



COMPETITION COMMISSION OF INDIA

Suo Moto Case No. 03 of 2014

In Re:

*Cartelization in respect of tenders floated by Indian Railways for supply of
Brushless DC Fans and other electrical items.*

CORAM

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

**Mr. SudhirMital
Member**

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

Appearances:

For M/s Pyramid Electronics (OP- 1) Shri Kamal Nijhawan, Advocate
and Shri Sumit Gaur, Advocate
Shri Sandeep Goyal Shri Sandeep Goyal

For M/s R. Kanwar Electricals (OP - 2) Shri Rahul Singh, Advocate
and Shri Gautam Chawla, Advocate
Shri Ashish Jain Shri Ashish Jain
Shri Arun Kumar Jain

For M/s Western Electric and Trading Shri Amit Sibal, Sr. Advocate
Company (OP - 3) Shri M. M. Sharma, Advocate
and Ms. Deepika Rajpal, Advocate
Shri Ramesh Parchani Shri Tahir A. Siddiqui, Advocate
Shri Joby Thomas
Shri Sanjeev Kapoor



Order under Section 27 of the Competition Act, 2002

1. This case was taken up by the Commission *suo moto*, based on the information received from the Superintendent of Police, Anti-Corruption HQ, Central Bureau of Investigation (CBI), New Delhi *vide* letter dated 01.04.2014 wherein it was stated that the CBI, during an inquiry into certain alleged misconduct by a public servant, had found that three firms *i.e.*, M/s Pyramid Electronics, Parwanoo (hereinafter 'OP 1'), M/s R Kanwar Electricals, Noida (hereinafter 'OP 2') and M/s Western Electric and Trading Company, Delhi (hereinafter 'OP 3') (collectively OP 1, OP 2 and OP 3 referred to as 'OPs') had cartelised in respect of the tenders floated by the Indian Railways and the Bharat Earth Movers Limited (hereinafter 'BEML') for the supply of Brushless DC fans (hereinafter 'BLDC fans') and other electrical items.

2. Facts:

- 2.1 As per the letter dated 01.04.2014, the CBI, while enquiring into the alleged misconduct, found an e-mail dated 17.03.2013 in the e-mail inbox of Shri Ramesh Parchani, a partner of OP 3 (hereinafter 'Shri Ramesh Parchani'), along with an attachment providing details of four tenders of Indian Railways and BEML for procurement of BLDC fans. It contained the quantity unit value, rates to be quoted by OPs and quantities to be shared amongst them in these four tenders. A copy of the said e-mail along with the attachment was provided to the Commission. The Information contained in the said attachment is as below:

| | Tender | Description | Nos | Railway | Unit Value | Total Value | R Kanwar | Crompton (Western Electric) | Pyramid |
|------------|---------------|-------------|------|---------|------------|-------------|----------|-----------------------------|---------|
| | | O/B | | | | 0 | 0 | 0 | 0 |
| 27.02.2013 | 30120402OT460 | BLDC Fan | 9368 | NER | 3,481 | 3,26,10,008 | 3481 | 3495 | 3510 |
| | | | | | | | 4215 | 2810 | |
| | | | | | | | 14672415 | 9781610 | 0 |



| | | | | | | | | | |
|------------|------------|-------------|-------|------|-------|---------------------|--------------------|--------------------|--------------------|
| 20.03.2013 | 45131110 | BLDC Fan | 12175 | SCR | 3,481 | 4,23,81,175 | 3495 | 3520 | 3481 |
| | | | | | | | 2739 | 1826 | 4565 |
| | | | | | | | 9534459 | 6356306 | 15890765 |
| 25.03.2013 | 4102130113 | BLDC Fan | 4147 | NR | 3481 | 1,44,35,707 | 3520 | 3495 | 3481 |
| | | | | | | | | | 3110 |
| | | | | | | | 0 | 0 | 10825910 |
| 26.03.2013 | BEML | BLDC Fan | 5437 | BEML | 5,437 | 2,95,60,969 | 3495 | 3481 | 3520 |
| | | | | | | | 1632 | 2446 | |
| | | | | | | | 8873184 | 13298902 | 0 |
| | | C/F | | | | 11,89,87,859 | 3,30,80,058 | 2,94,36,818 | 2,67,16,675 |

2.2 It was further stated that CBI had sought information from North Eastern Railway (NER) and Northern Railway (NR) regarding the two tenders mentioned in the said attachments *i.e.*, tender No. 30120402OT460 dated 27.2.2013 and tender No. 4102130113 dated 25.3.2013, in order to verify whether the rates mentioned in the e-mail attachment were the same as quoted by the OPs in the said railway tenders. It was found from the information received that the rates mentioned in the e-mail against each OP were same as the rates quoted by them against the said two tenders.

2.3 After examining all the material on record, the Commission was of the *prima facie* view that the case involved contravention of provisions of Section 3(1) read with Section 3(3)(d) of the Competition Act, 2002 (hereinafter 'Act'). Therefore, the Commission *vide* its order dated 23.06.2014 directed the Director General (hereinafter the 'DG') to conduct an investigation into the matter under Section 26 (1) of the Act and submit an investigation report. The Commission also noted that apart from the three OPs identified by the CBI, the probability of other bidders also indulging in the bid rigging could not be ruled out and required investigation. The DG, accordingly, conducted an investigation and submitted its investigation report dated 27.03.2015 to the Commission.



3. DG's Investigation:

3.1 During the investigation, the DG found that as per the tendering system followed by the Indian Railways', the Research Designs & Standards Organisation, Lucknow ('RDSO') approved vendors are divided into two categories –Part I source/ supplier and Part II source/ supplier. Part I supplier is an older approved vendor which has earlier supplied as a Part II supplier for a certain period of time and whose supplies have received favourable report from the user (railway unit). As per the system, Part I supplier is eligible for 100% of tender quantity in case it emerges as L1 and 75% of tender quantity in case a Part II supplier becomes L1. However, the Part I supplier is eligible to supply at the higher rate quoted by it against the L1 rate of Part II supplier. On the other hand, a Part II supplier is eligible only upto 25% of the tender quantity, provided it emerges L1 amongst all the bidders.

3.2 In the instant case, the DG noted that amongst the parties that participated in the subject tenders, OP 1, OP 2 and OP 3 were Part I suppliers and M/s Light Engineering Corporation, Parwanoo (OP 4), M/s Kapson Industries Ltd., Jalandhar (OP 5) and M/s General Auto Electric Corporation, Mumbai (OP 6) were Part II suppliers and M/s BBC Corporation (OP 7) was an unapproved supplier. The details of OPs have been provided in the investigation report as below:

- i. M/s Pyramid Electronics, Panchkula (OP 1): A partnership firm engaged in the business of manufacturing of UPS invertors, battery charges, voltage stabilizers *etc.* It started manufacturing BLDC fans from 2012. Till May 2013, Smt Sangita Rani Goyal and Shri Sandeep Goyal were partners in the firm. It was a Part I source with the Indian Railways in the relevant period.



- ii. M/s R. Kanwar Electrical, Noida (OP 2): A partnership firm engaged in the manufacturing of electrical goods like mixi motors etc. since 1980. It started manufacturing BLDC fans and railway carriage (RC) fan from 2003-04. Shri Ashish Jain is the managing partner in this firm and his mother, Smt. Aruna Jain is a sleeping partner. It was a Part I source with the Indian Railways in the relevant period.
- iii. M/s Western Electric and Trading Company, Delhi (OP 3): A partnership firm engaged in trading of BLDC fans, and spares of equipment used in electric and diesel locomotives. It does not manufacture BLDC fans; though it has claimed that it is an authorized agent of M/s Crompton Greaves Ltd. (hereinafter 'CGL'). In operation since 1971, it started bidding for BLDC fans in tenders of Indian Railways around 10 years back. Shri Ramesh Parchani and his brother, Shri Vidya Sagar are partners in the firm. It was a Part I source with the Indian Railways in the relevant period.
- iv. M/s Light Engineering Corporation, Parwanoo (OP 4): A partnership firm engaged in supply of BLDC fans to Indian Railways. Shri Karanveer Singh and Shri Maninder Singh are its two partners. It was a Part II source with the Indian Railways in the relevant period.
- v. M/s Kapsons Industries Ltd., Jalandhar (OP 5): A company engaged in the business of providing customized engineering solutions to electrical, automobile, energy, engineering and appliance manufacturing industry; with good market shares across a wide spectrum of products including electrical stampings, die cast rotors, high pressure die cuttings, electrical motors, alternators, fan for railways, pumps etc. It was a Part II source with the Indian Railways in the relevant period.



