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Fair Competition  
For Greater Good

## COMPETITION COMMISSION OF INDIA

**Case No. 90 of 2016**

**In Re:**

**People's All India Anti-Corruption and  
Crime Prevention Society  
70/2, Gali No. 15-B, Swatantra Nagar  
Narela, Delhi - 110040**

**Informant**

**And**

**Usha International Ltd.  
Plot No. 15, Institutional Area, Sector-32  
Gurgaon - 122001, Haryana**

**Opposite Party No. 1 / OP-1**

**M/s Klassy Computers  
Shop No. 4, Ishana 1, Bhusari Colony  
Paud Road, Kothrud  
Pune, Maharashtra**

**Opposite Party No. 2 / OP-2**

**M/s Nayan Agencies  
Shukarawar Peth, Gadikhana  
Pune - 411002, Maharashtra**

**Opposite Party No. 3 / OP-3**

**M/s Jawahar Brothers  
Dhawalgiri, Baramati  
Pune, Maharashtra**

**Opposite Party No. 4 / OP-4**

**Pune Zilla Parishad  
(Through Chief Executive Officer)  
1, Velasli Road, Pune - 411001  
Maharashtra**

**Opposite Party No. 5 / OP-5**

**CORAM**

**Mr. Ashok Kumar Gupta  
Chairperson**

**Ms. Sangeeta Verma  
Member**

**Mr. Bhagwant Singh Bishnoi  
Member**



**Present:**

For People's All India Anti-Corruption and Crime Prevention Society:

Mr. Nikhilesh Kumar, Advocate

For Usha International Ltd. and its individuals:

Mr. Ramji Srinivasan, Senior Advocate with Mr. Shikhar Singh, Mr. Anuj Shah and Mr. Pawan Sharma, Advocates along with Mr. Pradeep Jain, Representative of OP-1

For M/s Klassy Computers:

Mr. Pawan Reley, Advocate

For M/s Nayan Agencies:

Ms. Anushree Bardhan, Advocate

For M/s Jawahar Brothers and its individuals:

Ms. Kanupriya Tiwari and Ms. Richa Rajesh, Advocates

For Pune Zilla Parishad:

Mr. Nitin Deshpande, Advocate

**Order under Section 27 of the Competition Act, 2002**

1. The Information in the present case was filed by People's All India Anti-Corruption and Crime Prevention Society ('**Informant**') under Section 19(1)(a) of the Competition Act, 2002 (the '**Act**') against Usha International Ltd. ('**OP-1**'), M/s Klassy Computers ('**OP-2**'), M/s Nayan Agencies ('**OP-3**'), M/s Jawahar Brothers ('**OP-4**') and Pune Zilla Parishad ('**OP-5**') alleging contravention of the provisions of Section 3(3) of the Act (hereinafter, OP-1 to OP-5 are collectively referred to as the '**Opposite Parties/ OPs**').



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### **A. Information filed under Section 19 of the Act**

2. The Informant was stated to be a society registered under the Societies Registration Act, 1860. OP-1 was, *inter alia*, stated to be engaged in the business of sale of new age home appliances such as sewing machines, fans, power products, water coolers, water dispensers, *etc.* OP-2, OP-3 and OP-4 were stated to be the authorised dealers of OP-1. OP-5 is the local government body that administers the rural areas of Pune district of Maharashtra.
3. As per the Information filed with the Commission, OP-5 invited bids, *vide* e-tender no. 1/15-16 dated 07.11.2015 (**'Impugned Tender'**), from eligible vendors for procurement of Picofall-cum-Sewing Machine (Multifunction) with Indian Standard Institute (ISI) mark for distribution amongst the people belonging to backward classes, women, and disabled persons living in the rural areas of Pune district under a scheme announced by the Social Welfare Department (SWD) of the Government of Maharashtra. It was submitted that the Government of Maharashtra, *vide* resolutions dated 02.01.1992 and 30.10.2015, had specified that the government departments should purchase products bearing ISI mark only through public procurement and in the event of non-availability of ISI mark products, the concerned department may opt for non-ISI mark products provided that the products to be purchased should be in conformity with the standards specified by ISI. It was averred that despite Picofall-cum-Sewing Machine bearing ISI mark being available in the market, OP-5, at the behest of OP-1, allegedly obtained equivalent specifications from the Government Polytechnic Institute, Pune *vide* letter dated 14.09.2015 and then invited bids. It was alleged that the same was done so that the product specifications of OP-1 would only match with the specifications of the Government Polytechnic Institute, Pune.
4. It was alleged that in response to the said e-tender, OP-2 to OP-4 had submitted identical bids and they also agreed as to who will submit the



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lowest bid and determined the common norms to calculate prices and terms of the bids. It was submitted that the bids submitted by OP-2 to OP-4 show that all of them quoted near identical prices. After the technical evaluation, the bids of OP-2, OP-3 and OP-4 were accepted and the bid of SVS Chemicals was rejected due to non-submission of 'experience certificate'.

5. The Informant had averred that OP-1 had submitted authorisation letters to OP-5 in favour of OP-2, OP-3 and OP-4 by deliberately mentioning itself as an authorised marketer of Usha-Jenome sewing machine. It was stated that the original manufacturer of the sewing machines sold by OP-1 was Janome (Thailand) Co. Ltd. and OP-1 was only its authorised Indian representative and neither OP-1 nor OP-2, OP-3 and OP-4 fulfil the eligibility criteria for the aforesaid tender of OP-5. It was averred that due to extraneous consideration, OP-5 had deliberately overlooked all the aforesaid aspects to favour OP-1. As per the Informant, the terms of the bid were framed in such a manner that none other than OP-1 and its dealers can fulfil the same. It was also stated that the Opposite Parties had indulged in malpractices and corruption causing huge loss to the public exchequer. Further, it was averred that OP-5 *vide* its letter dated 15.01.2016 changed the terms of the original tender in order to favour OP-1, thereby rendering the tender null and void.
6. It was further alleged that OP-1 submitted three bids through its authorised dealers, *viz.* OP-2, OP-3 and OP-4 with meagre price difference which is against the Central Vigilance Commission (CVC) guidelines. Further, on 08.01.2016 when the tender was opened, it was found that OP-2 had quoted per unit price of Rs. 11,900/- (Rs.12,621/- with taxes); OP-3 had quoted per unit price of Rs. 11,931/- (Rs.12,649/- with taxes); and OP-4 had quoted per unit price of Rs. 11,921/- (Rs.12,638/- with taxes). Subsequently, OP-2 *vide* its letter dated 11.01.2016 reduced the per unit price from Rs. 12621/- to Rs. 12521/- which was again reduced to Rs. 12250/- and the tender was awarded to OP-2.



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7. It was averred that the price quoted by OP-2 was almost double the Maximum Retail Price (MRP) of the same machine marketed and distributed by OP-1 in the open market. This clearly shows that OP-5 awarded the contract at a very high price due to extraneous consideration. It was also submitted that OP-2 to OP-4 have submitted their respective bids through a single IP address, *i.e.* 116.75.133.164 and the fee for tender and EMD was paid through a common bank, *i.e.*, the State Bank of India.
8. It was further alleged that OP-5 had floated another tender on 25.08.2016 to purchase Picofall-cum-Sewing Machine to the tune of Rs. 4,10,90,000/- wherein the delivery period and payment terms were changed, and a corrigendum was published, in this regard, on the last date of submission of tender, *i.e.* on 07.09.2016. Six bidders, *viz.* OP-1, OP-2, OP-3, OP-4, Suttraway Engg. Works Pvt. Ltd., and M/s Sunil Traders participated in the aforementioned tender. OP-5, after floating the new tender, again issued a supply order on 07.09.2016 worth Rs. 2,37,77,250/- to OP-2 before concluding the current bidding process. It was averred that the aforementioned supply order was placed on the basis of previous year's tender process which was illegal and unlawful and also contrary to the directions issued by the Hon'ble Bombay High Court *vide* its order dated 13.08.2008 in Writ Petition no. 1889 of 2007 in the matter of *Vijay Kumar Gupta vs. the State of Maharashtra and Ors.* In the said order, the Hon'ble High Court directed the Government of Maharashtra to ensure that no extension of contracts is granted by its various departments and instrumentalities in future except when it is found necessary in the wisdom of the competent Authorities for valid reasons alone that too to be recorded in writing and after due consultation with the concerned Department as also in accordance with Rules of Business, instructions issued by the Government, and in strict adherence to the prescribed procedure.
9. Based on the above, it was alleged that OP-1 has indulged in bid rigging and also entered into an agreement with OP-2, OP-3, OP-4 and OP-5 to



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eliminate competition in the market which is in violation of the provisions of the Act. The Informant thus requested the Commission to initiate an inquiry into the aforesaid conduct of the OPs and pass an order holding the aforesaid conduct of the OPs to be in contravention of the provisions of Section 3(3) of the Act.

### **B. Directions to the Director General**

10. Upon considering the Information and hearing the parties during the preliminary conference held on 04.01.2017, the Commission was of the *prima facie* view that OP-2, OP-3 and OP-4 had indulged in bid rigging and collusive bidding in contravention of the provisions of Section 3(3) of the Act. The Commission also observed that other allegations raised by the Informant regarding the conduct of OP-5 in facilitating bid rigging by OP-2 to OP-4 do not fall within the domain of competition law and the Informant may raise its grievance before the appropriate forum. Accordingly, the Commission passed an order dated 22.03.2017 under Section 26(1) of the Act directing the Director General (hereinafter, the “DG”) to cause an investigation to be made into the matter. The DG was further directed to investigate the role of the officials/persons who at the time of contravention of the provision of the Act, if any, were in-charge of and responsible for the alleged conduct of OP-2 to OP-4 or with whose consent or connivance the alleged conduct of OP-2 to OP-4 took place.

