



**COMPETITION COMMISSION OF INDIA**

**Reference Case No. 08 of 2014**

**In Re:**

**Shri Vijay Bishnoi  
Chief Materials Manager-I  
Office of the Controller of Stores  
North Western Railway  
Malviya Nagar  
Jaipur**

**...Informant**

**And**

- 1. M/s Responsive Industries Ltd.  
Eucharistic Congress Building No. 1 & 5  
Convent Street, Colaba  
Mumbai** **...Opposite Party No. 1**
- 2. M/s RMG Polyvinyl India Ltd  
10/1, Industrial Area  
Bulandshahar** **...Opposite Party No. 2**
- 3. M/s Premier Polyfilms Ltd.  
40/1A, Site-IV, Industrial Area  
Ghaziabad** **...Opposite Party No. 3**



**CORAM**

**Shri Devender Kumar Sikri**  
**Chairperson**

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

**Mr. Sudhir Mital**  
**Member**

**Mr. Augustine Peter**  
**Member**

**Dr. M.S. Sahoo**  
**Member**

**Justice G.P. Mittal**  
**Member**

**Appearances:** *For Informant*

None

*For Opposite Party No. 1*

Shri M. M. Sharma, Advocate  
Ms. Deepika Rajpal, Advocate  
Shri Abhishek Agarwal, Director

*For Opposite Party No. 2*

Shri Alok Dhir, Advocate  
Shri Apoorve Karol, Advocate  
Shri Vaibhav Tyagi, Advocate  
Shri Arvind Goenka, Director



*For Opposite Party No. 3* Shri K. K. Sinha, Director  
Shri Praveen Kumar, Sr. General  
Manager

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

1. The present reference was filed by Shri Vijay Bishnoi, Chief Materials Manager-I, North Western Railway, Jaipur ('Informant') under Section 19(1)(b) of the Competition Act, 2002 ('Act') against M/s Responsive Industries Ltd. ('OP 1'), M/s RMG Polyvinyl India Ltd. ('OP 2') and M/s Premier Polyfilms Ltd. ('OP 3') (OP 1, OP 2 and OP 3 collectively referred to as the 'OPs') alleging contravention of the provisions of Section 3 of the Act.

**2. Facts:**

2.1 In the instant case, the Informant had alleged cartelisation by the OPs in the tenders floated by North Western Railway (NWR) for supply of 'PVC Flooring (Vinyl) width 1620/mm minimum length 14 meters thickness 2/mm roll to RDSO specification no. RDSO/2006/CG-12 Rev. 1. Sample code NAC FLG-02 along with PVC welding electrode. The quantity of welding electrode to be three times the length of PVC sheet.' (hereinafter, the 'Product/ PVC flooring (CG-12)').



- 2.2 The Informant stated that, as per railway policy, the Product is to be procured by the Indian Railways from RDSO approved suppliers only and the OPs were the only three vendors approved by Research Designs and Standards Organization ('RDSO') for supply of the Product. It was stated that all three RDSO approved firms had been quoting less than Rs.300 per sqm in the tenders floated by NWR and other railway zones, before and in the calendar year 2013. However, from June 2014 onwards the rates were increased by all three firms substantially.
- 2.3 The Informant had averred that for tender no. 70.14.1822, which was opened on 25.04.2014 by NWR, the rates quoted by OP 1 and OP 2 were found to be on the higher side not only compared to the rates quoted in other railway zones but also last purchase rates of NWR. In the tender opened on 25.04.2014 by NWR, OP 1 had quoted the lowest rate of Rs 398.43 per sqm. However, the same OP had quoted Rs. 259.20 per sqm to Integral Coach Factory, Chennai ('ICF Chennai') in the tender opened on 06.03.2014 and Rs. 226.80 per sqm to North Central Railway ('NCR') in tender opened on 04.02.2014.
- 2.4 The Informant contended that as the increase in rates within such short span of time could not be justified when there had been no change in specification of the Product, the tender opened on 25.04.2014 had to be cancelled and retendered due to high rates. However, even in the retender no. 70.14.1822-A which was opened on 24.06.2014, OP 1 and OP 2 quoted all-inclusive rates of Rs. 395.48 per sqm and Rs. 581.29 per sqm respectively. Since L-1 for the tender *i.e.*, OP 1 did not turn up for negotiation, this tender was also cancelled and again retendered. In the second retender which was opened on 30.09.2014, all three OPs participated wherein the lowest rate quoted was Rs. 481.01 per sqm by



OP 1. This rate was 21.62% higher than the rate quoted in tender opened on 24.06.2015.