- vi. M/s General Auto Electric Corporation, Mumbai (OP 6): A partnership firm engaged in supply of LED signals, hand signal torches, battery chargers, B type choke, and BLDC fans. Its partners are Shri Hetal R Gandhi, Shri Nehal G Gandhi, Shri Ramesh N Gandhi, Smt.Poorna G Gandhi and Shri Geet N Gandhi. It was a Part II source with the Indian Railways in the relevant period.
- vii. M/s BBC Corporation, Mumbai (OP 7): A proprietorship concern having Shri Chandrakant Kamdar as the proprietor, and engaged in the manufacture of locomotive spare parts for Indian Railways besides BLDC fans. It was not an approved source during the relevant period.
- 3.3 For the purpose of investigation, the DG examined whether OP 1, OP 2 and OP 3 had violated the provisions of Section 3(3)(d) read with Section 3(1) of the Act. In accordance with the directions of the Commission, the DG also examined if there was any other bidder that had violated Section 3(1) read with Section 3(3)(d) of the Act.
- 3.4 On the issue whether OP 1, OP 2 and OP 3 had violated Section 3(3)(d) read with Section 3(1) of the Act, the DG analysed the e-mail dated 17.03.2013 furnished by CBI to the Commission. It was noted that Shri Sandeep Goyal, partner of OP 1 (hereinafter 'Shri Sandeep Goyal'), had sent this e-mail to Shri Ashish Jain, partner of OP 2 (hereinafter 'Shri Ashish Jain'), on 17.03.2013. Shri Ashish Jain had then forwarded this mail to Shri Gulshan Kapoor, the office executive of OP 3.
- 3.5 The DG compared the rates submitted by OP 1 for the four tenders and found that the rate submitted by OP 1 for tender No. 3012042OT460 dated 27.02.2013 was exactly the same as the rate mentioned in the attachment to



the e-mail and the rate submitted for tender No. 4102130113 dated 25.03.2013 was almost identical. The comparison of the rates quoted by OP 1 *vis-à-vis* the rates suggested in the e-mail, is as follows:

M/s Pyramid Electronics

Rates suggested in e-mail *vis-à-vis* rates quoted in the tenders

| Tender No. and Due date | Procurer/ Tenderer | Rates suggested in the E-mail dated 17.03.2013 | Rate actually quoted | Remarks |
|---|--------------------|--|----------------------|---------------------|
| 30120402OT460 (27.02.2013) | N.E Railway | 3510 | 3510 | Identical |
| 45131110 (20.03.2013) | S.C. Railway | 3481 | 3610.80 | Different |
| 4102130113 (25.03.2013) | North Railway | 3481 | 3480.75 | Almost Identical |
| DR01/RM2/120012 0506, BEML (26.03.2013) | BEML | 3520 | 3570.75 | Different |

3.6 Having noted the similarity of rates quoted by OP 1 with the rates proposed in the e-mail attachment, the DG observed that Shri Sandeep Goyal had admitted in his statement made on 17.02.2015 that he had sent the e-mail dated 17.03.2013 to Shri Ashish Jain, with an attachment providing the distribution of bidding rates for the BLDC fans with respect to OP 1, OP 2 and OP 3. He stated that he had consulted Shri Ashish Jain of OP 2 before quoting the bid in all the railway tenders and that approximately the same rates were also quoted by the others in these tenders. Shri Sandeep Goyal confirmed that he, along with Shri Ashish Jain and Shri Ramesh Parchani had rigged the tenders for BLDC fans. He submitted that he used to receive frequent phone calls from his competitors *i.e.*, OP 2 and OP 3 for purposes of coordinating their bids and in support thereof furnished copy of the call data records of his mobile for the



period between 20.03.2013 to 31.03.2013 which showed several incoming and outgoing calls from and to Shri Ashish Jain and Shri Ramesh Parchani. Based on the evidence gathered from the e-mail, call data records and the statement made by Shri Sandeep Goyal, the DG concluded that OP 1 had colluded with OP 2 and OP 3 to rig the bids.

- 3.7 With respect to OP 2, the DG observed that the fact that Shri Ashish Jain had forwarded the e-mail dated 17.03.2013 to an executive of OP 3 by itself indicated active involvement of OP 2 in the cartel.
- 3.8 On comparison of the rates submitted by OP 2 for the four tenders with the rates mentioned in the attachment, the DG noted that OP 2 had quoted same rates as in the attachment for tender No. 30120402OT460 dated 27.02.2013 and tender No. 4102130113 dated 20.03.2013. The rates quoted by it *vis-à-vis* the rates suggested in the e-mail, were as below:

R.Kanwar Electricals

Rates suggested in e-mail *vis-à-vis* rates quoted in the tenders

| Tender No. and Due Date | Procurer/ Tenderer | Rates suggested in the E-mail dated 17.03.2013 | Rate actually quoted | Remarks |
|--|--------------------|--|----------------------|------------------|
| 30120402OT460 (27.02.2013) | N.E. Railway | 3481 | 3481.07 | Almost Identical |
| 45131110 (20.03.2013) | S.C. Railway | 3495 | 3757 | Different |
| 4102130113 (25.03.2013) | North Railway | 3520 | 3520 | Identical |
| DR01/RM2/1200120506 BEML (26.03.2013) | BEML | 3495 | Not bid | -- |

- 3.9 The DG noted that Shri Ashish Jain, in his statement made on 16.02.2015, had submitted that he quoted rates for BLDC fans after consulting his father Shri Arun Kumar Jain and that apart from him, he had never consulted or interacted



with any employee/partner of any other firm participating in the said tenders, either personally or through phone or e-mail. However, he acknowledged that he knew Shri Sandeep Goyal from RDSO meetings and that he had received an e-mail dated 17.03.2013 from Shri Sandeep Goyal with an attachment pertaining to details of upcoming three tenders and one already passed tender which he had then forwarded to Shri Gulshan Kapoor of OP 3. Explaining his conduct of forwarding the e-mail to Shri Gulshan Kapoor, he stated that Shri Sandeep Goyal had called him earlier the same day and had threatened him to forward the e-mail to OP 3 or else he would get OP 2 black listed from RDSO. As regards the rates quoted in the tender by OP 2 being the same as the rates mentioned in the e-mail, Shri Ashish Jain submitted that the rates were same only for two tenders of which tender No. 30120402OT460 dated 27.02.2013 was already open and as such the quoted rates were known to all on the date of e-mail. For tender No. 4102130113 dated 25.03.2013, he accepted that the rates as given in the attachment of the said e-mail were the same as quoted, but this was only a mere co-incidence.

3.10 The DG also recorded the statements of Shri Arun Kumar Jain, consultant of OP 2 and father of Shri Ashish Jain on 16.02.2015, who admitted that Shri Ashish Jain had consulted with him on the rates quoted in the tenders by OP 2. He denied knowing anyone from OP 1 and OP 3. He further stated that his son, Shri Ashish Jain never disclosed the said telephonic threat from Shri Sandeep Goyal of OP 1. As regards the tender rates, similar answers were given by Shri Arun Kumar Jain also.

3.11 Apart from examining the e-mail and statement of Shri Ashish Jain, the DG also examined the call data records of the mobile of Shri Ashish Jain and that of Shri Sandeep Goyal and Shri Ramesh Parchani, and found that, contrary to the statement made by Shri Ashish Jain, the call data records showed that he had made/received nearly 50 calls to/from Shri Sandeep Goyal during the period 25.02.2013 to 31.03.2013 (before & after the four tenders). Further, he



had also made/received nearly 26 calls to/from Shri Ramesh Parchani, partner of OP 3, during this period. It was found that these calls were more frequent around the date of the tender and extended for several minutes.

