and technology to manufacture both types of AMDBS, i.e., Item 1 and Item 2. In EP1, floated for three months requirement and opened on 13.06.11, OP 2 quoted the price negotiated for Regular Tender 1 and OP 1 quoted a higher price for both the items. However, on 13.06.2011, i.e. on last day of submission of EP1, OP 1 withdrew its initial bid and quoted the same price which was quoted by OP 2.



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5.3 Thus, both OP 1 and OP 2 quoted the same prices for both the items and the Informant placed orders for 50% quantity each on both OPs. Further in EP2, both the OPs quoted the same price for both the above said items which was the price agreed between the Informant and OP 2 after negotiations in Regular Tender 1. Again, the Informant placed orders for 50% quantity each on both the items. Another emergency purchase tender i.e. EP3 for three months requirement was opened on 08.12.2011. In EP3, OP 1 quoted a price of Rs. 21,64,111.74 for Item 1 but also made an alternate offer of Rs.21,35,730.24 on account of indigenisation. The Tender Committee found the alternate offer made by OP 1 in EP3 to be technically suitable and recommended for dividing quantity as 60:40 on OP 1 and OP 2 for Item 1. For Item 2, the rates offered by OPs were same and the Tender Committee recommended placing 50% quantity on them.

5.4 Based on the above facts, the Informant had alleged that OPs colluded between themselves for three consecutive emergency tenders i.e. EP1, EP2 and EP3 for purchase of items in the year 2011. The Commission has no doubt that OPs quoted identical price for Item 2 in EP1, EP2 and EP3 and for Item 1 in EP1 and EP2. The limited question which requires determination by the Commission is as to whether the identical pricing in the three emergency tenders is because of collusion between OPs or not.

5.5 The Informant has alleged that OPs formed a cartel and shared the quantity for supply of AMDBS, taking advantage of the limited competition as well as the fact that railway coaches cannot be manufactured without the brake system.



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- 5.6 However, OPs contention is that the Informant required them to provide details like cost break-up, percentage of imported components and *pro-forma* invoice of imported components for both the items i.e. Item 1 and Item 2 for the regular tenders which were opened on 01.10.2010 and 30.01.2012. Since these details were not provided by OPs, the Informant allegedly filed reference before the Commission. The Informant has acknowledged that it asked OPs to submit the cost details so as to assess the reasonableness of rates quoted by them in the regular tenders. OPs have alleged in their submissions/objections that the reason for this reference is the refusal on part of OPs not to accede to Informant's demand for cost details.
- 5.7 The Commission also notes that despite the fact that EP1, EP2 and EP3 were issued and opened by the Informant during 2011 and that too in a quick succession with a difference of only few months, the Tender Committee of the Informant did not raise any objections on identical prices quoted by OPs in EP1, EP2 and EP3. Rather, the Informant went ahead to place supply orders on them for equal quantities for both the items in EP1, EP2 and EP3, except for Item 1 in EP3 wherein the orders were placed in a ratio of 60:40 on OP 1 and OP 2, respectively.
- 5.8 OPs have vehemently alleged that the Informant had informally suggested to OP 1 to quote the price negotiated between OP 2 and the Informant for regular tender 1 so as to expedite the supply in EP1. Further, they alleged that the policy of the Railways is not conducive to competition.



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- 5.9 In this regard it is imperative to take note of the observations made by the DG with regard to the policies of the Railways for procurement of goods by way of open tenders.
- 5.10 While investigating the alleged contravention in the instant case, the DG also examined the policies of the railways as OPs persistently argued that the procurement policies of the Railways are responsible for lack of competition between the suppliers. Even before the Commission, OPs urged that the policy of the Railways is such that there is very little incentive to compete as OPs know that they will secure 50% of the order \pm 10%. Interestingly, OPs have also urged that the policy further ensures that the bidders do not benefit even if they collude and pre-decide the price as the prices in different tenders are subject to the approval of the Tender Committee, Further, many a time the bidders are constrained to refund the money already received as the price for supplies made, if the Indian Railways later on determine the price is being lesser than the quoted price.
- 5.11 The DG noted that Railways, being the largest procurer of equipment and services, ought to design its procurement procedure to promote and sustain competition and provide a level playing field for its present and prospective suppliers. It is evident that the issues highlighted by the DG in its investigation report regarding policies of the Railways create an environment which is not conducive for competition.
- 5.12 Though tenders are floated to ensure competitive bidding, the bidding process does not assure L1 of the full award. Since AMDBS is a critical component of safety in high speed trains, Railways have the provision of splitting the quantity of supply between L1 and L2 bidders to ensure uninterrupted supply. Thus, L2 is also coaxed to supply a portion of the bulk



requirement at L1 rate (say about 40% of the tendered quantity if price differential is upto 3%). In such circumstances, when supply order is split, there is little incentive for competition amongst the bidders, as L1 in any case does not get the supply order for complete quantity (100%). Similarly, the L2 firm anyway gets a substantial portion of the order. In such a scenario the suppliers are aware that they will not secure the entire order but only half or at most 2/3rd of the order. As such, to maximise their profits, the suppliers tend to quote higher prices instead of competitive prices.

5.13 There is also a 'quantity variation clause' in railway tenders according to which variation is allowed to the extent of +/- 30% and this can be operated till the completion of contractual delivery period which is generally one year. OPs have alleged that this clause is onerous and heavily loaded in favor of the Informant. From the submissions of OPs and the findings of the DG, it has come out that the rates are quoted by a supplier on the basis of tender quantity it can possibly supply without incurring a loss. However, if the Railways operate +30% option clause or -30% during the fag end of delivery period, the supplier is penalized for no fault. Hence, the suppliers tend to inflate the quotes so as cater for the 'uncertainty' in quantity for supply and, therefore, Indian Railways may not get competitive rates.