2.5 Thus, based on these facts, the Informant alleged that the OPs had formed a cartel for supply of the Product to the Indian Railways and that the high rate quoted by them to NWR in the three tenders in 2014 was a result of an understanding amongst them. Further, by entering into an anti-competitive agreement to quote higher rates for the Product, the OPs were also determining price of the Product Thus, the Informant alleged contravention of the provisions of Section 3 of the Act by the OPs.

### **3. DG's Investigation and Findings**

3.1 The Commission vide its order dated 24.03.2015 passed under Section 26 (1) of the Act, directed the Director General ('DG') to investigate the case and submit an investigation report. Accordingly, the investigation report dated 19.10.2015 was submitted by the DG to the Commission.

3.2 Before going into the specific allegations in the matter, the investigation report of the DG briefly brings out the features of the concerned Product. It *inter alia* notes that the OPs are the only three RDSO approved vendors for the supply of PVC flooring (CG-12) for use in AC and non-AC coaches of Indian Railways. The Product is essentially the same for both AC and Non-AC coaches, with only difference being the colour. The Product is exclusive for coaches of Indian Railways as other parties do not require fire and smoke properties and also their products do not have the glass lamination while these are important requirements for Indian Railways. Thus, the Product being exclusive for Indian Railways



are manufactured by the vendors only on receipt of orders from Indian Railways and no inventory of the Product is maintained by them.

3.3 For the purpose of investigation into the allegations, the DG examined whether the market for supply of PVC flooring(CG-12) to the Indian Railways was conducive for cartelisation by the OPs; whether the OPs while bidding in Tender No.70.14.1822 opened on 25.04.2014 and in retenders opened on 24.06.2014 and 30.09.2014 acted in a concerted manner resulting in collusive bidding and whether the alleged conduct of the enterprise/s was anticompetitive in terms of Section 3 of the Act.

3.4 The DG has noted that although bid-rigging can occur in any economic sector, there are some sectors in which it is more likely to occur due to particular features of the industry or the product involved. Some features which tend to support the efforts of the firms to rig bids are: (a) presence of a small number of firms, (b) few or no substitutes for the product/ high dependence of the consumer on the product, and (c) firms selling identical or similar products. It has been observed that such conditions make the market conducive to cartelization as, given the presence of only a few firms and absence of good alternative products, the firms wishing to rig bids are more secure, knowing that the purchaser has hardly any good alternatives and, thus, their efforts to raise prices are more likely to be successful. Further, when the products or services being sold are identical or similar, it is easier for the firms to reach an agreement on a common price structure and collude to raise prices.

3.5 In this case, the DG has observed there were only three firms all over India approved by RDSO to supply the Product to Indian Railways, making the market highly concentrated. Further, the vendors knew that there was no substitute to the Product being manufactured and supplied



by them and, since the requirement of the Product was on day to day basis, if stock decreased or got exhausted the Indian Railways would be forced to buy from them to meet the urgent requirement, even if rates were high. Also, the vendors were engaged in manufacturing and supply of identical Product; in fact the specification, *i.e.*, CG-12, had been prescribed by the RDSO. Thus, the DG inferred that there existed possibility of meeting of minds amongst the vendors.