- 3.12 As per the DG report, Shri Ashish Jain when confronted with the aforesaid call data records, took the defence that the telephonic discussions between him, Shri Sandeep Goyal and Shri Ramesh Parchani were in the context of development of a 'die' of FRP connector, one of the components of BLDC fans. He submitted that he had even given Rs.16000/- to Shri Sandeep Goyal for this purpose. However, this was neither found recorded in the books of account of OP 2 nor any receipt of the same was produced before the DG.
- 3.13 The DG while considering the above explanation, found it highly improbable that all of the nearly 70 conversations lasting for several minutes each, made before and around the dates of the tenders, were only about joint development of a 'die'. The DG noted that some of the calls made by Shri Ashish Jain were in tandem with the receipt and forwarding of e-mail by Shri Ashish Jain on 17.03.2013. It was observed that on this day he made one long call and received two long calls from Shri Sandeep Goyal. On 18.02.2013 and 19.03.2013, Shri Ashish Jain made two calls to Shri Sandeep Goyal, while on 20.03.2013 he made 6 calls. Similarly, Shri Ashish Jain called Shri Parchani thrice on 16.03.2013, three times on 17.03.2013 and received 4 calls from him on 23.03.2013. The DG noted that these call records refuted the claim of Shri Ashish Jain that the phone calls were made only in the context of joint development of a 'die' and had no relation with cartelling for the purposes of bid rigging.
- 3.14 The DG not convinced by the explanation of Shri Ashish Jain that he had spoken to Shri Sandeep Goyal only about joint development of FRP connector 'die', confronted the statement of Shri Ashish Jain to Shri Sandeep Goyal. In



his statement made on 18.03.2015, Shri Sandeep Goyal stated that Shri Ashish Jain had always called him to join the already existing cartel amongst OP 2 and OP 3, though on one occasion they did discuss about jointly developing one 'die'. With respect to the claim of Shri Ashish Jain that he had given Rs. 16000/- to Shri Sandeep Goyal for development of 'die', Shri Sandeep Goyal submitted that no money was ever given to him for this purpose but he was aware that Shri Ashish Jain had given some money directly to a 'die' manufacturer in Delhi. As regards the involvement of Shri Ramesh Parchani in the said collaboration for 'die', Shri Sandeep Goyal stated that he was not aware of the same.

3.15 Based on the call data records and the statement of Shri Sandeep Goyal, the DG concluded that the defense of Shri Ashish Jain appeared to be merely an eyewash and that OP 2 was clearly involved in colluding with OP 1 and OP 3 to rig the bids for BLDC fans. In fact, Shri Ashish Jain was found to be the person actively coordinating with other two OPs.

3.16 Having noted the conduct of Shri Sandeep Goyal and Shri Ashish Jain, the DG then examined the conduct of Shri Ramesh Parchani. It was observed that Shri Ramesh Parchani, had received an e-mail dated 17.03.2013 from Shri Gulshan Kapoor, the office executive of OP 3, who in turn had received it from Shri Ashish Jain, partner of OP 2. As in case of OP 1 and OP 2, the DG compared the rates quoted by OP 3 in the tenders as against the rates mentioned in the e-mail and found that the rate for tender No. 30120402OT460 dated 27.02.2013 submitted by OP 3 was approximately the same and the rate quoted for tender No. 4102130113 dated 25.03.2013 was exactly the same as the rate mentioned in the e-mail. Further, even for the tender dated 20.03.2013, the rate quoted by OP 3 was approximately the same as that proposed in the attachment. The rates suggested in the e-mail *vis-à-vis* the rates actually quoted are as below.



M/s Western Electricals and Trading Company
Rates suggested in e-mail *vis-à-vis* rates quoted in the tenders

| Tender No. and Due Date | Procurer/ Tenderer | Rates suggested in the E-mail dated 17.03.2013 | Rate actually quoted | Remarks |
|---|--------------------|--|--|---------------------|
| 30120402OT460 (27.02.2013) | N.E Railway | 3495 | 3491.98 | Marginal difference |
| 45131110 (20.03.2013) | S.C Railway | 3520 | 3530 | Marginal difference |
| 4102130113 (25.03.2013) | North Railway | 3495 | 3495 | Identical |
| DR01/RM2/1200 120506, BEML (26.03.2013) | BEML | 3481 | 3498.36 (Quoted by M/s Crompton Greaves Ltd.) | Different |

3.17 In his statement before the DG on 18.02.2015, Shri Ramesh Parchani acknowledged that the said e-mail dated 17.03.2013 was received by Shri Gulshan Kapoor, an office executive of OP 3 and, thereafter, it was forwarded to him. However, he submitted that Shri Gulshan Kapoor never mentioned or discussed the e-mail or its attachment with him and he came to know in detail about the e-mail and its attachment only after he was called for investigation by the CBI in June 2013.

3.18 In this regard, the DG also recorded the statement of Shri Gulshan Kapoor who submitted that he had forwarded the e-mail dated 17.03.2013 to Shri Ramesh Parchani without having looked into the details of the e-mail. He further stated that he did not know from where Shri Ashish Jain had come to know his e-mail address. The DG observed that it is highly improbable that Shri Gulshan Kapoor would have forwarded the e-mail to Shri Ramesh Parchani without reading as it is clearly stated in the e-mail that it was to be forwarded to "Sir ji". Further, if he had not given his e-mail address to Shri Ashish Jain then he would have been surprised at the receipt of such an e-mail



from an unknown sender and would not have straightaway forwarded it to Shri Ramesh Parchani without understanding the contents or the purpose of the e-mail. Thus, the DG found the statement given by Shri Gulshan Kapoor to be false and deceptive.

3.19 Further, in his statement Shri Ramesh Parchani claimed that he never had any conversation or interaction with the partners or employees of any other firm participating in the tenders. In this regard, the DG observed from the call data records that Shri Ramesh Parchani spoke to Shri Ashish Jain on nearly 30 occasions between 25.02.2013 to 31.03.2013. Several of these calls were made by Shri Ramesh Parchani and others were made by Shri Ashish Jain. They also exchanged several text messages. Shri Ramesh Parchani also spoke to Shri Sandeep Goyal few times. When the DG confronted Shri Ramesh Parchani with these call data records, he found the replies to be self-contradictory and inconsistent. While Shri Parchani accepted that several calls were made between him and Shri Ashish Jain and Shri Sandeep Goyal, he claimed that these conversations were regarding development of a 'die' on behalf of CGL. This, when OP 3 was only a trader and not manufacturer of fans. Further he denied having known Shri Ashish Jain and Shri Sandeep Goyal despite call data records showing exchange of long calls amongst them. He attributed the long calls to his habit of keeping the mobile in active mode when he was in religious places like Gurudwara/Mandir *etc.* so that callers could hear bhajans etc.

3.20 As regards the rates quoted by OP 3 in the tenders of Indian Railways, Shri Ramesh Parchani submitted before the DG that OP 3 was an authorized dealer/agent of CGL and that for submitting the tender quotation it used to approach CGL for getting the authorization letter to participate in a particular e-tender, after the Indian Railways had issued a tender demand. It was submitted that since OP 3 was bound by the rates given by the CGL, so whatever rates were given, were quoted by OP 3. This was so even in the case



of three tenders of Indian Railways which constitute the present case. OP 3 furnished letters from CGL dated 18.02.2013, 15.03.2013 and other letters where the rates to be quoted were specified. He denied having ever consulted OP 1 or OP 2 for tender rates or having contacted or known anyone from OP 1 or OP 2.

3.21 On examining the rates suggested by CGL, the DG found that these were almost same as mentioned in the attachment to e-mail dated 17.03.2013. On being asked to explain how the four rates mentioned in letter dated 18.02.2013 issued by CGL came to be known to Shri Sandeep Goyal, Shri Ramesh Parchani stated that there could be a possibility of leakage of the said information from CGL itself or from his office. However, no direct link could be found by the DG between CGL and OP 1 and OP 2 either through call data records or e-mails. Rather, the call data records showed that Shri Ramesh Parchani himself had been communicating with Shri Sandeep Goyal and Shri Ashish Jain on mobile several times. Thus, it was inferred by the DG that the alleged source of leak could have been none other than Shri Ramesh Parchani himself who may have disclosed the rates suggested by CGL to Shri Ashish Jain and Shri Sandeep Goyal, or probably advised CGL about appropriate rates to be quoted in the tenders.

3.22 In this context, the DG also examined Shri Asif Ali, Marketing Manager of CGL. In his statement on oath on 18.02.2015, Shri Asif Ali accepted that CGL had provided rates for the subject tenders to OP 3. Shri Asif Ali also confirmed the statement of Shri Ramesh Parchani that CGL issued rates for quoting in the various tenders and that CGL had bid in the tenders of Indian Railways through OP 3. However, he stated that there was no formal agreement regarding OP 3 being an authorized dealer and that the rates were only advisory in nature and not binding on OP 3.



3.23 Thus, considering the evidence *i.e.*, the e-mail, the call data records, and the statements of OPs and other persons, the DG concluded that OP 3 had colluded with OP 1 and OP 2 for rigging the bids pertaining to tenders of Indian Railways for procurement of BLDC fans.