5.14 Further, the investigation has revealed that the time taken for negotiations in case of railway tenders discourage competitive quotes. As per the CVC guidelines, such negotiations should be resorted to only in rare situations and that too with the lowest technically qualified bidder. Since negotiation has become a regular feature, it appears that the bidders tend to quote inflated rates anticipating reduced rates in negotiation process.



5.15 The Commission also notes that in spite of the in-built mechanism against cartelization and collusion, the Informant never used the available mechanism. Also, the Tender Committee, as per the findings of the DG, has not recorded any suspicion on identical bids by OP 1 and OP 2 in EP1, EP2 or EP3. As per the observations recorded by the DG, the Tender Committee of the Informant found the rates quoted by OP 1 and OP 2 in EP1 to be reasonable and recommended the rates as well as to 'equally distribute the quantity in the ratio of 50:50'. Further, even in EP2, the Tender Committee of the Informant found the rates quoted by OP 1 and OP 2 to be reasonable and recommended the rates as well as to 'equally distribute the quantity in the ratio of 50:50'. Yet again in EP3, the Tender Committee of the Informant found the lower rate of Rs.21,35,730.24 quoted by OP 1 for Item 1 reasonable and recommended to split the orders in the ratio 60:40 for Item 1 and 50:50 for Item 2.

5.16 The DG also observed that, despite claiming to suffer from lack of competition in its tender, some actions by the Railways do not promote competition in the tenders. The case of Escorts is an illustration. Escorts was given a developmental order by the Informant and it supplied 2 sets of AMDBS to them in January 2014. The system is under testing in Rajdhani train. Soon thereafter, the specifications for the product were changed by RDSO. Moreover, in the subsequent tender, it was required that the bidder should have experience of supplying at least 18 sets of the brake system which should have been tried for at least 18 months in trains. Due to this condition, Escorts could not bid for full quantity in subsequent tenders. Thus, the tender conditions acted as an entry barrier to new suppliers and resulted in reduced competition. The DG has also made an observation that the Railways do not make endeavour to find new sources in tenders where



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there are few suppliers *e.g.* there are several countries like Japan, S. Korea and China which are running similar trains and there must be suppliers for the same items which the railways procure from OP 1 and OP 2.

- 5.17 Further, the Commission notes that OPs have alleged that the present reference has been filed by the Informant as a retaliatory action against them as they refused to submit the cost breakup of their products.
- 5.18 OPs have claimed that cost data is confidential and supplying the data to the Informant could result in commercial harm to them. Cost details are sensitive commercial information internal to the manufacturer and the same can be reasonably denied as there is an inherent risk of disclosure of such cost details which may lead to harm.
- 5.19 The Informant, *vide* its application/response dated 20.04.2015 intimated the Commission that the observations of the DG with regard to policy of the Railways has been referred to the Ministry of Railways for further action. Besides that, the only request that the Informant has made is with regard to sharing of cost details of OPs so as to enable the Railways to arrive at the reasonableness of the rates. It may be mentioned here that the Commission, as a market regulator, is entrusted with the duty to regulate and promote competition in the market and not for enabling parties to seek cost information.
- 5.20 Be that as it may, the main issue in this case is whether the identical pricing by OPs in EP1, EP2 an EP3 was because of collusion or otherwise. After having perused all the facts placed on record and the submissions made by OPs, the Commission is of the view that the evidence available on record is insufficient to hold OP 1 and OP 2 responsible for having colluded in EP1,



EP2 and/or EP3. The contention of OPs that the price quoted by OP 1 in EP1 for both items was done at the informal suggestion of the Informant has not been countered by the Informant convincingly.

5.21 OP 1 has submitted that since the purpose of emergency tenders is to meet immediate intermediate demands between regular tenders, the officials of the Informant informally communicated to OP 1 to quote the negotiated rate of Regular Tender 1 so that unnecessary delay in negotiation can be avoided. It was also contended that the Informant had informally communicated that the rates would be subject to final rates in regular tenders and therefore, the rates quoted in EP1, EP2 and EP3 were a mere formality.

6. In view of the foregoing and given the peculiar facts of the present case, the Commission is of the considered view that the evidence relied upon by the DG to reach the findings in the present case are not sufficient to hold OPs in contravention of the provisions of the Act. The matter is ordered to be closed forthwith.

7. Before parting with the order, the Commission, however, is of the view that the policy of the Railways with regard to procurement of Item 1 and 2, as noted by the DG also, may be made more in harmony with competition law principles. It is quite apparent that the procurement policies of the Railways, which have been dealt with in detail in the preceding paragraphs also contributed to the lack of competition between the suppliers in the present case. *Vide* its letter dated 20.04.2015, the Informant intimated the Commission that with regard to the findings of the DG vis-à-vis the procurement policy of the Railways, the Informant has referred the same to the Ministry of Railways for further action. It appears from the said response of the Informant that



Ministry of Railways is responsible for the formulation of such policies. In view thereof, the Commission hereby advise the Ministry of Railways to modify the said policies to incentivise the present as well as prospective suppliers of the items under consideration in this case. The role and working of RDSO also needs to be reassessed so as to subserve the objectives of competition.

8. Secretary is directed to inform the parties accordingly.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

Sd/-
(M. S. Sahoo)
Member

New Delhi
Dated 08-09-2015