### **C. Investigation by the DG**

11. After investigation, the DG submitted its investigation report on 28.03.2018. The DG framed the following two issues for the purpose of the investigation: (a) Whether there is cartelisation and bid rigging/collusive bidding in Tender No. 1/2015-16 dated 07.11.2015 floated by the Pune Zilla Parishad for supply of Picofall-cum-Sewing Machine? If yes, who are the Opposite Parties involved in the cartelisation and bid rigging/collusive bidding in contravention of the provisions of Section 3 of the Act? and (b)



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If the answer to Issue (a) is in affirmative, who were the persons/officers in-charge of and responsible for the conduct of the business of the OPs concerned at the time of the said contravention? Based on the analysis, evidence, facts and circumstances discussed in the investigation report, the DG found that OP-1 to OP-4 were in active collusion and there was meeting of minds between them and thereby, they have violated the provisions of Section 3(3)(d) read with Section 3(1) of the Act. Further, two individuals of OP-1 and 4 individuals of OP-4 were found to be responsible under Section 48 of the Act for their conduct. The findings of the DG, in brief, are as follows:

- 11.1. OP-2 utilised its own funds for the purposes of making of the bids in the names of OP-3 and OP-4 and for the same, the accounts of M/s Steelfab Corporation and M/s Steelfab maintained in the Oriental Bank of Commerce have been utilised. This illustrates the key role played by OP-2 in the entire process of bidding for the Impugned Tender.
- 11.2. The bid values quoted by the OPs in the Impugned Tender were very close to each other and is indicative of being filled up, after being fixed in consultation with each other or by a single person on behalf of all. OP-2 had quoted per unit price of Rs. 11,900/- (Rs. 12,621/- with taxes); OP-3 had quoted per unit price of Rs. 11,931/- (Rs. 12,649/- with taxes) and OP-4 had quoted per unit price of Rs. 11,921/- (Rs. 12,638/- with taxes). The DG observed that the difference in prices quoted by OP-2 and OP-3 is Rs. 28/-, and that of OP-3 and OP-4 is Rs. 11/- and OP-2 and OP-4 is Rs. 17/- only.
- 11.3. OP-2 used its own IP address for filling up the tenders of all three bidders, *i.e.* for itself and OP-3 and OP-4 which was not disputed rather admitted by OP-2. As per the DG, this goes to establish that the Impugned Tender was subjected to bid rigging by OP-2, coupled with the consent and connivance of OP-3 and OP-4 in the process to rig the bids.
- 11.4. The analysis of call data record (CDR) revealed that Mr. Venkatesh, Proprietor of OP-2 was in continuous touch with Mr. Nayan Shah,



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Proprietor of OP-3 and Mr. Rahul Shah of OP-4 at the time of submission of bids for the Impugned Tender. Based on the CDR analysis, there is evidence that on the date of submission of bids - by OP-3 and OP-4, all the three OPs were not only interacting with each other, but there were also - - talks in quick sessions amongst the three of them. They were in constant touch with each other - and thus - as per the DG, it is a reasonable inference that they had a deep level of association as well as they were into collusive bidding.

- 11.5. OP-2 to OP-4 were closely coordinating with each other in relation to participation in other tenders also.
- 11.6. The DG had also noted that in the instant matter, the bids have been ostensibly submitted by OP-2, OP-3 and OP-4 with the help of OP-1 which issued authorisation letters dated 24.11.2015 addressed to OP-5 whereby it authorised OP-2 to OP-4 to quote and negotiate for items mentioned in the said tender. In the absence of availability of such authorisations, OP-2 to OP-4 would not have been technically qualified by Pune Zilla Parishad. Thus, as per the DG, the role of OP-1 in the entire process of tendering is of relevance and significance. Accordingly, the DG has examined the manner in which such authorisation letters have been issued by OP-1 and noticed that these authorisation letters have been issued without making recourse to the stated manner/ procedure as no documentation, whether submitted by the aspiring bidder or the internal documentation/ file noting, *etc*, have been maintained and produced. The DG has also stated that in about half a dozen tenders, the bid money on behalf of OP-1 was paid by OP-2 and that the tenders were also filled in, by the latter. Thus, the DG has concluded that OP-1 was the main stakeholder of tender for supply of sewing machines and more specifically tender No. 01/2015-16 of OP-5 and that there was collusion/complicity between OP-1 and the bidders of this tender through OP-2, which is a contravention of the provisions of the Act.





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12. Finally, the DG concluded that the role played by Mr. Venkatesh of OP-2 at various stages of the bidding for the tender which includes use of his own funds for bids of OP-3 and OP-4, use of common IP address belonging to OP-2 for filling up of bids, close association and coordination between OP-2, OP-3 and OP-4 on a regular basis evidenced through admission of all the key personnel of these OPs as well as their CDRs, coupled with admitted coordination in various other tenders floated by the authorities in the region around the same time, *etc.* do establish beyond doubt the common thread and scheme for such coordination between them.
13. Thus, the DG concluded that there was a meeting of minds and coordination amongst OP-1 to OP-4 in contravention of the provisions of Section 3(3)(d) read with Section 3(1) of the Act.

**D. Consideration of the Investigation Report:**

14. The Commission considered the investigation report of the DG in its ordinary meeting held on 15.05.2018 and decided to forward an electronic copy thereof to the parties and their respective individuals found responsible for the purpose of Section 48 of the Act, for filing their respective objections/ suggestions thereto along with financial details. The parties/ persons were further directed to appear for oral hearing before the Commission either in person or through authorised representatives on 18.07.2018. The Commission heard the counsels of the parties including the Informant on 08.08.2018, 07.09.2018, and 10.09.2018, and decided to pass an appropriate order in due course.
15. During the course of hearing on 07.09.2018, Mr. A. N. Haksar, the learned senior counsel appearing on behalf of OP-1 and its individuals argued that the DG committed grave error by relying upon the deposition of OP-2 to bolster its purported findings to show personal relationship between Mr. Venkatesh R. Darak, Sole Proprietor of OP-2 and Mr. Sanjeev Thakur,



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Zonal Manager of OP-1. Mr. Haksar also contended that the DG did not provide sufficient opportunity to OP-1 to respond to the queries raised by the Office of the DG. Further, it was also contended that the DG did not provide any opportunity to cross-examine the persons whose statements were recorded by the DG and relied upon to record finding of contravention against OP-1.

16. Having heard the learned counsel for the parties and after perusing the records, the Commission was of the opinion that the DG while exercising its statutory powers under Section 41(2) read with Section 36(2) of the Act, did not give sufficient time to OP-1 to respond to the queries raised *vide* Notice dated 23.03.2018 and the Report was signed on 28.03.2018 itself without considering the reply submitted by OP-1 dated 31.03.2018. Moreover, the DG did not accord opportunity of cross-examination to the OPs. The Commission also noted that the DG did not examine the officials of OP-5 to ascertain the eligibility of the bidders in terms of tender conditions by requisitioning the relevant records.
17. Accordingly, the Commission was of the considered opinion that before proceeding any further in the present matter, it would be appropriate to direct the DG in terms of the provisions contained in Regulation 20(6) of the Competition Commission of India (General) Regulations, 2009 to conduct further investigation on the issues identified above. Accordingly, *vide* order dated 04.10.2018, the DG was directed to make further investigation/ analysis and submit a revised comprehensive Investigation Report after incorporating and analysing the replies filed by OP-1 besides providing opportunity of cross-examination to the OPs and doing the needful as elaborated above.

#### **E. Supplementary Investigation Report of the DG**

18. Based on the Order of the Commission dated 04.10.2018, the DG formulated following issues for investigation: (a) the role played by officials



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of OP-5 in the tendering process, particularly at the stage of designing of the tender and evaluation of the bids and examination of the officials of OP-5 to ascertain the eligibility of the bidders in terms of tender conditions; (b) to accord opportunity of cross-examination to the OPs; and (c) examination of reply of OP-1 dated 31.03.2018.

19. The DG submitted its Supplementary Investigation Report on 23.10.2019. During the investigation, the DG analysed the role of OP-5 in designing of tender and evaluation of the bids and it was noted by the DG that OP-5 did not follow the procedure laid down and as such did not exercise due diligence while evaluating the bids. Further, the OPs were accorded opportunities of cross-examination. Reply dated 31.03.2018 of OP-1 was also examined during the course of the investigation. The DG concluded by noting that the basic nature of the transgression, which existed in the initial report, has not been removed by the OPs and no new answer has emerged during further investigation. In fact, the DG stated that the second round of the investigation has strengthened the fact that there was a nexus and meeting of minds between the OPs, especially OP-1 and OP-2.

#### **F. Consideration of the Investigation Reports by the Commission**

20. The Commission considered the Supplementary Investigation Report of the DG in its ordinary meeting held on 10.02.2020 and decided to forward an electronic copy of the same to the Informant, Opposite Parties and the individuals who were identified by the DG for the purposes of Section 48 of the Act for filing their respective composite and comprehensive objections/suggestions on the Investigation Report of the DG dated 28.03.2018 as well as the Supplementary Investigation Report dated 23.10.2019. The Commission further directed the Opposite Parties to furnish their audited balance sheets and profit & loss accounts/ turnover for the previous three financial years, *i.e.* 2015-16, 2016-17 and 2017-18, if not already filed. These enterprises were further directed to file the details of



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the revenue and profit generated from sale of sewing machines during these financial years by way of affidavits supported by certificates of Chartered Accountants. The persons identified by the DG for the purposes of Section 48 of the Act were also directed to furnish their income details including the individual Income Tax Returns (ITRs) for the said duration, if not already filed. The parties/persons were further allowed to file their respective responses to the objections/ suggestions filed by the other parties/persons, if so desired. The parties/persons were further directed to appear for a final hearing on the Investigation Report, including the Supplementary Investigation Report, on 21.04.2020.

21. However, considering the exigencies due to COVID-19, the Commission extended the timelines for completing these compliances. Finally, the parties were heard through virtual mode, *i.e.* through video conferencing ('VC') on 29.10.2020 and the Commission decided to pass an appropriate order in due course. As prayed, the parties were also allowed to file synopsis of their oral arguments, within 2 (two) weeks, if so desired.

#### **G. Replies/ Objections/ Submissions of the parties**

22. Details of the replies, objections, and contentions of the parties in their written submission and those advanced during the oral hearing are summarised below:

##### *Reply of OP-1 and its individuals:*

23. It has been submitted that the investigation report wrongly implicated OP-1 guilty of alleged contravention of the provisions of the Act. There is no evidence or document in respect of entering into any anti-competitive agreement in present matter which would have made OP-1 liable under the Act. It has *inter-alia* been submitted that:

- 23.1. Bid rigging may happen in terms of fixation of price or quantity. However, OP-1 had neither fixed the price by manipulation of bids of



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participants of tender nor fixed quantity to be supplied by the participants to OP-5 by influencing and forming cartel with the participants.

- 23.2. There is no evidence in the investigation report in respect of appreciable adverse effect on competition in terms of Section 3 read with Section 19 of the Act.
- 23.3. Authorisation letters were issued by OP-1 to eligible entities which were found suitable for fulfilling OP-1's criteria for participation in tenders floated by OP-5. Mere absence of internal file noting, request letters from entities and copies of all participation letters, investigating officer erroneously inferred adversely against OP-1 without appreciating that the terms of delivery of the product were based on advance payments.
- 23.4. Total amount of the Impugned Tender was a minuscule portion of the total sales of OP-1 as also of total sales of OP-1 from sewing machines.
- 23.5. Opportunity of cross-examination was not provided in respect of statements of certain persons who made statements against OP-1 during the DG's investigations.
- 23.6. The DG gave erroneous and irrelevant finding that OP-1 was the only party who could have supplied sewing machines as per OP-5's specifications.
- 23.7. OP-1 has submitted that it did not bid in the Impugned Tender floated by OP-5 in November 2015 and the second tender floated by OP-5 in August 2016 (in which OP-1 submitted its bid) was cancelled without opening. Hence, it has been claimed that OP-1 was not at the same level as that of other bidders, *i.e.* OP-2 to OP-4 and hence there is no question of any cartel or bid rigging or collusive bidding by OP-1 within the meaning of the Act.