3.24 Comprehensively, the DG noted that in the present case OP 1, OP 2 and OP 3 being the only Part I bidders knew that one among them would either get the entire tender or at least 75% of the tendered quantity. Thus, a process of bid rotation appears to have been worked upon by them in the e-mail dated 17.03.2013 whereby the tenders were distributed amongst them. As per their planning and design, while in NER tender dated 27.02.2013, OP 2 was to bid the lowest, for South Central Railway (SCR) tender of 20.03.2013 and NR tender of 25.03.2013, OP 1 was to be the L1. OP 3 was to get the bid in BEML order. This arrangement was followed for tenders dated 27.02.2013 and 25.03.2013. However, there was variation from the arrangement in case of tender dated 20.03.2013 as well as in case of BEML tender. With respect to Indian Railways' tender dated of 20.03.2013, Shri Sandeep Goyal explained in his statement on 18.03.2015 that there was a re-negotiation of rates over telephone on insistence of Shri Ramesh Parchani. This was found to be corroborated by call data records also.

3.25 In view of the above, the DG concluded that OP 1, OP 2 and OP 3 acted in collusion with each other to rig/attempt to rig the bid pertaining to the four tenders in the month of February and March 2013. The DG found that there was a clear violation of the provisions of Section 3(1) read with Section 3(3) of the Act. While OP 1 confessed to bid rigging/ collusive bidding, OP 2 and OP 3 denied their complicity in the cartel. However, OP 2 and OP 3 failed to adequately refute the evidence against them in the form of e-mail and call data records showing communication amongst them on and around the dates of the tenders.



3.26 The DG also examined whether any bidder other than OP 1, OP 2 and OP 3 had violated Section 3(1) read with Section 3(3)(d) of the Act. To this end, the DG examined the conduct of OP 4, OP 5, OP 6 and OP 7 as follows:

- a. The DG noted that OP 4, during the relevant time, was a Part II supplier and became Part I supplier only after the aforementioned four tenders. Further, the rates quoted by OP 4 were lower than that of Part I suppliers in two tenders (due date 27.02.2013 and 25.03.2013) and as such it was seen to be competing with the Part I bidders for the maximum 25% tender. However, it neither emerged L1 nor was given any orders. Though the e-mail dated 17.03.2013 was not forwarded to OP 4, the call data records revealed that Shri Maninder Singh of OP 4 and Shri Ashish Jain of OP 2 had exchanged around 20 phone calls during the said period. Shri Maninder Singh explained that Shri Ashish Jain had spoken to him regarding some spare parts required by OP 2. Similar response was also given by Shri Ashish Jain. The DG observed that though there was evidence of telephonic communication between OP 2 and OP 4, but in view of the fact that OP 4, being a Part II supplier, could not have bid for an order above 25% of the contract even if it was L1, and that Shri Sandeep Goyal, who had confessed about the cartel, had not named OP 4 as a part of the same, any conclusion about direct complicity of OP 4 in the cartel could not be drawn.
- b. Similarly, with respect to OP 5, it was noted that OP 5 had participated in all the four tenders and quoted prices lower than OP 1, OP 2 and OP 3. From the call data records, calls were found between Ashish Jain and of OP 5. It was submitted by OP 2 and OP 5 that they had exchanged phone calls for the supply of spare parts only. Also, it was seen that as in case of OP 4, the e-mail was not forwarded to OP 5 and that OP 5 being a Part II supplier could not have got order for 75% of the tender even if it



was L1 amongst all the bidders. Moreover, the statement of Shri Sandeep Goyal did not show that OP 1, OP 2 and OP 3 had approached Part II suppliers. In the light of above, the DG stated that any conclusion about direct complicity of OP 5 in the said cartel could not be drawn.

- c. While examining the role of OP 6, the DG found that OP 6 had also participated in all the four tenders and had quoted lower rates than OP 1, OP 2 and OP 3. It emerged L1 in two tenders (due date 20.03.2013 and 27.03.2013). As in case of OP 4 and OP 5 it was seen that the said e-mail was not forwarded to OP 6. On analysis of call data records of Shri Ashish Jain, it was noted that around 10 calls had been exchanged between Shri Hetal R Gandhi of OP 6 and Shri Ashish Jain during the period 15.02.2013 to 31.03.2013. Shri Ashish Jain and Shri Hetal R Gandhi submitted that these calls were exchanged between them for supply of spare parts. The DG noted that based on evidence available on record, any conclusion about direct complicity of OP 6 in the said cartel could not be drawn
- d. As regards OP 7, the DG noted that it had bid only for one tender dated 27.02.2013 and appeared to be competing with other bidders. It was not a RDSO approved source. No documentary evidence in the form of e-mails etc. was found to show any collusion on the part of this concern with other OPs. As such no adverse conclusion was drawn against OP 7.

In view of the above, no contravention of Section 3(3)(d) of the Act was found against OP 4, OP 5, OP 6 and OP 7.

3.27 With respect to the individual liability under Section 48 of the Act, the DG found that Shri Sandeep Goyal of OP 1, Shri Ashish Jain of OP 2 and Shri Ramesh Parchani of OP 3 were actively involved in the formation of cartel for



the purpose of bid rigging. They met each other, shared the details either through e-mails or made calls to each other for fixing the rates.

4. Consideration of the investigation report of the DG by the Commission:

- 4.1 The Commission considered the investigation report of the DG and decided to forward the same to three OPs *i.e.*, OP 1, OP 2 and OP 3, and also to the individuals (i) Shri Sandeep Goyal (for OP 1); (ii) Shri Ashish Jain (for OP 2); and (iii) Shri Ramesh Parchani (for OP 3), for filing their objections/suggestions thereof.
- 4.2 The submissions filed by OP 1, OP 2 and OP 3 and their officials were considered and the parties were heard on 30.07.2015. In their submissions, OP 2 and OP 3 raised certain preliminary issues such as procedural infirmities in the investigation carried out by the DG including violation of the principles of natural justice. It was *inter alia* urged that no effective opportunity was granted to OP 2 to cross-examine Shri Sandeep Goyal of OP 1 whose statement was relied upon by the DG to give an adverse finding against OP 2. Further, OP 3 also sought direction for cross-examination of six persons and urged that the counsel for OP 3 was not permitted to cross-examine Shri Sandeep Goyal. Moreover, the opportunity granted to Shri Ramesh Parchani of OP 3 to cross-examine Shri Sandeep Goyal could not be said to be a real opportunity as Shri Ramesh Parchani was an old person, a heart patient and not legally qualified to cross-examine a witness. After due consideration of the issues raised, the Commission *vide* a reasoned order dated 14.08.2015 permitted cross-examination of Shri Sandeep Goyal by OP 2 and OP 3.
- 4.3 The DG was further instructed by the Commission *vide* order dated 01.09.2015 to submit a report on cross-examination. After giving opportunity to OP 2 and OP 3, as per the directions of the Commission, the DG submitted



a supplementary report to the Commission on 19.10.2015 which was forwarded to OPs.

- 4.4 The objections/ suggestions filed by the OPs 1, 2 and 3 and their partners, who were found actively involved in bid rigging, to the investigation report of the DG are summarised below.

5. Objections/ suggestions of the OPs:

OP 1 and Shri Sandeep Goyal

- 5.1 OP 1 and Shri Sandeep Goyal, in their combined written submission dated 22.07.2015, contended that though the investigation report had taken into account the disclosures made by OP 1, the DG did not acknowledge that it was on the basis of disclosures made by OP 1 along with the various documents submitted by it that the DG was able to establish role of each OP.
- 5.2 It was pointed out that on 10.03.2015, OP 1 had moved a leniency application under Section 46 of the Competition Act, 2002 read with Regulation 5 of CCI (Lesser Penalty) Regulation, 2009 before the Commission. It was submitted that since the report was based on the revelations made by the OP 1, it deserved grant of lesser penalty. OP 1 and Shri Sandeep Goyal further prayed for 100% reduction in penalty.

OP 2 and Shri Ashish Jain

- 5.3 In addition to the submissions filed on 29.07.2015, prior to the hearing on 30.07.2015, OP 2 and Shri Ashish Jain filed their combined written submissions on 04.01.2016 to both the reports of the DG. The parties reiterated the previous arguments and the events thereafter. Both M/s R. Kanwar Electricals and Shri Ashish Jain denied the contents of the investigation report of the DG.