- 3.6 To analyse the existence of cartelisation in the case, the DG first examined the basis of pricing of bids by the OPs from the standpoint of both the Informant and the OPs. To this end, the DG required the Informant to provide a cost break-up of PVC flooring (CG-12). In response, the Informant submitted that it did not calculate the internal costing of the Product. The reasonability of rate was determined by it as per Last Purchase Rate (LPR), if available, in its own railway zone or in other railway zones. In case this was not available, then the rate of similar items was taken as the basis for deciding the reasonability of rates. When the rates quoted in tender were quite high compared to LPR, only then costing of the item was done. Moreover, costing was done when the item was being procured for the first time. Therefore, internal costing was done on need basis only. Regarding estimated cost of the Product in the instant case, it was found that the Informant had not done any rate analysis for purchase of the Product. The reasonability of rate had been seen on the basis LPR. However, as per the Railway Board letter dated 14.02.2007, which was issued at the time of introduction of material in the railway in the year 2007, the tentative cost of the Product was Rs. 55000/- per coach set and technical department of NWR advised that in each coach approximately 80 sqm of PVC flooring would be required after including compartment space, doorway and lavatory. Therefore, the price of the Product worked out to approximately Rs.



687.50 per sqm. As per RDSO, the requirement per coach was approximately 68 sqm, hence, as per this estimate, the cost worked out be Rs. 809 per sqm.

3.7 The DG also sought cost break-up of PVC flooring (CG-12) from the OPs. The OPs provided cost break-up of manufacturing PVC flooring (CG-12) and their quoted selling price per sqm. with particular reference to the three tenders as follows:

	OP 1			OP 2	OP 3
	NWR tender opened on 25.4.14	NWR tender opened on 24.6.14	NWR tender opened on 30.9.14		
Cost per sqm of raw materials	532.38	546.11	575.92		
Total Cost with Overheads	557.38	571.11	600.92		
Total Cost (including cost of raw materials, overheads, excise duty, V.A.T. and transport)	662.59	678.78	713.95	507.93	510.22
Average selling price per sqm	398.43	395.48	481.01	587.47 (25.4.14)  581.29 (24.6.14)  541.46 (30.9.14)	NA (25.4.14)  NA (24.6.14)  514.33 (30.9.14)
Loss	-264.16	-283.30	-232.94	No Loss	No Loss



- 3.8 From the aforesaid cost-break-up and the statements of the OPs, the DG found that the pricing of the Product to the Indian Railways was not based on costing and expected profit margins. Neither the Informant requisitioned cost break-up of the PVC flooring (CG-12) at the time of floating the tender nor the OPs submitted the same. The Informant as well as the OPs stated that the bid rates were quoted on the basis of LPR.
- 3.9 Further, the DG noted that cost break-up had no relevance to the OPs for supply of the Product as they primarily aimed to maintain prestigious registration of RDSO. As per statement of OP 1, business from Indian Railways was procured by it for volume and capacity utilization and any loss incurred in supply to the Indian Railways was recouped by it from the orders executed for the other purchasers. The other OPs mentioned that rates of the Product quoted by them to Indian Railways was no reflection upon their costing as OP 1 had set a trend of quoting prices below cost and hence, there was no option for them but to bid accordingly for getting at least a few tenders in an year.
- 3.10 The factors considered by the OPs in quoting bid prices were: the quantity of material to be supplied in the current tender, the raw material cost at the relevant time, the last quoted rate in tender of the same zonal railway, the last quoted rate in tenders of different zonal railways, the current capacity utilization for full optimization of the capacity and the best response to the anticipated response of the competitors to the last quoted rate in tender for the Product.
- 3.11 In this background, the DG then considered the tender/ retenders which are the subject matter of allegation. As mentioned earlier, the rates



quoted by the vendors in the tender/ retenders of NWR in which they allegedly engaged in collusive bidding were as follows:

(Amount in Rs. per sqm)

<b>Tender No.</b>	<b>Tender opening date</b>	<b>OP 1</b>	<b>OP 2</b>	<b>OP 3</b>
70.14.1822	25.04.2014	398.43	587.47	Not participated
70.14.1822A	24.06.2014	395.48	581.29	Not participated
70.14.1822B	30.09.2014	481.01	541.46	514.33