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*Reply of OP-2:*

24. OP-2 has submitted that the findings against it in the DG's Report are false, baseless and without merit, and therefore liable to be dismissed for want of evidence and no application of mind. It has been *inter alia* submitted that:
- 24.1. If there had been cartelisation among OP-1 to OP-4, OP-2 would never have reduced the price of the sewing machine and that too after finding out that there were only 3 bidders left in the tender who are authorised dealers of OP-1.
- 24.2. Even assuming that there was a cartel in the present matter, it cannot be presumed to have an effect on the competition in the market or affect the consumers.
- 24.3. The DG's Report did not take into consideration that OP-2 also works as a cybercafe and offers tender filling services which are available to public at large by paying the necessary charges.
- 24.4. OPs are located in Pune itself, and therefore the freight component, travel expenses, labour charges would have only small difference.
- 24.5. All the bidders who participated in the tender know each other and interact with each other over phone to talk about business, market and sometimes about their personal matters. Therefore, these conversations, in absence of any cogent evidence, must not be considered as the circumstances or factors indicating cartel.
- 24.6. OP-1 and OP-2 only share professional relationship with each other.
- 24.7. In the event, the Commission concludes that there was a cartel between OPs in the present matter then the penalty should be imposed only on the relevant turnover of the Impugned Tender and not on average turnover of all the products it is dealing with.

*Reply of OP-3:*

25. OP-3 has stated that the findings of the DG, as against OP-3, are false, untenable and without merit and liable to be dismissed outright for want of cogent evidence. It has been *inter alia* submitted that:



- 25.1. Instant case is based on indirect evidence in the form of same IP address of all the Opposite Parties, payment of tender fee and EMD from the account of OP-2 and Mr. Nikhil Gandhi, price parallelism and call data records. It has also been submitted that parallel behaviour may amount to an 'agreement' only if there is no plausible explanation for the same which has been provided in the present matter.
- 25.2. OP-3 is weak in computers, and therefore needed help to fill the technical envelope of the Impugned Tender. However, the commercial bid was filled by OP-3 himself and thus there was no sharing of information.
- 25.3. On 26.11.2015, OP-3 was called by OP-2 that technical envelop has been finished and now, OP-3 needs to fill commercial bid. Thus, the tender was submitted on 26.11.2015.
- 25.4. Due to e-procurement limit, OP-3 took help from OP-2 to pay the tender fee and EMD in relation to the Impugned Tender.
- 25.5. OP-5 has on previous occasions, experienced price difference of ₹ 2 also in its tenders, and therefore the price difference in present matter should not be construed as cartel. Further, all the OPs belong to same geographical location, and therefore expenditure on account of labour and travel do not make much difference.
- 25.6. Filling of technical envelope by OP-2 not only in the Impugned Tender but in other tenders, e.g. Baramati Tender resulted in frequent interaction between OP-2 and OP-3.

*Reply of OP-4 and its individual*

26. OP-4 has submitted that answering party itself is a victim of fraud and forgery as its digital signatures along with other documents were misused by OP-2 to apply for the Impugned Tender for which a complaint has also been filed with local police authorities. It has been *inter alia* submitted that:
  - 26.1. OP-4 did not make any payment of tender fee and the EMD for the Impugned Tender and accordingly, the refund of EMD amount was not issued in its favour.



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- 26.2. In terms of the terms and conditions of the Impugned Tender, OP-4 was neither called to produce any original documents nor it produced any such documents before the Social Welfare Department, Pune.
- 26.3. OP-4 is not engaged in the business of sewing machines, and therefore it could not even qualify for the Impugned Tender.
27. Both Mr. Jawahar Motilal Shah and Mr. Harshwardhan Motilal Shah, partners of OP-4 stated that Mr. Rahul Shah (son of Mr. Jawahar Lal Shah) is aware of the business activities of Jawahar Brothers, and therefore he was also added as a party in the proceedings. In addition to the above submissions of OP-4, Mr. Rahul Shah has *inter alia* submitted that:
- 27.1. Tender documents submitted to OP-5 on behalf of OP-4 were in the name of 'Jawahar Brothers & Agency' whereas its name is 'Jawahar Brothers'. Further, the authorisation letter issued by OP-1 was also in the name of Jawahar Brothers & Agency.
- 27.2. OP-4 requested OP-2 to procure digital signatures for OP-4 for the purpose of another tender; other documents of OP-4 (including stock certificate) were also given to OP-2 for the same. These documents were misused by OP-2 for submitting bid in the Impugned Tender.
- 27.3. No communication has taken place between OP-1 and OP-4.
- 27.4. No sample has been submitted by OP-4 with OP-5 which was required as a prerequisite for the Impugned Tender.
- 27.5. Mr. Rahul Shah admitted having received the tender submission message but claimed that similar format of auto generated SMS received from GEPMAH, caused confusion and he was under the impression that the SMS received pertains to another tender 10 2015\_RDPUN\_81219\_1 for flour mills which was submitted on the same date as that of the Impugned Tender.

#### **H. Analysis and findings of the Commission**

28. The Commission has perused the investigation report(s), suggestions/objections filed by the parties and other material available on record





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including the oral arguments made by the parties. As per the Investigation report(s), OP-1 was formed in 1934 and is *inter alia* engaged in the business of home appliances including sewing machines. OP-2 is a proprietary firm owned by Mr. Venkatesh Ramlal Darak located in Pune which is involved in supply and sales of various products/services. OP-3 is a proprietary firm owned by Mr. Nayan Kumarpal Shah located in Pune and deals with domestic appliances and agricultural goods. OP-4 is a registered partnership firm located in Baramati with three partners namely Mr. Jawahar Motilal Shah, Mr. Abhay Motilal Shah (deceased) and Mr. Harshwardhan Motilal Shah .

29. The allegations in the information essentially center around the bids invited by OP-5 from eligible vendors for procurement of Picofall-cum-Sewing Machine (Multifunction) with Indian Standard Institute (ISI) mark for distribution amongst the people belonging to backward classes, women, and disabled persons living in the rural areas of Pune district under a scheme announced by the Social Welfare Department (SWD) of the Government of Maharashtra, *vide* e-tender No.1/2015-16 dated 07.11.2015.
30. At the outset, the Commission would deal with the role of OP-5 and its liability under the Act. The Commission while directing the DG to conduct an investigation, *vide* its order dated 22.03.2017, noted that “...*other allegations raised by the Informant regarding the conduct of OP-5 in facilitating the bid rigging by OP-2 to OP-4 do not fall within the domain of competition law and the Informant may raise its grievance before the appropriate forum.*”
31. In this regard, the Informant in its response to the Investigation Report has stated that the Commission has the power to examine the role of OP-5 under the provisions of the Act. For the same, the Informant has relied on the observations of the Commission in its order dated 01.05.2018 in Case No. 50 of 2015 titled *Nagrik Chetna Manch And Fortified Security Solutions &*



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*Others* passed under Section 27 of the Act. The relevant extract of the order is as follows:

*“During investigation, the DG examined allegations of cartelisation and bid rigging and/ or collusive bidding by OP-1, OP-2, OP-4, OP-5, OP-6 and OP-7 in the PMC’s Tender nos. 34, 35, 44, 62 and 63 of 2014 pertaining to ‘Design, Supply, Installation, Commissioning, Operation and Maintenance of Municipal Organic and Inorganic Solid Waste Processing Plant(s)’. Further, the DG also examined whether the officials of PMC had a role to play in facilitating collusion amongst the OPs to pre-determine the winner of the bids.”*

32. In this regard, the Commission is of the view that the plea raised by the Informant is untenable. No doubt the DG as well as the Commission have the power to examine the representatives of the procurer to understand and ascertain the tender design, tendering mechanism including the eligibility of the bidders in terms of tender conditions by requisitioning the relevant records. This is, however, not to suggest that the procurer itself could be proceeded against in an inquiry for violation of the provisions of the Act in respect of the tenders floated by it, where bid rigging is alleged to have taken place. Any lack of due diligence or non-compliance with the procurement procedure has to be dealt with administratively in accordance with the relevant and *extant* mechanism by appropriate authorities. Needless to add, in appropriate cases, the role of the procurer can also be examined within the purview of the Act for contravention of the provisions thereof.
33. It is observed that the Informant itself has not only alleged bid rigging by OPs in contravention of the provisions of Section 3(3) of the Act but has also prayed the Commission to hold the OPs in contravention of the said provisions. A bare reading of the provisions of Section 3(3) of the Act would show that only the entities engaged in identical or similar trade of goods or provision of services are covered within the purview thereof. It is not the case of the Informant that OP-5 was also engaged in the business of supply of Picofall-cum-Sewing Machine as was the case with OP-1 to OP-4. Therefore, any agreement or understanding or arrangement of OP-5 with OP-1 to OP-4, cannot be the subject matter of scheme envisaged under



Section 3(3) of the Act. The examination of the officials of the procurer can only supplement the investigation conducted by the DG and evidence collected against other opposite parties/ bidders in the matter. Therefore, the Commission is of the opinion that allegations of the Informant regarding the conduct of OP-5 as alleged in the Information do not fall within the purview of the Commission.

34. Before proceeding to analyse the allegations on merits, the Commission would deal with the submissions of OP-2 that the DG does not have the power to requisition call data records from the telecom service providers and requisitioning of such records and sharing of the same with other OPs is violative of the fundamental right to privacy enumerated under Article 21 of the Constitution of India. Further, it was contended that the DG has not shared the original records with OPs including the communication to the telecom service providers requisitioning these records. The DG has also not stated the provision of law under which it was empowered to requisition such records. Therefore, OP-2 has requested that call data records should be rejected/ignored by the Commission.
35. Having considered the plea raised by OP-2, the Commission is of the considered opinion that the same is thoroughly misplaced. A bare reading of the provisions of Section 36 of the Act read with Section 41 thereof would reveal that for the purposes of discharging functions under the Act, the DG has been vested with the specified powers of Civil Courts as available under the Code of Civil Procedure, 1908 which sufficiently enable and empower the DG to call for such records from the telecom service providers. Needless to add, collusive conducts such as bid rigging require investigators to seek such data as invariably the bidders would not leave any paper trail in order to minimise documentation to evade the process of law.
36. OP-2 has also averred that in order to find the location of OP-3 and OP-4, the DG has relied on Cell ID and address submitted by the telecom service



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provider. However, as per OP-2, the said document cannot be considered as credible and reliable due to absence of electronic certificate as mandated by the Hon'ble Supreme Court in plethora of judgements. This plea is without any basis as the relevant certificates have already been provided by the DG and are available on record.