- 5.4 In the first written submission dated 29.07.2015 filed in reply to the investigation report of the DG, OP 2 had submitted that the investigation carried out by the DG suffered from procedural infirmities including violation of the principles of natural justice. In this regard, it was *inter alia* averred that complete call data records were not provided, no effective opportunity of hearing was given and that its officers were harassed while recording their statements. The Commission had, therefore, heard the OPs on 30.07.2015 and *vide* order dated 14.08.2015 allowed cross-examination of Shri Sandeep Goyal and also granted liberty to inspect records.
- 5.5 In the submissions dated 04.01.2016, which were filed after the cross-examination report of the DG was forwarded to the OPs, OP 2, at the outset, denied the findings of the DG and stated that the DG had exceeded its jurisdiction and mandate under order dated 14.08.2015, by filing the supplementary report dated 19.10.2015 and that the same ought to be rejected by the Commission. Further, OP 2 alleged procedural infirmities in the cross-examination as well and submitted that given the contradictions in the statement of Shri Sandeep Goyal revealed during cross-examination, his statement cannot be relied upon to infer any violation of the Act on the part of OP 2.
- 5.6 The contradictions alleged by OP 2 in the cross-examination with respect to the statements of Shri Sandeep Goyal dated 17.02.2015 and 18.03.2015 mainly relate to Shri Goyal's response regarding consulting other bidders before quoting bids, his explanation on the call data records for the tender dated 20.03.2013 and date of meeting in Connaught Place. It was averred by OP 2 that the contradictory responses and unsatisfactory explanation given by Shri Sandeep Goyal show that his statement is motivated and cannot be relied upon.



- 5.7 It was also argued that the DG did not have the power to requisition call data records from the telecom service provider. Therefore, calling of such records and sharing of such records with the other OPs, was violative of the fundamental right to privacy of OP 2. It was further argued that the DG did not share the original record with the OPs, including the communication to the telecom service provider requisitioning these call data records, and has not stated in its report the provision of law under which it was empowered to requisition the call data records. As such, the call data records, in their entirety, deserve to be rejected/ ignored by the Commission.
- 5.8 It was also averred by OP 2 that since all call data record regarding which the questions were posed to Shri Ashish Jain during recording of his statement was not provided by the DG before such examination, therefore, the answers given by Shri Ashish Jain to such questions would not be complete and should not be relied upon against them. It was submitted that the alleged calls between the bidders on 25.02.2013 and 16.03.2013 before the tender submission were on different subjects than what was submitted by Shri Sandeep Goyal. Such calls were only with respect to discussions regarding 'die' for FRP connector and were not to discuss the tenders. It was argued that merely the statement of Shri Sandeep Goyal cannot in any manner be a sufficient ground to conclude that the tender dated 27.02.2013 was collusively bid by OP 2 along with the OP 1 and OP 3.
- 5.9 It was alleged by OP 2 that during the recording of statement on 16.02.2015 the officials at the DG's office had coerced Shri Ashish Jain and Shri Arun Kumar Jain to confess to the alleged cartel. It was also averred that the statement of Shri Ashish Jain recorded on 17.03.2015 was fabricated by the Additional Director General ('ADG') and that when OP 2 resisted he was threatened with dire consequences.



5.10 When during the hearing, OP 2 was asked to respond to the similarity in the rates quoted by OP 2 with the rates mentioned in the e-mail, the counsel for OP 2 submitted that the rates matched only in two tenders *i.e.*, tenders dated 27.02.2013 and 25.03.2013. As regards tender dated 27.02.2013, the counsel submitted that this tender was already open when the e-mail dated 17.03.2013 was sent by Shri Sandeep Goyal and the rates could have been taken by Shri Sandeep Goyal from the public domain. With respect to tender dated 25.03.2013, it was submitted that it was merely a coincidence that this rate had matched with the rate quoted in the e-mail. OP 2 denied having colluded with OP 1 and OP 3 to rig the four tenders of Indian Railways and BEML mentioned in the e-mail dated 17.03.2013.

5.11 Based on the above averments, OP 2 prayed that the findings of the DG *qua* OP 2 and Shri Ashish Jain should be rejected since they were based on material/evidence obtained in violation of the principles of natural justice and that a fresh investigation be conducted.

OP 3 and Shri Ramesh Parchani

5.12 OP 3 and Shri Ramesh Parchani filed their combined written submissions to both the reports of the DG on 21.01.2016. At the outset, OP 3 and Shri Ramesh Parchani denied that they had entered into any agreement or concerted practice, anti-competitive or otherwise, with anyone, in violation of Section 3(3) (d) of the Act read with Section 3(1) of the Act. Further, it was submitted that the findings of the DG are primarily based on the confessional statement of the witness of OP 1, Shri Sandeep Goyal, the attachment to the impugned e-mail dated 17.03.2013 and the call data records of the OPs, without giving any consideration to the written submissions of OP 3. Further, the allegation made in the confessional statement of Shri Sandeep Goyal had not been corroborated from any independent source.



5.13 In their detailed submissions, OP 3 argued that the rates suggested in the attachment to the e-mail dated 17.03.2013 were not used by OP 3 and even other OPs during actual bids in at least 3 out of 4 tenders. Therefore, the alleged arrangement between OPs, even if presumed for once, was not put into actual effect and hence there was no cartel.

5.14 Specifically, on tender-wise basis it was submitted that the tender of 27.02.2013 was already open by the date on which the e-mail was sent *i.e.*, 17.03.2013. The rates quoted by each of the 3 bidders were well known and, therefore, it had no relevance in so far as any perceived benefit to the bidders was concerned. Moreover, in this tender, OP 3 on behalf of CGL did not quote the suggested rate of Rs. 3495 but instead quoted a lower rate of Rs. 3491.98 and was L-5. With respect to tender dated 20.03.2013, OP 3 submitted that the rate quoted by OP 3 again did not match with the rate suggested in the attachment. For tender dated 25.03.2013, OP 3 stated that though the rates as suggested in the attachment were the same as mentioned in the e-mail attachment but the said tender was ultimately dropped due to change in specification of the subject product. Also, OP 3 had quoted the rates based on advice given by CGL *vide* their letter dated 18.02.2013. Lastly, in tender dated 26.03.2013, the rate of Rs. 3412.70 was quoted directly by CGL and not by OP 3.

5.15 It was stressed that OP 3 had always quoted rates on the basis of prior written advice received from CGL for each tender which explained the reason for matching of rates in only one tender *i.e.*, tender dated 25.03.2013. It was stated that OP 3 had no discretion of its own to quote the rates in the bid for BLDC fans in any railway tender. Though this was pointed out to the DG during the course of investigation, the DG incorrectly presumed that the rates were leaked and shared by Shri Ramesh Parchani of OP 3 with OP 1 and OP 2.



5.16 Shri Ramesh Parchani of OP 3 contended that he had no knowledge about the impugned e-mail till CBI summoned him in June, 2013. It was alleged that Shri Arun Rawat, Inspector of Police, CBI, who initiated the investigation in the criminal case against Shri Kulbushan, the then Member (Electrical) in the Railway Board), was the first to discover the existence of the impugned e-mail. It was stated that the DG could have summoned and investigated Shri Arun Rawat to verify the statement dated 18.2.2015 made by Shri Ramesh Parchani wherein he had stated that the impugned e-mail with the attachment came to his knowledge for the first time on 21.06.2013 during his questioning by the CBI and that the impugned e-mail remained in his inbox till as late as 28.06.2013. As per OP 3, this fact *ipso facto* was sufficient to prove the innocence of Shri Ramesh Parchani/OP 3 as no prudent person would leave such incriminating evidence in his system for more than 3 months.

5.17 It was submitted by OP 3 that there was no evidence of the alleged "agreement" between OP 3 and other OPs under Section 3 of the Act except un-corroborated confessional statements of Shri Sandeep Goyal which should not have been relied upon by the DG without corroboration from an independent source. Further, OP 3 has pointed out that since Shri Ramesh Parchani was summoned by CBI as a witness in the criminal case investigated by the CBI in which Shri Sandeep Goyal was co-accused, he had a motive to implicate the other suppliers who had deposed before the CBI during the investigation in the criminal case. It was argued that the veracity of the confessional statement ought to have been verified from an independent source.