3.12 The DG report notes that the Tender Committee ('TC') evaluated the rates submitted for tender opened on 25.04.2014 and as the rates quoted by the bidders were on higher side, it decided to retender the case. On evaluation of the retender opened on 24.06.2016, the TC was of the opinion that the rates were high despite retendering and OP 1 being L1 was called for negotiation. As OP 1 did not turn up for negotiation and the rates received were still on the higher side, the TC decided to retender the case once again. In the retender opened on 30.09. 2014, in which all three OPs participated; the TC noted that the firm which was L1 in earlier tender had increased the rates in this retender by 21.62% in comparison to tender opened on 24.06.2015 and that retendering may lead to further increase in rates. Though there were negotiations with the L1 bidder, the TC was still of the opinion that even the negotiated rates were on higher side and that it could not proceed with the tender and decided to close the case.



3.13 The DG found that LPR was an important benchmark for Indian Railways in evaluating tender bids and questioned Informant during investigation about the basis of identifying LPR and the variation that was acceptable. The Informant submitted that when a tender decision was taken, a general price trend was examined by comparing own LPR as well as the rates obtained and finalised by other zonal railways. As a general practice, rates of nearby railway zones or of railway zones whose data was available through Materials Management Information System ('MMIS') platform of Indian Railways was taken and compared. The rates of other railway zones were an important benchmark for deciding the tender as condition of supply of various items in a railway zone were almost similar. However, there was no limit for the variation of rate and it was left to the judgement of the TC. In the present case, while the information from other zonal railways including Central Railways ('CR') was available, the information that Southern Railways and North Eastern Railways ('NER') had purchased at higher rates was not available. However, a conscious decision was taken by the TC that increase in the rates within short gap of time could not be explained.

3.14 In view of the aforesaid, the DG during the investigation compared the bid price quoted across various railway zones in the corresponding period and found that during the same period, the OPs had quoted in similar price range in other railway zones (other than NWR) and tender bids were in similar price band across all zones. From the statement of the Informant and based on the data of various zonal railways, the DG found that the Informant had chosen only selected tenders for comparing the rates quoted by the OPs in the tenders in question. Even after the first retender was cancelled, the Informant did not make any inquiries from the other zonal railways regarding the prevailing rates of the



Product and only those tenders were chosen which were available on MMIS platform. Therefore, the DG has found that the allegation of the Informant that the OPs quoted higher rate as compared to the LPR of other zonal railways was not substantiated.

3.15 Specific queries were also raised by the DG to the OPs regarding their behaviour in the subject tenders/ retenders whereby they had quoted higher price to NWR. OP 1 submitted that higher rates had been quoted by it to NWR pursuant to its business decision. OP 2 submitted that as it was advised by the Indian Railways not to stop quoting in tenders and to quote the actual rates, it had quoted rates based on actual costing with reasonable profits. OP 3 stated that as the LPR was far below its cost of manufacturing and it would not have been an L-1 in any case, it had not submitted an offer in the tender and first retender. However, after second retender was floated, railways pressurised it to participate stating that if it did not participate a complaint would be filed against it in RDSO.

3.16 Further, the DG found that the justification given by the OPs regarding quantity, number of rolls, size of rolls, distance *etc.* was reasonable in view of business dynamics. For instance, on examination of the tender documents of CR, East Central Railways ('ECR') and Northern Railways ('NR'), it was noted that the tender of CR was for quantity of 56949 sqm, ECR tender was for quantity of 4184 sqm and NR tender was for quantity of 89221sqm and due to small quantity of ECR tender, OP 1 had quoted higher rate to ECR as compared to the rates quoted by it to NR and CR during the same month of February 2013.

3.17 On examination of the rates quoted by the OPs in various tenders, the DG also found that the rates quoted in tenders for PVC flooring (CG-12) by the OPs varied inconsistently from year to year. However, from



April 2014 onwards, there was a regular increase in rates quoted by all the OPs for PVC flooring (CG-12) in different zones of railways. In this regard, it emanated from the investigation that around April 2014, on account of certain factors such as stringent testing procedure, ongoing PIL regarding quality of flooring material supplied to Indian Railways, market leader OP 1 raising its rates, etc. the rates quoted in tenders for PVC flooring (CG-12) exhibited an upward trend across various railways zones.