37. OP-4 has further submitted that it sought to examine OP-5 and the Government Polytechnic Institute (GPI) Pune before the DG, however, the request was denied by giving baseless reasons. It has been submitted that OP-5 and GPI are material witnesses to extract the truth and their cross-examination is necessary for just adjudication of the matter. In this regard, the Commission summarily notes that the findings of the DG against OP-4 are based on tender documents, CDRs, depositions besides the documents submitted by OP-4 itself and other OPs. In this backdrop, when nothing incriminating has been attributed to OP-4 based on the examination of the representatives of OP-5, the issue of seeking cross-examination of such deponent becomes infructuous.
38. OP-4 has also contended that during the cross examination of OP-1 by OP-4, there were many questions which remained unanswered and OP-1 assured that same will be answered within a certain period. However, till date no such questions been have answered by OP-1. OP-4 has submitted that answers of such questions are important for fair adjudication of the matter. The Commission notes that OP-1 has in fact responded to these queries *vide* submissions dated 14.08.2019 and 22.08.2019 which were also provided to OP-4 as annexures to the Supplementary Investigation Report of the DG *vide* the Commission's letter dated 17.02.2020.
39. Having dealt with the above aspects, the Commission proceeds to examine whether the Opposite Parties (OP-1 to OP-4) indulged in bid-rigging/collusive bidding in respect of the Impugned Tender floated by OP-



5 in contravention of the provisions contained in Section 3(3)(d) read with Section 3(1) of the Act?

*Price Parallelism*

40. To begin with, it would be apposite to examine the rates quoted by the bidders while participating in the Impugned Tender floated by OP-5. For felicity of reference, the same are excerpted below:

**Table-1**

<b>Bidder (OP)</b>	<b>Rate quoted per unit (without taxes)</b>	<b>Rate quoted per unit (with taxes)</b>
OP-2	Rs. 11,900/-	Rs. 12,621/-
OP-3	Rs. 11,931/-	Rs. 12,649/-
OP-4	Rs. 11,921/-	Rs. 12,638/-

**Table-2**

<b>Comparison of rates of the bidders <i>inter se</i></b>	<b>Difference in rate quoted per unit (with taxes)</b>
OP-2 with OP-3	Rs. 28/-
OP-3 with OP-4	Rs. 11/-
OP-2 with OP-4	Rs. 17/-

41. OP-2 submitted that *vide* letter dated 11.01.2016 it reduced the bid price (inclusive of taxes) from Rs. 12,621/- to Rs. 12,521/- and further to Rs. 12,250/- and the tender was awarded to it. It has been submitted that if there had been any cartelisation amongst OP-1 to OP-4, OP-2 would never have reduced the price of the sewing machine and that too after finding out that there were only 3 bidders left in the tender who are the authorised dealers of OP-1 (who must have known that whosoever wins the bid, the benefit would be to OP-1). Therefore, OP-2 has averred that reduction of price at the stage of negotiation shows that there was no cartelisation in the tender and OP-2 did not charge any excessive prices over and above competitive/market price to earn “supra normal profits”. OP-2 has also



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justified its bid price on the basis of MRP of the product and the accompanying accessories and annual maintenance charges to be supplied/provided to OP-5.

42. OP-2 has further submitted that considering the quantity of products to be supplied, the said price difference between the price bids of the OP-2 to OP-4 makes huge difference at the last. It has been further submitted that OPs are located in Pune itself, and therefore the freight component, travel expenses, labour charges would have only small difference. OP-3 has also sought to justify the similar price on the basis of geographical location of all the OPs.
43. The Commission considered the aforesaid submissions of OP-2 and noted that the bid values quoted by these OPs in the Impugned Tender were very close to each other with difference of less than thirty rupees and it is highly unlikely that in normal market conditions, the prices quoted by 3 different bidders would be so close to each other. In a competitive bidding, it is expected of the bidders to quote their rates in a competitive and independent manner after taking into account their input costs and prevailing market conditions and the Act prohibits any anti-competitive agreement which manipulates the fair price discovery.
44. Some of the participating bidders claimed similar geographical location and the resulting similar overheads as a reason for quoting similar bid price. In this regard, it is observed that they have not been able to demonstrate/justify with any evidence, *e.g.* cost data, the miniscule difference in the price bid in the Impugned Tender. Similar price quotes, in the absence of any plausible justifications, in response to the Impugned Tender are indicative and suggestive of the fact that such similar price quotes/ differences may not be mere coincidences but may be an outcome of some agreement or understanding or arrangement amongst the participating bidders. No doubt, price parallelism *per se* may not be sufficient to establish collusion in itself,



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and accordingly, the DG has proceeded to examine whether such parallel behaviour of the bidders in quoting almost similar bid prices in response to the Impugned Tender floated by Pune Zilla Parishad was an outcome of any concerted act. The Commission has perused the evidence collected by the DG in this regard and the submission of the parties thereon in the succeeding paras.

45. Before analysing the evidence gathered by the DG, the Commission deems it appropriate to deal with a contention raised by some of the OPs that on other occasions also, there was insignificant bid price difference in respect of the tenders floated by OP-5. In this regard, as pointed out above, mere price parallelism in itself may not be sufficient under the scheme of the Act to hold the parties in contravention, yet such behaviour may fall foul of the provisions of the Act, which prohibit bid rigging, if there are other factors and evidences available on record to show collusion amongst the bidders. Hence, the plea is of no consequence as the Commission has to assess entire material and evidence available on record, in addition to the parallel behaviour, before reaching any finding of contravention of the provisions of the Act by the parties.

*Payment and Refund of Tender Fee and the EMD for the Impugned Tender*

46. The DG during its investigation has also collected evidence related to payment of tender fee and EMD (collectively referred to as, the '**Tender Charges**') for the Impugned Tender. The DG has gathered evidence related to entire trail of movement of the funds for payment of the Tender Charges for the Impugned Tender on behalf of the three OPs, refund of the same to the unsuccessful bidders, payments from the bank account of OP-2, etc.
47. The DG's investigation has revealed that proprietor of M/s Steelfab Corporation, Mr. Nikhil Gandhi paid the Tender Charges (including bank charges) of Rs. 12,81,769/- each on behalf of OP-2 (on 27.11.2015) and OP-



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3 (on 26.11.2015); whereas proprietor of M/s Steelfab, Mr. Nilesh Gandhi (brother of Mr. Nikhil Gandhi) paid the same on behalf of OP-4 on 26.11.2015. Thus, the Commission notes that the payment of Tender Charges on behalf of the three OPs mentioned above was not sourced from their respective bank accounts but certain other parties bank accounts have been utilised for the payment of the said EMD and tender fee. In this regard, the Commission also observed that OP-2 transferred a sum of Rs. 38,46,000/- to the bank account of M/s Steelfab Corporation on 26.11.2015 apparently to facilitate the payment of Tender Charges on behalf of OP-2 to OP-4. This amount was sufficient to cover the Tender Charges for three bids to be submitted to Pune Zilla Parishad.

48. On 12.01.2016, Pune Zilla Parishad awarded the Impugned Tender to OP-2. Thereafter, Pune Zilla Parishad refunded the EMD to the unsuccessful bidders. The analysis of the evidence on record indicates that on 07.03.2016, Rs.12,56,600 was refunded back by Pune Zilla Parishad to Mr. Nikhil Gandhi on account of OP-3 not being successful in the Impugned Tender. Further, Rs12,56,600 was refunded back by Pune Zilla Parishad to Mr. Nilesh Gandhi on account of OP-4 not being successful in the Impugned Tender. Thereafter, on 08.03.2016, the sum total of these two credits, *i.e.* Rs. 25,13,200/- was credited back to the account of OP-2 by Mr. Nikhil Gandhi.
49. The depositions of Mr. Nikhil Gandhi and Mr. Nilesh Gandhi show that the payment of Tender Charges by these two individuals were at the behest of Mr. Venkatesh Darak of OP-2 on behalf of OP-2 to OP-4. This entire sequence of events detailing the trail of money for the payment of Tender Charges and refund of EMD clearly shows that OP-2 arranged the funds for the payment of Tender Charges for the purpose of submitting three bids for the Impugned Tender, *i.e.* one for itself and the remaining two in the names of OP-3 and OP-4. This evidences the key role played by OP-2 in the entire





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process of bid submission for the Impugned Tender on behalf of all three OPs.

50. OP-2 has stated that as per the general practice of tender filling in the area in question, the person in whose name the tender is being filled deposits the earnest amount. However, if such person is not able to make the payment depending on his e-procurement limit, then he insists OP-2 to make the payment in the beginning and later pay back to OP-2. It has been further claimed that e-procurement limit of OP-2 was only Rs. 5 lakh whereas Rs. 12,56,000/- was required to be deposited for the Impugned Tender. Therefore, OP-2 approached Mr. Nikhil Gandhi for the same. OP-3 also in its submissions asserted that its e-procurement limit is only Rs. 3,00,000/- and thus it took help from OP-2 for the payment of tender fee and EMD. In this regard, the Commission is of the view that it is highly unlikely that one competitor would seek assistance from another for filling tenders without jeopardising his/her independence in submission of bids especially considering the financial interest involved. Rather such cooperation would facilitate collusion between competitors. It is also noted that OP-2 has claimed that tender filling services are available to everyone by paying necessary charges. However, except for bald assertions, none of the OPs including OP-2 have placed on record any evidence to establish such kind of financing arrangement between OP-2 to OP-4 and any financial charges that would have been paid to OP-2 for arranging the funds. OP-2 has also claimed in its submissions that such payments are paid back to OP-2 by the bidders using its services. However, in the present matter, neither OP-2 nor OP-3 has claimed to have received/paid back the Tender Charges to OP-2 or provided any documentary evidence to that effect. It also seems highly improbable that OP-2 would make payment to the tune of Rs. 12,56,000 each on behalf of OP-3 and OP-4 without any collateral security. Thus, this arrangement seems to be part of a broader understanding with each other to coordinate and cooperate in submitting bids for the tenders and harm the



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process of competition. The argument put forth by OP-2 is nothing more than an afterthought to suppress the actual sequence of events.

51. OP-2 has claimed that it used to charge OP-3 and OP-4 in lump sum for tender filling as they are its regular clients. OP-2 was waiting for OP-3 and OP-4 to give it more tenders to fill and then take the fee. In the absence of any evidence to this effect, this only seems to be an afterthought by OP-2 to somehow defend itself before the Commission.
  