5.18 As regards the call data records showing telephonic calls between Shri Ramesh Parchani and other OPs, it was submitted that such calls were made in the context of procuring 'die' for manufacturing FRP connector. It was explained that Shri Ramesh Parchani contacted Shri Ashish Jain for supply of FRP connectors since the railways had started preferring BLDC fans with FRP



connectors from 2009-10 onwards which OP 1 and OP 2 were supplying rather than BLDC fans with Wago connectors which OP 3 used to supply. Therefore, in order to remain in the market, OP 3 contacted the two firms through its concerned staff and requested OP 2 for supply of FRP Connectors in 2012, which they agreed to supply at the rate of Rs. 35. Around 2013, OP 3 discovered another local source for the supply of FRP connectors, who agreed to supply the same connector at a cheaper rate of Rs.14. OP 3, accordingly, started procuring the same from this local supplier from early 2013 onwards. But since it was a small supplier, the supplies were not sufficient to meet the requirement of OP 3 as the demand for the fans had considerably increased from the Zonal Railways by that time. Hence, around the same time, in early 2013, *i.e.*, around February, 2013, Shri Ramesh Parchani, after finding the difference in the prices of the FRP connectors, confronted Shri Ashish Jain telephonically as to why he was providing the FRP connectors for Rs.35 to OP 3 when the same were available for Rs.14 from a local shop. During this telephonic conversation, Shri Ashish Jain suggested that the three Part I firms should get a 'die' *i.e.*, the machine which could be used for manufacturing FRP connectors. Shri Jain also informed that he could get the said 'die' manufactured from a place called Baddi in Himachal Pradesh, which would cost around Rs. 50,000/- and the cost of manufacturing of the 'die' could be contributed equally by all the three Part I sources. It was in this context that Shri Ramesh Parchani or his employee Shri Gulshan Kapoor may have called Shri Ashish Jain during the month of February 2013 onwards. However, no contact was made with Shri Sandeep Goyal as Shri Ashish Jain assured to obtain his consent for sharing the cost of the 'die' equally. In this connection Rs. 16000/- was to be paid by Shri Ramesh Parchani to Shri Ashish Jain for onward transfer to either Shri Sandeep Goyal or some 'die' manufacturer. This fact as stated by him *i.e.*, Shri Ramesh Parchani in his statement recorded on 18.03.2015 was not considered by the DG.



- 5.19 It was also pointed out that the DG ignored the contradictions and omissions made by Shri Sandeep Goyal in his confessional statements dated 17.02.2015 and 18.03.2015 as well as in his cross examination done by the counsel for OP 3 on 09.09.2015, which if examined would show that the alleged cartel was merely a plot by Shri Goyal to implicate the other 2 OPs in order to take revenge for their deposing before the CBI.
- 5.20 It was further submitted that the conclusion of alleged cartel by the DG is against economic theory because firstly, the alleged arrangement, even if presumed to be there, was for a short duration of only one month *i.e.*, February to March 2013 and secondly, it was not for making any profit since the rates quoted were as per the existing trend of around Rs. 3400 - 3500. As per the confessional statement of Shri Sandeep Goyal, the alleged cartel was formed somewhere in February 2013 and there was no evidence to suggest that the same continued after March 2013. Also, as per the same confessional statement, the purpose of alleged cartel was to ensure a market share for each participant and not for the purpose of earning/sharing additional/ excessive profits by charging excessive prices. It is alleged that the above two statements of Shri Sandeep Goyal are against the very concept of cartelization as a cartel is formed for charging excessive prices over and above the competitive/ market prices to earn “supra normal profits.
- 5.21 It was also argued that that unlike OP 3, who is an agent/dealer of CGL for BLDC Fans, the other two firms named in the CBI complaint/ *prima facie* order of Commission u/s 26(1) of the Act are manufacturers of BLDC Fans. It was submitted that OP 3 was not a “direct competitor” of OP 2 and OP 1, and as such the alleged “agreement” between OP 3 and these two firms, even if presumed for the sake of argument, did not constitute a “horizontal anticompetitive agreement” within the meaning of Section 3(3) of the Act.



5.22 OP 3 further stated that agency agreements were outside the purview of competition law since a principal and its agent, in a genuine Agency agreement constitute, a “single economic unit” for the purposes of competition law.

5.23 OP 3 lastly submitted that the DG’s findings were based on an incorrect understanding of facts and law as there was no direct evidence to prove the existence of an agreement and only circumstantial evidence and oral statement were relied upon to arrive at the conclusion. It was also stated that the DG had not considered any or all factors mentioned in Section 19(3) of the Act. There was no discussion in the DG Report that there was any appreciable adverse effect on competition due to the alleged action of OPs in terms of Section 19(3) of the Act which is a prerequisite and touch stone to attract Section 3 of the Act.

5.24 Pursuant to the hearing on 28.01.2016, OP 3 filed additional written submission dated 04.02.2016 refuting the findings of the DG wherein it has mostly reiterated the arguments which it had put forth in its previous submissions.

6. Analysis:

6.1 The Commission has considered all the material on record and heard the submissions of the learned counsel for OP 1, OP 2, OP 3 and their officers *i.e.*, Shri Sandeep Goyal, Shri Ashish Jain and Shri Ramesh Parchani.

6.2 The Commission notes that the OPs have raised certain issues on procedural grounds. Hence, before analyzing the case on merits, it is considered appropriate to deal with these issues at the outset.



- 6.3 It is noted that Shri Ashish Jain of OP 2 has raised allegation of coercion, harassment, fabrication of his statement by the DG and also procedural infirmities at the cross-examination stage. Having heard OP 2 and perused its written submissions, it is observed that OP 2 has not produced any evidence in support of its contentions and has merely made bald allegations. In case OP 2/ Shri Ashish Jain were being threatened/coerced, they could have approached the Commission at that point of time itself without waiting for the stage of hearing. It appears to be an afterthought and nothing more than an endeavour on part of OP 2 to vitiate the investigation by the DG. Thus, in absence of any concrete evidence, the Commission finds no substance or merit in these allegations.
- 6.4 Further, OP 2 has contended that the DG has not supplied complete call data records before recording the statement of Shri Ashish Jain, and, therefore, it was in a position to give justification only for the call data records supplied by DG and not all call data records. In this regard, the Commission is of the view that the opportunity to inspect the records and obtain copies thereof was always available to OP 2 and, in fact, such opportunity had been expressly granted to it by the Commission *vide* its order dated 14.08.2016. The fact that OP 2 never availed this opportunity and raised same contention again reflects lack of diligence on its part and also an attempt to needlessly deflect and prolong the matter by resorting to dilatory tactics.
- 6.5 Another contention of OP 2 is that the DG had exceeded its jurisdiction by submitting a supplementary report on cross-examination. However, the Commission finds no merit in this contention given that the report was submitted in furtherance of the order of the Commission dated 01.09.2015. The prayer of OP 2 for rejection of supplementary report on cross-examination is entirely misplaced and is liable to be rejected.



- 6.6 Having dealt with the procedural issues, the Commission now proceeds to examine the case on merits.
- 6.7 Considering that a finding of contravention has been made by the DG against OP 1, OP 2 and OP 3, the Commission is of the view that the main issue for consideration and determination in the instant case is whether OP 1, OP 2 and OP 3 have contravened the provisions of Section 3(1) read with Section 3(3)(d) of the Act or not.
- 6.8 It is observed that in order to arrive at its finding of contravention against OP 1, OP 2 and OP 3, the DG has relied upon three types of evidence *i.e.*,
- (i) e-mail correspondence,
 - (ii) call data records and
 - (iii) statements of opposite parties
- 6.9 The Commission notes that the most clinching evidence of understanding/ arrangement amongst the OPs in the instant case is the e-mail trail from OP 1 to OP 2 and then to OP 3 which contained a suggestion of rates to be quoted and quantities to be shared amongst the three Part I bidders in the three tenders by Indian Railways and one tender by BEML for procurement of BLDC fans. This e-mail was not forwarded to any of the other OPs *i.e.*, OP 4, OP 5, OP 6 or OP 7, who were Part II bidders.
- 6.10 In order to ascertain whether the arrangement proposed in the e-mail was implemented by the parties, the rates suggested in the attachment to the e-mail dated 17.03.2013 were compared with the rates actually quoted by the OPs in the four tenders as tabulated below:



| Tender No. and Due Date | 30120402OT460, (27.02.2013) (1) | 45131110, (20.03.2013) (2) | 4102130113, (25.03.2013) (3) | DR01/RM2/120 0120506, (26.03.2013) (4) |
|---------------------------------|--|-----------------------------------|-------------------------------------|--|
| Procurer | <u>N.E Railway</u> | <u>S.C Railway</u> | <u>North Railway</u> | <u>BEML</u> |
| OP 1 (Rate in e-mail) | 3510 | 3481 | 3481 | 3520 |
| OP 1(Rate quoted) | 3510 | 3610.80 | 3480.75 | 3570.75 |
| OP 2 (Rate in e-mail) | 3481 | 3495 | 3520 | 3495 |
| OP 2(Rate quoted) | 3481.07 | 3757 | 3520 | No bid |
| OP 3 (Rate in e-mail) | 3495 | 3520 | 3495 | 3481 |
| OP 3 (Rate quoted) | 3491.98 | 3530 | 3495 | 3498.36 (Quoted by Crompton Greaves Ltd.) |
| L1 based on rates in e-mail | OP 2 | OP 1 | OP 1 | OP 3 |
| L1 based on rates quoted | OP 2 | OP 3 | OP 1 | Crompton Greaves |