3.18 To examine whether this general trend could be on account of meeting of mind amongst the OPs, further analysis/investigation was carried out by the DG on the following points:

- a) ***Distribution of Market:*** The DG has observed from the details of tenders for the period 2010-11 to 2014-15 that in almost all tenders, OP 1 is L1. The director of OP 1 also stated that OP 1 is a dominant player in supply of the PVC flooring CG-12 to Indian Railways. It was also observed by the DG that the other two OPs i.e., OP 2 and OP 3 were awarded only few tenders in this period. These OPs stated that the supplies to Indian Railways was a loss making business for them but to maintain their RDSO approval they quoted rates below cost in few tenders to win some of them.

The DG examined the relative share of the OPs in PVC flooring (CG-12) Tenders for AC Coaches in terms of value as well as number of tenders awarded across various railway zones and observed that OP 1 was a major player both in terms of value and volume. Out of 66 tenders that were issued by various zonal railways for supply of PVC flooring in AC Coaches during the period 2010-11 to 2014-15, OP 1 received 46, OP 2 only 2 and OP 3 received 18 tenders. While their share in receiving the number of



tenders was 69.70%, 3.03% and 27.27% respectively; their shares, in terms of value were 88.09%, 0.35% and 11.56%, respectively.

The DG also examined the relative shares of the OPs in PVC flooring (CG-12) tenders for Non-AC coaches and found that out of 140 tenders floated by various zonal railways for Non-AC coaches during the period 2010-11 to 2014-15, the number of tenders received by OP 1, OP 2 and OP 3 were 107, 5 and 28 respectively. Their respective shares value-wise were 75.08%, 3.55% and 21.37% and based on number of tenders were 76.43%, 3.57% and 20%.

- b) **Possible Geographic Allocation of Market:** The DG has found that all three approved firms have been bidding differently in different railway zones indicating no specific pattern amongst them with respect to any possible geographical allocation of the market. The DG examined relative share percentage of the OPs in PVC flooring (CG-12) tenders in terms of value and number of tenders awarded for AC and Non-AC coaches in various railway zones from 2010-11 to 2014-15 and found no instance of geographical distribution of market in this case.
- c) **Interface/Interaction among OPs :** During investigation, DG also probed whether the OPs had any interaction amongst themselves in order to manipulate bids on the following lines:
- (i) **Industry Association:** The DG found that the OPs had not formed any trade association/federation.



- (ii) *Meetings*: The OPs denied that they had met each other for the railway business. However, it was found that there were financial and business transactions between OP 2 and OP 3 and also they were related to each other. However, they were both found to have distinct management. OP 2 was run by Mr. Arvind Goenka and OP 3 was managed by his father Mr. Amar Nath Goenka. Although OP 2 and OP 3 were being run by members of same family but it could not be proved during investigation that they had any understanding amongst them while bidding for tenders of Indian Railways.
- (iii) *Different IP addresses of OPs*: The DG has observed from the data provided by the Informant that in the three tenders under question, IP addresses and the date and time of bid submission by the OPs were different. Therefore, no set pattern was found to conclude bid rigging.
- (iv) *Call details of the OPs*: During investigation call details of key persons of the OPs were examined by the DG and it was found that there was no communication between OP 1 and OP 2/ OP 3. However, key persons from OP 2 and OP 3 had been in touch with each other since they had business transactions and family relations. When confronted with call details, OP 2 and OP 3 denied that they communicated with each other with regard to railway business. The DG has opined that in the absence of contrary evidence, no adverse inference can be drawn against OP 2 and OP 3 for such communications.



d) **Utility of RDSO approval:** All the OPs submitted to the DG that they were supplying PVC flooring (CG-12) to Indian Railways at below cost rates to maintain RDSO approval which made them more credible to other buyers/vendors and also for exports and also enabled them to obtain other Government tenders. All the OPs informed that non-supply of PVC flooring (CG-12) for more than one year to Indian Railways would render them delisted/deregistered from RDSO certification.