52. In support of its arguments that it offers tender filling services on payment basis, OP-2 has provided two documents claiming its appointment as Tender Consultant by M/s Jai Khodiyar Industries and M/s Micro Industries. In relation to these documents, it is noted that none of these documents is dated. Moreover, it is interesting to note that these two documents though issued by separate entities are identical in language and thus make same grammatical/language error(s) e.g. *“You will allowed the normal course of the Company’s business publish any same tender”*, *“Klassy will provide all the necessary information about upcoming tender through tale-calling/email”*, etc. It is further noted that both the appointments are claimed to be *“... for a period of Twenty four months, beginning from 1/3/2015 to 31/3/2017...”*. However, the said period is twenty-five months (i.e. from 01.03.2015 to 31.03.2017). It appears that OP-2 has obtained these documents in support of its claim of Tender Consultant for the purpose of present proceedings and no reliance whatsoever can be placed thereon.

#### *Single IP Address*

53. The DG in its investigation has also revealed that all the three bids of OP-2 to OP-4 were submitted from a single IP address, i.e. 116.75.133.164. The evidence collected by the DG, in the form of confirmation from the Internet Service Providers, evidences the fact that the said IP address belong to OP-2 i.e. Klassy Computers. OP-2, in its deposition accepted the fact that his IP



address was used for filling the Impugned Tender on behalf of all the three OPs.

54. In this regard, OP-2 has stated that the DG Report did not take into consideration that OP-2 also works as a cybercafe and offers tender filling services which are available to public at large and anybody can use the same by paying the necessary charges. OP-3 in its submissions also asserted that he is weak in computers, and therefore procured the services of OP-2 to fill the technical envelop which includes many formalities and detailed procedure. As already stated, the Commission is of the view that it is highly unlikely that one competitor would seek assistance from another for filling tenders and such cooperation would facilitate collusion between competitors. Further, OP-2 has claimed that tender filling services are available to everyone by paying necessary charges. However, except for bald assertions, OP-2 and OP-3 have not placed on record any evidence to the effect that such charges have been paid to OP-2 for providing its services in relation to the Impugned Tender.
55. It has also been claimed that there was no condition which prohibited the bidders to use the same IP address under the terms and conditions of the Impugned Tender. The plea is thoroughly misconceived as any act or conduct on the part of the bidders which results in bid rigging or collusive bidding stands in violation of the provisions of the Act as the bidders are required to participate in the tender process in an independent and competitive manner.
56. It has also been submitted by OP-2 that 'technical envelope' of the bid was completed by its employees and the 'commercial envelop' was filled by the concerned OP itself. In the present matter, the commercial envelop was filled by OP-3 and OP-4 on 26.11.2015 and by OP-5 on 27.11.2015 by using the same cybercafé and thus same IP address was used to upload all the bids. In this regard, OP-2 has also relied on the judgement of the Hon'ble High



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Court of Bombay in the case of *S K Translines Private Limited v. The Maharashtra State*, WP No. 3393 of 2016 wherein it was held that “...Merely a singular instance of a party filling in the tender from the same I.P. address as the other tenders would be too slender a consideration to come to a conclusion of the said person forming a cartel...”. OP-2 has also placed reliance on the judgement of Hon’ble Competition Appellate Tribunal in the case of *Delhi Development Authority v. Shree Cement Limited*, 2010 CTJ 17 (COMPAT) (MRTP) and the judgement of Hon’ble Supreme Court of India in the case of *Union of India v. Hindustan Development Corporation*, (1993) 3 SCC 499. The Commission is of the view that the said reliance of OP-2 to buttress its argument is misconceived as all the evidence unearthed during the investigation have to be assessed holistically and not in isolation to each other. Therefore, all the evidence collected by the DG, viz. usage of single IP address, price parallelism, submission of Tender Charges by OP-2, CDR analysis, close relationship between OPs, etc. have to be seen in conjunction with each other to determine existence of an agreement amongst OP-2 to OP-4, as detailed hereinabove and to be further discussed hereinafter.

#### *Call Data Record (CDR)*

57. During the investigation, the DG has also obtained call data record of the interaction between OPs. The Commission also notes that CDRs are only corroborative evidence used by the DG to support its finding of bid-rigging by the OPs and the major evidence against the OPs in this regard is quoting of similar prices with a difference of few rupees for the Impugned Tender which is hard believe as a coincidence. CDRs are a plus factor which strengthen the finding arrived at against the OPs. They are not the sole but one of the several such plus factors being relied upon by the Commission to find contravention by the OPs.
58. The analysis of CDRs reveal that OP-2 and OP-3 were in constant touch with each other during each event of the Impugned Tender, i.e. date of



floating of the tender, pre-bid meeting, issuance of authorisation letters by OP-1, tender fee and bid submission date. Specifically, on 25.11.2015 (*i.e.* one day before submission of the bid of OP-3), a total of 19 calls of about 90 minutes and on 26.11.2015 (*i.e.* on the date of submission of Tender Charges and the bid of OP-3), a total of 32 calls of about 158 minutes, were made between OP-2 and OP-3. It is also noted that on 26.11.2015, during the process of bid submission of OP-3, one call before submission of the bid and 2 calls immediately after submission of the bid are present in records. It is also noticed that after the tender fees and bids of OP-3 were submitted, Mr. Nayan Shah spoke with Mr. Venkatesh 19 more times. Further, on 27.11.2015, when EMD and fee of OP-2 were submitted, a total of 16 calls of about 109 minutes were made between Mr. Nayan Shah and Mr. Venkatesh. The Commission considers this constant interaction between the two OPs as an important indicator and plus factor in the present matter about the existence of collusion between the OPs.

59. The investigation has also revealed that the interactions between the two OPs, *i.e.* Mr. Nayan Shah and Mr. Venkatesh had been continuing even at the stage of Investigation by the DG office. As per the deposition of Mr. Nayan Shah, both had communicated with each other just a day before the said deposition. He also accepted that he met Mr. Nikhil Gandhi in April 2015 in Pune Zilla Parishad office and thereafter, he met Mr. Gandhi multiple times.
60. From the CDR analysis between Mr. Rahul Shah of OP-4 and Mr. Venkatesh of OP-2, it is noted that both were in continuous interaction with each other for a long period of time, even before 6 months of floating of the impugned tender and such interaction continued even after the closing of tender and thereafter. Mr. Rahul Shah in his deposition claimed that the conversation was with respect to its digital signatures lying with OP-2 for tenders for flour mills. In this regard, it is noted that it is highly improbable that these lengthy discussions at regular intervals aggregating to hundreds



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of minutes are only with respect to issue of digital signatures. It seems that the two have far greater degree of interaction with each other. In this regard, it is important to note from the deposition of Mr. Venkatesh that both have been helping each other while filling multiple other tenders also. It is also noted that account of OP-4 has been used by OP-2 on few occasions for submitting tender fee and EMD for some of these other tenders also. Mr. Rahul Shah has also admitted paying EMD and tender fee in other tenders at the behest of Mr. Venkatesh. This goes on to establish that both these OPs have close relationship with each other and help each other in commercial matters.

61. The CDR analysis also reveals communication between Mr. Nayan Shah of OP-3 and Mr. Rahul Shah of OP-4. It also shows that the three OPs were interacting with each other in quick sessions on 26.11.2015, *i.e.* the day when the bids of OP-3 and OP-4 were submitted for the Impugned Tender.
62. OP-2 in its submissions has questioned the powers of the DG to requisition call data records which has already been dealt earlier. It has been further argued that even assuming that the DG has power to requisition call data records, it has erroneously arrived at pre-determined conclusions based on conjectures and incorrect analysis of the factual background. It has been claimed that since OP-2 operates as a cybercafe and offers tender filling services, it has to interact with its clients for filling technical envelope and other details. OP-2 has also averred that the calls made on 26.11.2015 (*i.e.* the date when the bid for OP-3 was submitted for the Impugned Tender), OP-2 and OP-3 interacted in relation to Baramati Tender also as OP-2 filled the 'technical envelop' of this tender on behalf of OP-2 for the consideration of nominal charges. OP-3 in its submission has claimed that it has paid an amount of Rs. 10,000 to OP-2 for its services. OP-3 has also reiterated similar arguments in its submissions and averred that filling of technical envelope by OP-2 not only in the Impugned Tender but in other tenders *e.g.* Baramati Tender resulted in frequent interactions between OP-2 and OP-3.



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In relation to this argument of OP-2 that it operates as a cybercafe and offers tender filling services, it has already been noted above that except for bald assertions, OP-2 has not placed on record any evidence to the effect that it was engaged for such services by OP-3/OP-4 in return for any charges or such charges were infact paid to OP-2 for its services. Again, the argument put forth by OP-2 is nothing more than an afterthought to suppress the actual sequence of events.

63. Though frequent interactions by themselves cannot be objected to, but when seen in the context of similar price bids and other factors/ circumstances discussed herein, such interactions amongst OPs provide them with opportunities to collude, which is absent in case of competitors who do not have such relationship. Thus the facts that OPs were in continuous contact with each other for business purposes and were having financial dealings amongst them have been considered by the Commission as a plus factor in the instant matter.

*Mobile location details of OP-3*

64. Mr. Nayan Shah, in his deposition stated that he filled up the tender rate, *i.e.* the Bill of Quantity (BoQ) in the Impugned Tender and thereafter, the staff of OP-2 took over and completed the process. However, the DG's Investigation had found that Mr. Nayan Shah could not have been present on the premises of OP-2 during the filling up of the BoQ which is evident from call data records, which give his location at the point of time when the BoQ was being filled. From the call data records of Mr. Nayan Shah, the DG has noted that he had an interaction with Mr. Venkatesh at 16:40:49 hours, that is, 4 minutes prior to the submission of the bid online. Thereafter, Mr. Nayan Shah had communicated with Mr. Venkatesh at 16:45:57 hours and thereafter at 16:46:44 hours, *i.e.* soon after of filling of the bid online of OP-3. In both the instances, the location of Mr. Nayan Shah was in the area where the office of OP-3 is located, which is situated at a distance of 8.7 Kms from the office of OP-2. The DG has also noted that the estimated time



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of travel by road could not be less than 30 minutes considering the density and congestion in that area of Pune. The DG has thus concluded that the claim made by Mr. Nayan Shah is not correct and that at the time of submission of the bid of OP-3, Mr. Nayan Shah was not available at the premises of OP-2.

65. In relation to above mentioned call records, OP-2 has claimed that during the submission of its bid on 26.11.2015, OP-3 left his mobile phone in his office and therefore, to confirm the OTP (one-time password) sent to the registered mobile number of OP-3 and thereafter, to confirm the bid submission, OP-3 called his number from the phone of OP-2. OP-3 again took same stand in its submissions before the Commission and averred that apart from location details, there is no evidence that OP-3 was not present in OP-2's office whereas, the depositions of OP-2 and OP-3 corroborate the presence of OP-3 in OP-2's office. In this regard, the Commission notes that apart from oral claims as to the presence of OP-3, OP-2 and OP-3 have not adduced any evidence as to the actual presence of OP-3 in the premises of OP-2 to fill the commercial envelop. Filling tenders from the same IP address raises suspicion of meeting of minds/collusion. Merely stating that the commercial bid was submitted by the bidder himself without providing any substantive evidence to that effect is not sufficient to remove the suspicion. On the other hand, the Commission considers the mobile location details indicating presence of OP-3 in his own premises during bid submission period as a substantive plus factor coupled with other evidence on record to hold that OP-2 and OP-3 had prior understanding and meeting of minds to rig the bids filed in response to the Impugned Tender.