From the above table, it is evident that:

- as per arrangement, the rates agreed to be quoted by OPs were Rs.3481 (by L1), Rs.3495 (by L2) and Rs.3520/3510 (by L3);
- the arrangement was followed for tender dated 27.02.2013. OP 2 quoted the same rate as was mentioned in e-mail attachment *i.e.*, Rs.3481 and was L1. OP 3 and OP 1 had also quoted identical/similar rates as in e-mail attachment and were L2 and L3, respectively;
- the arrangement was not followed for tender dated 20.03.2013. The rates quoted in this tender were different from what was mentioned in the e-mail. Interestingly, all the three OPs, did not quote rates lower or equivalent to the previous L1 *i.e.*, Rs. 3481; rather all quoted a higher rate. OP 3 was L1 in this tender.



- d. after deviating in tender dated 20.03.2013, the arrangement was again followed by OP 1, OP 2 and OP 3 in tender dated 25.03.2013, where OP 1 quoted Rs. 3480.75 and was L1, OP 3 and OP 2 quoted identical rates as in e-mail and were L 2 and L 3, respectively.
- e. the arrangement was not effectuated in tender dated 26.03.2013, as instead of OP 3, CGL quoted directly in this tender. Further, OP 2 did not submit bid and the rates quoted by OP 1 did not match with the rates in the e-mail.

6.11 Thus, it appears from the e-mail that OP 1, OP 2 and OP 3 who were the only three Part I bidders for BLDC fans, had decided to divide the four tenders amongst themselves in a mutually agreed manner, envisaging bid rotation. A perusal of the actual quotations by the OPs reveals that though the rates actually quoted by OP 1, OP 2 and OP 3 did not match with the rates proposed in the e-mail in all the tenders, yet OP 1, OP 2 and OP 3 were L1 in one tender each of Indian Railways indicative of an arrangement of bid rotation, despite deviation from the rates proposed in the e-mail.

6.12 Apart from above, the existence of an arrangement and its adherence by OP 1, OP 2 and OP 3 is also borne out of fact that rates actually quoted by the OPs match with the rates in the e-mail attachment in respect of two tenders *i.e.*, tender dated 27.02.2013 and tender dated 25.03.2013. As regards tender dated 27.02.2013, OP 2 and OP 3 have submitted that as the e-mail was sent on 17.03.2013 much subsequent to this tender date, the OPs could not possibly have colluded for this tender. OP 1 could have easily obtained these rates from public domain. Accordingly, it was argued that the complicity of the OPs for this tender cannot be drawn based on the e-mail, as it had become redundant by the date this e-mail was sent. With respect to tender dated 25.03.2013, whereas OP 1 admitted that it had quoted the rates as per the e-mail attachment in accordance with the arrangement amongst the OPs. OP 2 and



OP 3 could not give any explanation for the similarity of rates quoted by them in this tender with rates mentioned in the e-mail attachment except to state that it was a mere coincidence. The point on ‘coincidence’ could, for once, have been believed if the rate quoted by only one of the OPs was matching, but the factum of rates of all the three OPs, being the same, cannot be a ‘coincidence’ by any measure.

6.13 On considering the aforesaid, it is observed that for once even if the contention of OP 2 and OP 3 with respect to tender dated 27.02.2013 were to be accepted, yet the fact remains that they had exchanged the e-mail in which rates to be quoted amongst them in three future tenders were mentioned. This conduct by itself evidences complicity amongst the OPs. Further, just because only one tender was rigged out of the larger arrangement, as contended by OP 2 and OP 3, does not absolve the parties from their liability under the Act. Where the evidence establishes the complicity to effectuate even part of the arrangement, there would be contravention of the provisions of the Act. Rather, the mutual understanding/agreement to indulge in bid rigging would itself *ipso facto* violate the provisions of the Act. Thus, in the present case, the act of exchange of the said e-mail by the three OPs and quoting of same rates in tender dated 25.03.2013 as proposed in the e-mail attachment, are sufficient ground by themselves to show an arrangement amongst the OPs and effectuation of such arrangement in contravention of Section 3(3)(d) of the Act.

6.14 Apart from the e-mail evidence, the DG has also adduced evidence such as in the form of statements of OPs and their call data records. The Commission notes that Shri Sandeep Goyal, partner of OP 1, in his statement made to the DG has not only admitted that he had sent the e-mail dated 17.03.2013 to Shri Ashish Jain but also admitted that he, along with OP 2 and OP 3, had rigged three tenders of Indian Railways for BLDC fans. On 10.03.2015, OP 1 also filed an application under Section 46 of the Act read with Competition



Commission of India (Lesser Penalty) Regulations, 2009 with the Commission requesting for lesser penalty. It waived confidentiality on its identity as well as the information furnished. In his submissions, Shri Sandeep Goyal admitted to being a part of the cartel.

6.15 Further, in his statement made on 18.03.2016, Shri Sandeep Goyal revealed the *modus operandi* of the cartel. He submitted that the cartel was formed in February 2013 when he agreed to join the cartel on the insistence of Shri Ashish Jain of OP 2 with whom he had telephonically discussed and agreed on the rates to be quoted in the tender dated 27.02.2013. Subsequently, he met Shri Ashish Jain and Shri Ramesh Parchani in a restaurant/ coffee shop in Connaught Place, New Delhi where the rates to be quoted in the forthcoming three tenders of Indian Railways and BEML for BLDC fans during the month of March, 2013 were discussed and agreed upon and it was decided that Shri Sandeep Goyal would prepare a sheet in this regard for the purpose of internal record and send it to Shri Ashish Jain, including the rates already quoted for the tender dated 27.02.2013. Further, Shri Sandeep Goyal also revealed that the quotation of tender dated 20.03.2013 was changed by all at the instance of Shri Ashish Jain on the date of tender itself as Shri Ramesh Parchani of OP 3 wanted to be the lowest bidder amongst the three of them and that Shri Ashish Jain had called him six times on 20.03.2013 for this purpose. Shri Sandeep Goyal also informed that once OP 1 was delisted by RDSO in May 2013, OP 2 and OP 3 never approached OP 1 again.

6.16 The above statement of Shri Sandeep Goyal reveals that apart from the said e-mail, discussions regarding rates to be quoted in the forthcoming tenders took place amongst OP 1, OP 2 and OP 3 on telephone as well. To confirm the statement of Shri Sandeep Goyal, the DG sought call data records of the mobiles of Shri Sandeep Goyal, Shri Ashish Jain, Shri Ramesh Parchani and officers of other OPs *i.e.*, OP 4 -7, from telecom service providers. Pursuant to the notice, the call data records were furnished by the telecom service



providers along with a certificate under Section 65B of the Evidence Act, 1872. The call data records gathered by the DG show that during the period 25.02.2013 to 31.03.2013 i.e., from before to/and after the four tenders, Shri Sandeep Goyal, Shri Ashish Jain and Shri Ramesh Parchani communicated with each other several times. Shri Sandeep Goyal spoke with Shri Ashish Jain around 50 times and couple of times with Shri Ramesh Parchani. Similarly, Shri Ashish Jain and Shri Ramesh Parchani communicated with each other around 30 times between 25.02.2013 to 31.03.2013.