3.19 The DG report has hence concluded that during the course of investigation, no evidence was found which could substantiate the allegation of anti-competitive conduct of the OPs in violation of Section 3(3)(a) or Section 3(3)(d) read with Section 3(1) of the Act.

#### **4. Objections/Suggestions of the Parties**

4.1 The Commission in its ordinary meeting held on 11.02.2016 had considered the investigation report of the DG and decided to forward an electronic copy of the same to the Informant and the OPs for filing their suggestions/ objections.

4.2 The Informant in its written submission stated that no suggestions/ objections to the investigation report of the DG were being offered by NWR in the instant case. Further, the OPs in their written submissions accepted the findings of the investigation report of the DG.

4.3 The Commission heard the submissions of the OPs and the informant on the investigation report of the DG on 30.03.2016.



## **5. Findings of the Commission**

- 5.1 The Commission has perused the material available on record and heard the learned counsel for the OPs. The issue before the Commission for consideration and determination is whether contravention of the provisions of Section 3 of the Act is made out in the present case or not.
- 5.2 The primary allegation of the Informant is that the OPs have colluded to quote higher rates in the bids for Tender No. 70.14.1822 opened on 25.04.2014 and also in the retenders *i.e.*, Tender No. 70.14.1822-A opened on 24.06.2014 and Tender No. 70.14.1822-B opened on 30.09.2014 floated by NWR, resulting in parallel increase in rates quoted by them particularly from June 2014 onwards.
- 5.3 In order to investigate the allegation of the Informant, the DG *inter alia* examined various tenders floated for the Product by Indian Railways during the period 2011-12 to 2014-15 and found that in most tenders OP 1 was the L1 bidder. In this period, OP 1 had a share of around 88% in terms of the value of tenders and a share of around 70% in terms of number of tenders awarded for supply of the Product to Indian Railways. The market shares of OP 2 and OP 3 were found to be much smaller. Such market shares indicate the position of dominance being enjoyed by OP 1 in the market. Even OP 1 has admitted that it is a dominant player in the market for supply of the Product.
- 5.4 OP 2 and OP 3 have pointed out that OP 1 has acquired dominance in the market by setting a trend of quoting rates below cost which enables OP 1 to win almost all the tenders for the Product floated by the Indian Railways. This puts pressure on OP 2 and OP 3 to bid accordingly to



win atleast a few tenders every year to maintain their RDSO certification. Moreover, Indian Railways also pressurizes them to participate or otherwise risk getting blacklisted.

5.5 The Commission has observed that OP 1 has not, either during the course of investigation by the DG or during submissions before the Commission, denied that it has been quoting below cost. Rather it has stated that it does so to maintain prestigious certification of RDSO which enables it to procure orders from other parties. OP 1 has submitted that it bids for the business of Indian Railways for its volume and capacity utilization and the cost break-up of the Product has no relevance while quoting for tenders floated by Indian Railways. It does not make any specific costing projection while bidding for tenders floated by Indian Railways and works on an average cost pricing model depending upon the total cost of production in the entire business in a particular financial year divided by the total sales revenue in that financial year. Thus, any loss incurred in supply to Indian Railways is recouped by it from the orders executed for other parties.

5.6 The Commission notes that the market dynamics in this case are peculiar. This is so because while the conditions in the market for supply of the Product such as presence of small number of players, no substitutability for the Product, identical products *etc.* point towards a market that may be conducive to cartelization; however, the market dynamics as they exist indicate differently. In the market for supply of the Product, OP 1 is found to be a dominant player which is continuously quoting prices below cost, a fact which has apparently deterred other two players in the market *i.e.*, OP 2 and OP 3 from competing in the market. Such market dynamics may be indicative of abuse of dominance by



way of predatory pricing. However, this was neither the allegation of the Informant nor an issue that was referred to the DG for investigation.