#### *Role of OP-4 in the Impugned Tender*

66. During the investigation, M/s Jawahar Brothers professed its non-involvement in the bidding for the Impugned Tender and filed an affidavit in that regard. To examine the submission of OP-4 and its role in the entire





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tender process, the DG has collected various evidence in the form of depositions, call data record, *etc.* During the course of the investigation, Mr. Jawahar Motilal Shah was summoned by the DG who in turn nominated his son Mr. Rahul Shah in his place to appear before the Commission due to ill health. Mr. Jawahar Motilal Shah also submitted that his son Mr. Rahul Shah was well versed with the business activities of Jawahar Brothers and would be competent to do all acts, deeds and things as was necessary and on behalf of Mr. Jawahar Shah. He also permitted Mr. Rahul Shah to sign and execute and to appear before the Commission, on his behalf. He also gave him all the powers legally through a power of attorney dated 23.11.2017. As per the records, Mr. Harshwardhan Motilal Shah also appointed Mr. Rahul Shah as his authorised agent as he was well versed with the Impugned Tender as also in dealing with OP-2 on behalf of OP-4 for flour mill tender.

67. As already stated, Mr. Rahul Shah has claimed that OP-4 has never participated in the Impugned Tender and stated that it did not attend the pre-bid meeting, did not pay the tender fee, *etc.* and its documents/digital signatures were misused by OP-2 for submitting bid for the Impugned Tender. In this regard, it is noted from the tender filling process as explained to the DG during the course of investigation, that at the time when the bid is uploaded, a message (SMS) would go to the registered mobile number of the bidder. In the case of OP-4, the registered mobile number for the Impugned Tender was that of Mr. Rahul Shah. On 26.11.2015, at 17:12 hours the bid of Jawahar Brothers for the Impugned Tender was filled up and as per the CDR of Mr. Rahul Shah, he received an SMS from GEPMAH (the sender identification of Government e-procurement Maharashtra) at 17:13 hours for the Impugned Tender. It is also noted that just after the filling up of another tender 10 2015\_RDPUN\_81219\_1 for flour mill (**‘Flour Mill Tender’**) at 23:12 hours on the same day, Mr. Rahul Shah received another SMS at 23:13 hours from the same automatic message system, *i.e.* GEPMAH. OP-4 has not contested submission of bid in the said



tender. In this regard, Mr. Rahul Shah admitted having received the messages but claimed that similar formats of auto-generated SMS received from GEPMAH caused confusion and he was under the impression that the SMSs received pertained to Flour Mill Tender. However, this claim of Mr. Rahul Shah stands negated as the times of submission of the bids for the two tenders on 26.11.2015 were starkly different, and therefore the times for receipt of SMS are also different (as detailed above). Therefore, when the Flour Mill Tender was submitted at 23:12 hours, it is not understood as to how Mr. Rahul Shah could have presumed confirmation SMS received at 17:13 hours was in respect of this tender. An SMS notification on the registered mobile number of the bidder is a clear knowledge and intimation. In view of foregoing, the plea of Mr. Rahul Shah and thus OP-4 claiming confusion and lack of knowledge in respect of filling of Impugned Tender, stands falsified and rejected.

68. It has also been claimed by OP-4 that tender form submitted to OP-5 on behalf of OP-4 were in the name of '*Jawahar Brothers & Agency*' whereas no such firm is in existence and the firm of OP-4 is registered in the name of '*Jawahar Brothers*'. As per OP-4, this strengthens its stand that it is a victim of fraud and forgery. In this regard, the Commission has perused the stock availability certificate submitted by OP-4 while responding to first Investigation report and noted that the same has been issued on the letter head of *Jawahar Brothers & Agency* which is claimed by OP-4 as non-existent. If the case of OP-4 is that there is no entity by the name of *Jawahar Brothers & Agency*, it is not understood as to how Mr. Rahul Shah had submitted the said stock certificate with the Commission while responding to the Investigation Report. This inconsistency was posed before Mr. Rahul Shah during his cross examination by OP-1; however, he could not provide any plausible justification for the same.

69. It is further noted that OP-4 while responding to first Investigation Report stated that "...the tender specifies the condition that all the bidders have to



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*submit a certificate stating that sufficient stock is available with the tender participants. The OP-4 had handed over such certificate with respect of Flour Mill Tender to OP2. Unfortunately same was uploaded by OP2 for Sewing Machine Tender”. However, while responding to Supplementary Investigation Report, OP-4 changed its submission to “stock availability certificate was created by OP-2 on behalf of OP-4 for flour mill tender which was to be submitted next day after impugned tender i.e. on 27.11.2015 and mistakenly OP-2 utilized same in respect of impugned tender.” (emphasis supplied)*

70. The Commission also notes that for the Impugned Tender, the email ID mentioned in the bid of OP-4 was *jmshah.baramti@gmail.com*. Mr. Rahul Shah, during his deposition disassociated himself from the said email ID. However, the DG during the course of examination of the details of Baramati Tender (as explained in subsequent paragraphs) received from Block Development Officer, Baramati found that the same email ID was quoted in that tender. This tender was in fact awarded to OP-4. Thus, it is noted that this claim of Mr. Rahul Shah, who is otherwise well versed with the business activities of OP-4, is misconceived and erroneous.
71. Mr. Rahul Shah also claimed that Mr. Venkatesh was not returning the digital signatures of OP-4 and also cheated him in Flour Mill Tender in November 2015. It is therefore surprising that despite this, OP-4 continued its business relationship in subsequent tender (e.g., Satara Tender in March 2016).
72. It is also noted and as detailed in subsequent paras that Mr. Rahul Shah admitted cooperation with OP-2 in other tenders wherein he paid tender fee on behalf of all the bidders. Based on the same, the Commission notes that OP-4 has not come to the Commission with clean hands as OP-2 and OP-4 are close business associates and are colluding in various Government tenders to harm the competitive process. In view of the foregoing and



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considering all the evidence holistically (as adumbrated above and in succeeding paragraphs), the Commission is of the view that the argument of OP-4 that it was not aware of the submission of its bid in the Impugned Tender is misconceived and thus liable to be rejected. Mr. Rahul Shah and thus, OP-4 has played an active role in rigging the bids in the Impugned Tender.

#### *Close Coordination in other Tenders*

73. The Informant had also referred to another tender floated by OP-5 in its information filed u/s 19(1)(a) of the Act, which is tender bearing no. ID 2016\_RDPUN\_148014\_1 for supply of sewing machines, floated in August 2016. The DG, in its investigation, also examined the said tender and it is noted that there were six participants in this tender, namely OP-1, OP-2, OP-3, OP-4, M/s Sunil Traders, and Suttraway Engg. Works Pvt. Ltd. The investigation has revealed that the payment of the EMD as well as the tender fee for this tender also has been made by OP-2 not only for itself but also for three other bidders, namely M/s Sunil Traders, OP-1, and OP-3. Mr. Venkatesh of OP-2, in his deposition admitted having paid the tender fee and the EMD on behalf of other OPs.
74. The DG has also analysed the coordination between OPs in two other tenders. In relation to submission of tender fee and EMD for another tender floated by OP-5 for supply of flour mills, bearing ID 2015\_RDPUN\_84469\_1 (**Baramati Tender**), Mr. Rahul Shah in his deposition admitted that he made three payments at the behest of Mr. Venkatesh (OP-2) in December 2015. His account was used to make the said payments on behalf of OP-2 to OP-4 and the said tender was awarded to OP-4. Though, Mr. Rahul Shah claimed ignorance as to the identity of other two bidders but this goes on to show close relationship between OP-2 to OP-4. He agreed to allow his account to be used for payment of tender fee and EMD for his supposed competitors at the request of Mr. Venkatesh.



As per the CDR analysis, both OP-2 and OP-4 exchanged many calls on the same day when tender fee and EMD were paid for Baramati Tender. The said interaction was admitted by Mr. Rahul Shah in his deposition. The Commission also notes this is the same modus operandi as followed by Mr. Venkatesh in respect of the Impugned Tender. Mr. Rahul Shah also admitted that he made three payments to ensure that he wins the Baramati Tender and Mr. Venkatesh promised that he would fill up L1 bid in his name.

75. During the course of Investigation, the DG also examined another tender floated by a Government Agency of Satara bearing 10 2016\_SATAR\_101854\_1 (**Satara Tender**) in March 2016. This tender was for supply of fully automatic box type domestic flour mill and there were four bidders, three of whom were again OP-2 to OP-4 and the fourth bidder was M/s Om Enterprises who could not qualify the technical bid stage. For this tender also, the tender fees as well as EMD were paid by Mr. Rahul Shah on behalf of all three OPs.
76. It is interesting to note that while replying to Supplementary Investigation Report, OP-4 has contended that “*OP-4 was unaware of Satara tender, and never filled it of its own, its OP-2 who has submitted satara tender by misusing digital key of OP-4 and other documents, the same tender was given to OP-2.*” Whereas, during deposition, Mr. Rahul Shah admitted paying tender amount of Rs. 40,600/- not only for himself but also for two other bidders for Satara Tender. Not only that, he accepted having made a mistake by doing so. He also stated that “*I was told that unless three bids are received the tender would be cancelled. To ensure tender was not cancelled I did this*”. This clearly indicates that OP-4 is trying to mislead the proceedings.
77. OP-2 has contended that the DG in its supplementary report rather than connecting the collusion between OP-1 and OP-2 in tender in question focused on the subsequent tenders. In this regard, the Commission notes that



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there is rarely direct evidence of action in concert and in such situations, the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia, which, taken together, may in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. In the present case, it is important to look at the conduct of the OPs in other tenders as well to infer the existence of any agreement in relation to the Impugned Tender. Modus of a cartel is not a one-time affair; rather, people who cartelise, pursue their anti-competitive agenda through various means, either simultaneously or one followed by the other. They may meet to decide their agenda for cooperation followed by interactions, telephonic or otherwise, regarding terms and modus of cooperation and, later, monitor each other to ensure compliance of their decision. Thus, there is merit in the DG relying upon the cooperation exhibited by OPs in other tenders also. Therefore, the contention of OP-2 is misconceived and must be rejected.