5.7 Thus, the only issue that is before the Commission for examination in this case now is whether increase in rates by the OPs after June 2014 was due to collusion amongst the OPs resulting in contravention of the provisions of Section 3 of the Act.

5.8 In this regard, the OPs have submitted that the rates quoted in the subject tenders were higher than LPR quoted in the previous years as these rates had been quoted after taking into consideration actual cost of the Product. Another ground on which the increase in rates have been justified by the OPs is the incident of fire in railway coaches around 2013-14 which caused death of passengers and led to filing of PIL in the Supreme Court. It has been submitted by the OPs that pursuant to this incident, the testing procedure was made more stringent by the Indian Railways and as a result they decided to quote rates in the tenders on the basis of their actual cost. Further, OP 2 and OP 3 have submitted that they quoted as per actual cost after being advised to do so by the Indian Railways. Also, OP 1 has tried to justify its increase in rates in and around April-May 2014 on ground of hike in raw material prices. However, when it was confronted by the DG with the fact that the prices of some raw materials had decreased during the period April-May 2014, OP 1 responded by stating that it did not do any tender specific costing for the Product and that it had been cross subsidizing its losses from Indian Railways with profit from other products/ contracts. Further, OP 1 submitted that the rate quoted by it to the Indian Railways was a subsidized rate and had not been reviewed since a long time. Therefore, as a business decision in April 2014, it decided to review the cross



subsidy and re-quote the rates as per current market situation and capacity utilisation and other economic factors.

- 5.9 To determine whether such increase in rates was actually a business decision, as has been claimed by each of the OPs, or limited only to tenders of NWR which are the subject matter of this case, the DG during the investigation compared the rates quoted by the OPs across various railway zones during the period corresponding to the said tenders of NWR and noted that the OPs had quoted in similar range in other railway zones also. More specifically, it is noted that the rate quoted by OP 1 in the tender of NWR opened on 25.04.2014 was Rs. 398.43 per sqm; during the same period OP 1 received purchase orders from Southern Railways (SR) in tender opened on 09.06.2014 at a rate of Rs. 381.63 and in tender opened on 17.6.2014 at a rate of Rs. 408.43 per sqm and from NER in the tender opened on 12.9.2014 at a rate of Rs. 480 per sqm.
- 5.10 The Commission notes that, during the investigation, when the Informant was confronted with the aforesaid rates and when asked to provide reason why the rates quoted by the OPs in the tenders of NWR, which are subject matter of this case, were found to be high by the Informant when on similar rates orders had been placed by other zonal railways on the OPs, the Informant responded that when tender decision was taken, a general trend from its own LPR and rates obtained and finalized in some of the zonal railways were examined, however, the information that SR and NER had purchased at higher rates was not available with the Informant on file. On these facts, the Commission agrees with the finding of the DG that such submissions of the Informant show that only select tenders had been chosen by the Informant for assessing the rates quoted by the OPs and even after cancelling the first retender, the



Informant failed to make any further inquiries regarding the rates quoted by other zonal railways to ascertain the prevailing rates of the Product.

5.11 Thus, the Commission observes that the Informant while making the allegations of collusive behavior against the OPs in the Information did not examine the market conditions or the conduct of the OPs holistically and proceeded to deduce that the increase in rates was on account of collusion based on limited information available with it. Further, the Informant also did not take into consideration the costing of the Product. This is apparent from the submission of the Informant to DG that generally while determining reasonability of rate the internal costing of the Product was not calculated rather it was determined based on LPR, either in its own railway zone or in other railway zones and that the costing of the product was considered only when the rates quoted in a tender turned out to be high compared to LPR. However, it is noted that in the instant case even though the TC had found tender rates to be high, the Informant had not done any rate analysis for purchase of the Product and the reasonability of rate had been considered by it on the basis LPR.