#### *Role of OP-1 in the Impugned Tender*

78. The Informant has alleged that OP-1 is also part of the cartel and rigged the bids in the Impugned Tender. Accordingly, the DG has also investigated its role in the Impugned Tender and concluded that OP-1 is also a part of the cartel.
79. As a preliminary objection, OP-1 has submitted that it did not bid in the Impugned Tender floated by OP-5 in November 2015 and the second tender floated by OP-5 in August 2016 (in which OP-1 submitted its bid) was cancelled without opening. Hence, OP-1 was not at the same level as that of other bidders, *i.e.* OP-2 to OP-4 and thus, there is no question of any cartel or bid rigging or collusive bidding by OP-1 within the meaning of the Act. In this regard, it is noted that though OP-1 did not participate in the



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Impugned Tender as a bidder, Mr. Sanjeev Thakur of OP-1, during his deposition, admitted that he attended the pre-bid meeting of the Impugned Tender on 17.11.2015 but could not participate in the tender due to some technical reasons and thus, could not transfer the EMD amount on time. Thus, OP-1 had every intention to participate in the Impugned Tender but could not do so due to a technical reason. Further, as admitted, OP-1 participated and submitted its bid for tender ID 2016\_RDPUN\_148014\_1 for supply of the same product, *i.e.* sewing machine floated by OP-5 in August 2016, wherein OP-2 to OP-4 also submitted their respective bids. Merely because OP-1 could not participate in the Impugned Tender due to a technical reason is not sufficient to hold it at a different level than the other OPs. In view of these admitted facts, the contention of OP-1 that it was not placed at the same level as that of OP-2 to OP-4, is misconceived and deserves to be rejected.

80. The DG in his report has noted that OP-1 issued authorisation letters to OP-2 to OP-4 in relation to the Impugned Tender which became the foundation for the technical acceptance of their bids by OP-5. The DG has examined the procedure adopted by OP-1 for issuing authorisation letters to the bidders and noted that it did not carry out due diligence before issuing authorisation letters to OP-2 to OP-4 for the Impugned Tender and further, these authorisation letters of all three OPs were handed over by OP-1 to OP-2. The DG, on the basis of other evidence, also noted that Mr. Sanjeev Thakur and Mr. Venkatesh share close relationship with each other. In view of the foregoing, the DG concluded that there was a meeting of minds and coordination among the key officials of OP-1, OP-2, OP-3 and OP-4 in relation to the Impugned Tender.
81. OP-1 in its response has submitted that authorisation letters were issued by OP-1 to eligible entities which were found suitable and fulfilling OP-1's criteria for participation in tenders floated by OP-5. It has also been submitted that terms offered by OP-1 were delivery against advance



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payment and hence there was no need for conducting any detailed background check. OP-1 has further averred that no prudent businessman will do any background check of any person who approaches him for purchase of his products against advance payment. In view of the foregoing, OP-1 has claimed that in no circumstances, absence of supporting documents can lead to inference of collusive conduct on part of OP-1.

82. The DG also noted that authorisation letters for OP-3 and OP-4 were sent directly to OP-2 by OP-1, and therefore the same is indicative of meeting of minds. However, the investigation has not revealed any coherent evidence which could substantiate the same. Moreover, it is also noted that OP-1 also forwarded authorisation letters in favour of OP-2/ OP-3/ OP-4 to OP-5 *vide* its email dated 27.11.2015. The DG also made certain other observations like alteration in the prescribed format of the authorisation letter issued by OP-1 as a marketer and not as a manufacturer, OP-1 in this regard, has submitted that such change in authorisation letter was done to better describe OP-1. The DG also stated that OP-1 was the only party who could have supplied sewing machines as per OP-5's specifications. The Commission does not find this observation relevant for the purpose of determining of issues at hand.

83. Mr. Sanjeev Thakur of OP-1, in his deposition, also admitted that OP-2 made payment towards tender fee and EMD for OP-1 in Tender 2016\_RDPUN\_148014\_1 for supply of sewing machine floated in August 2016. He also submitted that OP-1 was facing technical issues over portal of local Authority, Pune in respect of deposition of EMD in 2016, so the EMD on behalf of OP-1 was deposited by its dealer, *i.e.* OP-2. In its submissions, OP-1 has reiterated the same and stated that due to certain firewalls in the computer systems of OP-1, the bid for this tender could not be uploaded and/or fee could not be paid. The investigation has also revealed that OP-2 has made payment towards tender fee and EMD for OP-1 on 2 occasions (as admitted by OP-1). The DG observed that OP-1 did not





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take any corrective measures to overcome a problem which was hindering it from filing bids and thus made an inference against OP-1. In this regard, OP-1 has contended that “...*The business of UIL through Tenders business in sewing machines in comparison to total turnover of UIL was negligible that it was not prudent to remove firewalls and security checks. Removing the security checks and firewalls for such negligible business was not a prudent trade-off and therefore the same were not changed...*”

84. In relation to these payments, the DG has noted that OP-1 was not able to explain how the Tender fee and charges levied by the bank were paid by it to OP-2 as there is an amount of Rs. 3,300 which, though, miniscule was not refunded into the account of OP-2 and which had to be borne by him. This, as per DG, bolsters the fact that there was an understanding between OP-1 and OP-2. In this regard, OP-1 has responded that the amount of Tender fees, bank charges and expenses were paid by it by way of a credit note of Rs. 5,211/- on 31.03.2017 in trade account of OP-2 maintained with OP-1.
85. The DG has also noted that OP-1 has undertaken responsibility on behalf of bidders on the Impugned Tender even after warranty period of the sewing machines. The DG has claimed that by issuing such authorisations in favour of the bidders who are found to have no experience in the field of sewing, OP-1 has tied itself with Pune Zilla Parishad by taking onerous responsibility of unlimited duration. The DG has thus concluded that entire exercise was an outcome of collusive conduct between OP-1 and other bidders. In this regard, OP-1 has submitted that it is common public knowledge that manufacturer of consumer goods always provides after sales services and support to the ultimate consumer and not the person selling or supplying the same. In relation to the observation of the DG that bidders did not have prior experience of sewing machines, OP-1 has claimed that in the business of trading of consumer goods, the trader need not have any prior experience of the particular product as he is never called to provide after



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sales services which is the matter entirely between manufacturer and the ultimate consumer.

86. The DG also noted that OP-1 has been the main beneficiary for the Impugned Tender and there has been complete alignment of the interest of OP-1 with the bidders concerned particularly when the supplies shall be sourced by the winning bidder from OP-1 itself. In this regard, OP-1 has submitted that said factor is of no consequence as in every supply of goods, the manufacturer/ supplier is always the beneficiary.
87. Another factor relied upon by the DG is the close association between Mr. Thakur of OP-1 and Mr. Venkatesh of OP-2. In this regard, OP-1 has submitted that given the fact that OP-2 is an authorised dealer of OP-1, the regular interaction between them is not sufficient to presume bid-rigging or collusion between the parties. Since OP-2 was awarded the Impugned Tender, there was a need of interaction between two OPs.
88. Having considered the investigation report(s) and the response of OP-1 thereon, the Commission is of the considered opinion that the circumstances and evidence collected and collated by the DG to hold OP-1 in contravention of the provisions of the Act in relating to the Impugned Tender, are not sufficient and tenable. Mere absence of proper due diligence and verification by a manufacturer before issuing authorisation letters, cannot, in itself, be a ground to hold OP-1 liable for contravention of the provisions of the Act. Further, the “personal” relationships between employee of OP-1 and proprietor of OP-2, as brought out by the DG to establish contravention, are wholly extraneous and unwarranted. There is not sufficient evidence brought on record by the investigation wherefrom contravention of OP-1 can be established for bid rigging in respect of the Impugned Tender.



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### *Conclusion*

89. Definition of an ‘agreement’ as given in Section 2(b) of the Act requires, *inter alia*, any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. An understanding may be tacit and the definition under Section 2(b) of the Act covers even those situations where the parties act on the basis of a nod or a wink. There is rarely direct evidence of action in concert and in such situations, the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In light of the definition of the term ‘agreement’, the Commission has to assess the evidence on the basis of preponderance of probabilities.
90. Further, since the prohibition on participating in anti-competitive agreements and bid rigging and the penalties which the infringers may incur are well known, it is normal for such practices and agreements to take place in a clandestine fashion, for meetings to be held in secret, and for associated documentation to be reduced to a minimum. The Commission in this regard notes that, in respect of cases concerning cartels which are hidden or secret, there is little, or no documentary evidence and evidence may be quite fragmentary. The evidence may also be wholly circumstantial. It is therefore, often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia, which, taken together, may in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. In the present case, as detailed earlier, the DG has demonstrated a parallel conduct in quoting similar price by OP-2 to OP-4 through a detailed analysis of the Impugned Tender. Further, the DG supported such behaviour with various plus factors, as analysed hereinabove in this order.



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91. Applying the aforesaid legal test to the evidence detailed in the present case and on a holistic consideration of the above factors, the Commission concludes that quoting of bid prices which are very close to each other with difference of just a few rupees by OP-2, OP-3 and OP-4 for the Impugned Tender is not a mere coincidence but a result of consensus/ understanding amongst OP-2 to OP-4. The Commission also notes that when seen in isolation, none of the above discussed factors may be conclusive proof to indicate collusion amongst OP-2 to OP-4 but a holistic assessment of bid prices of OP-2 to OP-4 coupled with the factors discussed above is conclusive of an agreement amongst OP-2, OP-3 and OP-4 to fix price, resulting in rigging the bids in the Impugned Tender of OP-5. In relation to OP-1, the Commission is of the view that the evidence on record is not sufficient to conclude that OP-1 was involved in the agreement between OP-2 to OP-4 to rig the bids in the Impugned Tender.
92. Thus, once an ‘agreement’ is established in terms of the definition of this term as given in Section 2(b) of the Act and further such agreement is found to be established in respect of the specified clauses of Section 3(3) of the Act, then by virtue of the statutory presumption provided thereunder, such agreement is presumed to have an appreciable adverse effect on competition. No doubt, such presumption is rebuttable, and the parties are at liberty to rebut such presumption.
93. To sum up, Section 3(1) of the Act proscribes anti-competitive agreements as specified therein and further Section 3(2) thereof declares such agreements to be void. Furthermore, by virtue of the provisions contained in Section 3(3), any agreement which (a) directly or indirectly determines purchase or sale prices; or (b) limits or controls production, supply, markets, technical development, investment or provision of services; or (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of



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customers in the market or any other similar way; or (d) directly or indirectly results in bid rigging or collusive bidding, is presumed to have an appreciable adverse effect on competition.

94. In this regard, one of the OPs has contended that even assuming that there was a cartel in the present matter, it cannot be presumed to have an effect on the competition in the market or affect the consumers. In relation to this contention, it is important to note the ratio set by the Hon'ble Supreme Court of India in the matter of *Rajasthan Cylinders and Containers Ltd. v. Union of India and Others, 2018 (13) SCALE 493* wherein it was held that the agreements of nature mentioned in sub-section (3) are presumed to have an appreciable effect and, 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. The relevant excerpts of the Hon'ble Supreme court decision in *Rajasthan Cylinders (supra)*, are as follows:

*“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.”*

95. The instant matter pertains to bid rigging in respect of the tender floated by OP-5. Since bid rigging by OP-2 to OP-4 in the Impugned Tender stands established, the statutory presumption of appreciable adverse effect on competition (AAEC) automatically follows. The Commission notes that cartelisation including bidrigging is a pernicious form of competition law contravention. Any party willing to advance justification has to give proper reasoning with clear and cogent evidence for the same. Vague assertions would not help such parties to evade the responsibility cast upon them under the provisions of Section 3 of the Act.
96. OP-2 has contended that there was no AAEC by comparing the price quoted in the Impugned Tender with the Maximum Retail Price (MRP) of the Picofall-cum-Sewing Machine in the market along with the accessories to be supplied to OP-5 or for that matter with the price in the open market. It has been claimed that after balancing the interest of the consumer and his nominal profit as a common businessman, OP-2 was bound to sell one Picofall-cum-Sewing Machine @ Rs. 12,250/- that too below MRP otherwise it would have incurred him loss.
97. In the present matter, OP-5 being a government body, has continuous requirement of procuring products for social welfare purpose, which it procures through tendering process only. Under these circumstances, the collusion to fix prices by rigging the bids in the Impugned Tender would have an adverse impact on the price discovery process and the price paid by OP-5. Such conduct in public procurements, besides defeating the tendering process, has an adverse impact on the exchequer and is a brazen defiance of the responsibility cast under the Act. In view of the above, the Commission finds the contentions of OPs concerning absence of appreciable adverse



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effect on competition misconceived and are thus, rejected. By simply comparing the price quoted in the Impugned Tender with the MRP of the product under consideration, the parties cannot rebut the statutory presumption of AAEC as specified under the provisions of the Act.

98. It has also been contended by OP-2 that OP-5 had the right to reject the bid and thus, anything done by OP-5 cannot be considered as an act of OP-2. In this regard, reliance has been placed on the decision of the Hon'ble Competition Appellate Tribunal in the case of *Escorts Ltd v. CCI, Appeals Nos. 13, 15 and 20 2015* decided on December 2015, 2016 CompLR (ComAT). The Commission notes that the observations of the Hon'ble Competition Appellate Tribunal in that case are not applicable in the present matter as the Commission is neither making any observation in relation to the conduct of OP-5 nor ascribing the conduct of OP-5 on to OP-2.
99. The Commission also notes that rebuttal of presumption of AAEC can be made by the parties taking recourse to all or any of the factors provided under Section 19 (3) of the Act. In the present matter, none of the parties has been able to demonstrate before the Commission, as to how their impugned conduct resulted into any (i) accrual of benefits to consumers; (ii) improvements in production or distribution of goods or provision of services; or (iii) promotion of technical, scientific, and economic development by means of production or distribution of goods or provision of services, in terms of Section 19 (3) of the Act.
100. In view of the above, the Commission holds that the parties are unable to rebut the presumption of AAEC in the matter and, therefore, the Commission finds the agreement amongst OP-2 to OP-4 to rig bids in the Impugned Tender floated by OP-5, for procurement of Picofall-cum-Sewing Machine, to be in contravention of the provisions of Section 3(1) read with Section 3(3)(d) of the Act.



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101. Having found OP-2 to OP-4 to be in contravention of Section 3(1) read with Section 3(3)(d) of the Act, the next issue to be determined is whether their office bearers identified by the DG are responsible under Section 48 of the Act. It is noted that OP-2 and OP-3 are sole proprietorship concerns whereas OP-4 is a partnership firm and accordingly, the DG has identified the following individuals of OP-4, responsible under Section 48 of the Act: (i) Mr. Jawahar Motilal Shah, Partner, (ii) Mr. Harshwardhan Motilal Shah, Partner, (iii) Mr. Abhay, Partner (*since deceased*) and (iv) Mr. Rahul Shah.
102. Mr. Jawahar Motilal Shah, during investigation, has informed that his son Mr. Rahul Shah has been well versed with the business activities of OP-4. The DG has found Mr. Rahul Shah to be not only actively involved in the activities of OP-4 but also fully conversant with the tendering work undertaken by OP-4. The Commission notes that both the partners of OP-4, *i.e.* Mr. Jawahar Motilal Shah and Mr. Harshwardhan Motilal Shah cannot escape their liability under Section 48(1) of the Act merely by identifying Mr. Rahul Shah as the person conversant with the tendering work undertaken by OP-4. Therefore, the Commission agrees with the findings of the DG to hold Mr. Jawahar Motilal Shah, Partner of OP-4, and Mr. Harshwardhan Motilal Shah, Partner of OP-4 in terms of Section 48(1) of the Act and Mr. Rahul Shah of OP-4 in terms of Section 48(2) of the Act, for the impugned conduct of OP-4, which is found herein above to be in contravention of the provisions of Section 3 (3) (d) read with Section 3 (1) of the Act.
103. In view of the above, the Commission passes the following:

### **ORDER**

104. The Commission, in terms of Section 27 (a) of the Act, directs OP-2 to OP-4 and the individuals of OP-4, as mentioned above, who have been held liable in terms of the provisions of Section 48 of the Act, to cease and desist in future from indulging in practices which have been found in the present





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order to be in contravention of the provisions of Section 3 of the Act, as detailed in the earlier part of the present order.

105. So far as imposition of monetary penalty is concerned, it would be apposite to refer to the decision of the Hon'ble Supreme Court of India in *Excel Crop Care Limited v. Competition Commission of India & Anr.*, Civil Appeal No. 2480 of 2014 decided on 08.05.2017. One of the issues which fell for consideration before the Hon'ble Supreme Court in this case was as to whether penalty under Section 27(b) of the Act should be imposed on total/entire turnover of the offending company or only on "relevant turnover", *i.e.* relating to the product in question?

106. After referring to the statutory scheme as engrafted in Section 27 of the Act and analysing the case law at length, the Hon'ble Supreme Court opined that adopting the criteria of 'relevant turnover' for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties. While reaching this conclusion, the Hon'ble Supreme Court recorded the following reasons:

*When the agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the 'maximum penalty' imposed in all cases be prescribed on the basis of 'all the products' and the 'total turnover' of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services etc. It, therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of 'relevant turnover'.*

107. Thus, the starting point of determination of appropriate penalty should be to determine relevant turnover, and thereafter to calculate appropriate percentage of penalty based on facts and circumstances of the case.



108. Coming to the facts of the present case, the Commission notes that the infringing anti-competitive conduct of the parties pertained to supply of Picofall-cum-Sewing machines. OP-2 has provided details of revenue generated from supply of such machines in respect of the relevant period. At the same time, it is observed that OP-3 has submitted that it did not have any revenue from supply of Picofall-cum-Sewing machines during 2015-16 to 2017-18. OP-4 has provided the financial statements as sought for by the Commission, but it has not provided any separate details of revenue generated from supply of such machines, as directed by the Commission. Having considered these aspects and the larger public policy objectives of the Act, the Commission is of the considered view that, no doubt, the penalty has to be imposed on the infringing parties by taking the relevant turnover into account as a starting point, yet, it cannot be overlooked that bid-rigging takes place in myriad and diverse forms of manipulation where one or the other bidder would be merely providing cover and as such would have no revenue from the product under consideration. For example, bid suppression, cover bid and bid rotation are common stratagem deployed by the collusive bidders to rig the bids particularly in government tenders. In such scenarios, there would be no revenue from sale or supply of the concerned product so far as the bidders who have chosen to submit cover bids. To allow such parties to walk free without incurring any monetary penalty for their anti-competitive conduct would not only stultify the Parliamentary intent in providing deterrence through penalties against such behaviour but would also run contrary to the underlying spirit of the judgement of the Hon'ble Supreme Court of India in *Excel Crop Case (supra)* which recognized the need for proportionality in modulating penalties in case of multi-product companies by taking relevant revenue into account. The present is not such case as the bidders who rigged the bids are essentially traders/service providers and cannot be as such considered as multi product companies. Taking such a pedantic interpretation would provide a virtual free run to potential bidders who participate in government



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tenders and an effective immunity against any antitrust action for their anti-competitive behaviour. This cannot be the purport or intent either of the Parliament or the Hon'ble Supreme Court of India in laying down the parameters and perimeter for imposition of monetary penalty upon the contravening parties. Thus, while taking revenue from supply of Picofall-cum-Sewing machines would be a guiding factor for the Commission, it cannot be the inhibiting factor in letting the bidders go scot free, who acted as conduits in the larger civil conspiracy to rig the tenders floated for welfare schemes of the State.

109. The Commission now proceeds to decide the appropriate quantum of the penalty.

110. It may be noted that the twin objectives behind imposition of penalties are: (a) to reflect the seriousness of the infringement; and (b) to ensure that the threat of penalties will deter the infringing undertakings. Therefore, the quantum of penalties imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the mitigating and aggravating circumstances of the case. The Commission is also guided by the judgement of the Hon'ble Supreme Court of India in Excel Crop case (supra) which enunciates the principle of proportionality. Proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalizing the infringer, on the one hand, and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act, on the other.

111. The Commission notes that the infringing OPs have rigged the bids in respect of procurement of sewing machines which were to be distributed for social welfare objectives, and this itself compels the Commission to take serious note of the infringement. At the same time, the Commission is also not oblivious of the fact that these OPs are sole proprietorship concerns and



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partnership firm. The Commission has also considered the revenue generated from the supply of such machines and for the reasons mentioned in para 108, the larger goal of swift market correction would be met if a penalty of Rs. 10,00,000/- (Rs. Ten Lakh only) is imposed upon each of the infringing OPs, *i.e.* OP-2 to OP-4. It is ordered accordingly. Further, a penalty of Rs. 10,000/- (Rs. Ten Thousand only) is imposed upon each of the individuals of OP-4 as identified by the DG in terms of the provisions of Section 48 of the Act. OP-2 and OP-3, being sole proprietorship concerns, no separate penalty is being imposed upon their respective proprietors.

112. Accordingly, the Commission imposes penalties as detailed in the preceding para, for the impugned conduct which has been found to be in contravention of the provisions of Section 3 of the Act, as detailed in the order.
113. The Commission directs these OPs and the individuals liable under Section 48 of the Act to deposit the penalty amount within 60 days from the receipt of this order.
114. The Secretary is directed to communicate to the parties, accordingly.

Sd/-  
**(Ashok Kumar Gupta)**  
**Chairperson**

Sd/-  
**(Sangeeta Verma)**  
**Member**

Sd/-  
**(Bhagwant Singh Bishnoi)**  
**Member**

**New Delhi**  
**Date: 17 / 03 /2021**