5.12 As regards the conduct of the OPs in quoting increased rates in the alleged tenders, it is noted that, in response to the allegation of simultaneous increase in the rates quoted to NWR after April 2014, all the OPs have submitted that the increase in rates was on account of business decision taken by them to quote at the actual cost. The Commission is of the opinion that if such decision has been taken by the OPs independently and rationally, it cannot be faulted with merely because it led to increase in prices. Further, the investigation has revealed that when the rates quoted by the OPs in tenders of NWR were compared to the rates quoted by them in tenders of other zonal railways it was found that the OPs had quoted in a similar range and tender bids



were in similar price band in tenders floated by other zonal railways also during the corresponding time period. Thus, it is clear that the business decision taken by the OPs had not been implemented by them selectively.

5.13 Further, the OPs submitted that the decision to quote increased rates was triggered by events such as stringent testing procedure being introduced by Indian Railways after filing of a PIL in the Supreme Court regarding quality of the Product, the Indian Railways pressurising OP 2 and OP 3 to participate in the tenders even if at actual cost, *etc.* The investigation has not revealed anything to the contrary in this regard. Further, the DG has also found the justification given by the OPs regarding variation in quoted rates to different zonal railways on account of quantity, number of rolls, size of rolls, distance *etc.* to be factually correct and reasonable. Thus, in light of foregoing, it appears that the decision of the OPs to quote increased rates may have been founded on a reasonable business decision borne out of their prevailing circumstances rather than collusion amongst them.

5.14 The Commission further observes that in order to establish meeting of minds leading to increased rates being quoted by the OPs in tenders of most zonal railways post June 2014, some evidence of agreement between the OPs is required either direct or circumstantial. While there is no direct evidence to show meeting of minds, there is also no circumstantial evidence that indicates collusion amongst the three OPs. An examination of the rates quoted by the OPs in various tenders shows that mostly the rates quoted by OP 1, OP 2 and OP 3 were not the same. Rather OP 1 quoted far below OP 2 and OP 3 in most tenders. OP 2 and OP 3 submitted that they had followed the trend set by OP 1 of quoting rates below cost to procure a few orders; however, this by itself cannot be the basis for a conclusion that the behaviour of the OPs amounted to



collusion. Further, no set pattern was found amongst the firms with respect to any possible geographical allocation of the market. Also, there was no evidence of communication between OP 1 and OP 2/OP 3 nor there were any financial dealings between OP 1 and OP 2/ OP 3 which could establish profit sharing.

5.15 Given that OP-2 and OP-3 are related to each other, as OP-2 is run by Mr. Arvind Goenka and OP-3 is managed by his father Mr. Amar Nath Goenka, the DG also looked at the possibility of collusion amongst these OPs while quoting for the tenders which are subject matter of the present case. The examination of call detail records showed that key persons of OP-2 and OP-3 had been in touch with each other since they had business transactions and family relations between themselves. The possibility of them discussing railways tenders, thus, could not be ruled out. However, given that (a) there were only few occasions when either of them became L1 in the railway tenders, (b) both OP-2 and OP-3 had distinct management, and (c) in the three tenders under question, IP addresses and the date and time of bid submission by them were different, neither the DG has drawn nor the Commission finds it appropriate to draw a conclusive inference of collusion amongst OP-2 and OP-3 merely because these are related firms.

5.16 In light of the above analysis, the Commission is of the opinion that the allegation of the Informant that the OPs had entered into an anti-competitive agreement to quote higher rates for the Product and determined the price of the Product could not be established from the evidence and material available on record.



5.17 Accordingly, no contravention of the provisions of Section 3 of the Act by OPs is made out in the instant matter. The matter is thus, closed under the provisions of Section 26 (6) of the Act.

**Sd/-**

**(Devender Kumar Sikri)**

**Chairperson**

**Sd/-**

**(S. L. Bunker)**

**Member**

**Sd/-**

**(Sudhir Mital)**

**Member**

**Sd/-**

**(Augustine Peter)**

**Member**

**Sd/-**

**(Dr. M.S. Sahoo)**

**Member**

**Sd/-**

**(Justice G.P. Mittal)**

**Member**

**New Delhi**

**Dated: 21.09.2016**