6.17 The Commission observes that the statement of Shri Sandeep Goyal when considered in conjunction with the e-mail and call data records, clearly shows that the tender dated 27.02.2013 was part of the understanding/ arrangement amongst the OPs. As per the call data records, the OPs had called each other several times around the dates of this tender. The call data records of Shri Sandeep Goyal shows that Shri Ashish Jain had called Shri Sandeep Goyal three times on 25.02.2013, two times on 26.02.2013 and once on 27.02.2013; Shri Sandeep Goyal also called Shri Ashish Jain once on 26.02.2013. Further, call data records of Shri Ashish Jain show that he called Shri Ramesh Parchani two times on 25.02.2013, three times on 26.02.2013 and once on 27.02.2013. In fact, on 27.02.2013, there are consecutive calls by Shri Ashish Jain to Shri Sandeep Goyal and Shri Ramesh Parchani. Such frequency of conversations amongst OP 1, OP 2 and OP 3 on and just prior to the date of the tender cannot, presumably, be for any reason other than to discuss the tender. This is confirmed by the statement of Shri Sandeep Goyal and inclusion of this tender in e-mail dated 17.03.2013. Thus, all evidences when read together would go to establish that this tender was also rigged by OP 1, OP 2 and OP 3 in collusion with each other.

6.18 Further, as regards the tender dated 20.03.2013, it is observed that the call data records would lead to corroborate and support the contention of Shri Sandeep Goyal that the quotation of tender dated 20.03.2013 was changed based on



telephonic discussions amongst OP 1, OP 2 and OP 3. As per call data records, OP 1, OP 2 and OP 3 were found to be in continuous communication with each other around this date also. The call data records of Shri Sandeep Goyal show that he had talked to Shri Ashish Jain at least three times each on 16.03.2013 and 17.03.2013, two times each on 18.03.2013 and 19.03.2013 and around 5 to 6 times on 20.03.2013. The call data records of Shri Ashish Jain show similar frequency of communication between Shri Ashish Jain and Shri Ramesh Parchani from 16.03.2013 till 19.03.2013. When various evidences *i.e.*, (a) statement of Shri Sandeep Goyal, (b) the call data records, (c) actual bidding data and (d) fact of OP 3 becoming L1 in the tender (due date 20.03.2013) despite quoting approx. Rs. 50/- higher than the last purchase rates (and other two OPs quoting even higher rates); are considered in conjunction, the only plausible conclusion that can be drawn is that OP 1, OP 2 and OP 3 had come to an understanding to rig this tender also.

6.19 Here, it is pertinent to know that the conduct of the OPs quoting higher rates in tender dated 20.3.2013 compared to previous tender *i.e.*, tender dated 27.2.2013, is peculiar because the normal tendency amongst bidders, particularly in case of tenders floated by the Indian Railways, is to submit bids that are closer to the last purchase rate or the rate approved by the Railways, unless there is significant increase in input cost or other genuine reasons. In this particular case, the Part I bidders have quoted Rs.50/- to Rs.300/- higher than the last purchase rates within a few days without any justifiable reason and, thereafter, again brought down their rates in tender dated 25.3.2013. Such increase and decrease in rates within a short span of one month can only imply cartelization by the OPs.

6.20 In light of above observations, the Commission is of the view that OP 1, OP 2 and OP 3 not only rigged the tender dated 25.03.2013 but they also rigged the tender dated 27.02.2013 and 20.03.2013. While OP 1 has admitted to entering



into an arrangement with OP 2 and OP 3 to rig the four tenders for BLDC fans and quoting rates in three out of four tenders in collusion with OP 2 and OP 3, the latter have denied being part of the cartel.

6.21 As noted hereinabove, there are primarily three types of evidences in this case *i.e.*, (a) e-mail, (b) call data records and (c) statement of OPs. While the defence taken by OP 2 and OP 3 regarding the said e-mail has already been discussed above in this order, the Commission would now deal with the defences taken by OP 2 and OP 3 against the statement of Shri Sandeep Goyal and the call data records.

6.22 As regards the statement of Shri Sandeep Goyal, the Commission notes that OP 2 as well as OP 3 have urged that reliance should not be placed on the statement of Shri Sandeep Goyal as it was an uncorroborated and motivated statement. OP 3 has particularly stated that the statement of Shri Sandeep Goyal was motivated against him for the reason that he was a witness in a criminal case in which Shri Sandeep Goyal was co-accused. In this regard, it is noted that for purposes of competition law, the motivation with which anti-competitive conduct is revealed to the Commission is not relevant. The only aspect that is material is whether the entities have indulged into such anti-competitive conduct. In the present case, the statement of Shri Sandeep Goyal is not the only evidence. There are other evidences also *i.e.*, (a) e-mail dated 17.03.2013 and its exchange amongst OPs, (b) the information from Indian Railways and BEML about the rates actually quoted in the tenders and (c) the call data records which establish complicity amongst OPs to rig the tenders for BLDC fans floated by Indian Railways. Moreover, the fact remains that the e-mail dated 17.3.2013 is much prior to the initiation of CBI enquiry and the deposition by OP 3 and at that time *i.e.*, 17.3.2013, Shri Sandeep Goyal had no reason to frame/concoct the said mail, other than the presumption that there must have been some understanding/discussions amongst the parties on railway tenders.



6.23 Further, OP 2 and OP 3 have pointed out certain instances of contradictions and omissions in two statements of Shri Sandeep Goyal such as omission to mention the exact date and venue of meeting between OPs in Connaught Place, New Delhi in February 2013 or producing any proof thereof, contradictions in the submissions regarding consultations on bids, meeting and communication with other OPs *etc.* It is noted that the counsels of OP 2 and OP 3 also cross-examined Shri Sandeep Goyal in this regard. On perusal of the cross-examination statement of Shri Sandeep Goyal, it is observed that OPs could not establish anything substantial to impeach the credibility of his statement on material points such as arriving at an understanding/arrangement on phone and the instance of meeting amongst OPs. Further, other evidences such as exchange of e-mail amongst OPs and call data records which show the existence of a cartel and bid rigging by OPs could not be refuted. Hence, in view of foregoing, the contradictions/omissions alleged by OP 2 and OP 3 such as contradiction in his statement and call data records as to sequencing of calls amongst OPs, not remembering the date of meeting, *etc.* are not substantial and do not discredit the statement of Shri Sandeep Goyal.

6.24 With respect to call data records which show that the three OPs were in constant communication with each other during the period of tender and more frequently around the tender dates, both OP 2 and OP 3 have submitted that the calls were in relation to joint procurement of a 'die' for manufacturing of FRP connector. OP 2 to support its contention has stated that it had paid Rs. 16000/- to OP 1 for development of 'die' but it failed to provide any receipt or book entry to substantiate the same. Moreover, Shri Sandeep Goyal has denied in his statement that any money was given to him. Further, he has stated that only one call with OP 2 was regarding 'die' for FRP connector and that rest of the calls related to discussion regarding tenders. It is interesting to note that OP 3, who is not even a manufacturer but only a dealer for Crompton Greaves, has also given the same explanation that the calls were in connection



with joint procurement of 'die' for FRP connector. It is quite far-fetched that when OP 3 is not even a manufacturer of BLDC fans, it would still require a 'die' for manufacturing a component of that item. Moreover, the rate of the item for which the tender was floated was around Rs. 3,500/- and the cost of 'die' was Rs. 14 to Rs. 35 (as stated by OP 3). It is difficult to believe that several calls made amongst the OPs during the period of tender were about an item which was priced $\leq 1\%$ of the rate of the item itself. Though OP 3 has repeatedly stated that it was procuring the 'die' on behalf of CGL, this defence is merely an afterthought with intention to negate the obvious inference that the calls were exchanged to discuss the tenders in question. Moreover, it has not been able to produce or show any document from CGL that the latter had tasked OP 3 to do so on its behalf.

6.25 In regard to the call data records which showed that Shri Ramesh Parchani had spoken to Shri Ashish Jain numerous times and that too for long duration, Shri Parchani attributed the long duration of the calls to his habit of keeping the mobile in 'on' mode while in religious places such as Gurudwara/ Mandir, to let the caller listen to the bhajans. Also when he was shown the call records that indicated that he had talked to Shri Ashish Jain numerous times and few times with Shri Sandeep Goyal, he denied that he knew them. Such denial was made despite the fact that he himself had earlier stated that he was engaged in business dealings with OP 2 and OP 1 for development of 'die' on behalf of CGL. Having considered the statement of Shri Parchani, it is apparent that the irrational responses given by Shri Ramesh Parchani to the DG are an attempt to mislead and subvert the fact that he had colluded with Shri Ashish Jain and Shri Sandeep Goyal to rig the upcoming tenders of Indian Railways for BLDC fans.

6.26 Another contention that the Commission considers appropriate to take up at this stage is the submissions of OP 2 and OP 3 regarding the e-mail dated 17.03.2013. On examining the e-mail trail from OP 1 to OP 3, it is observed



that the e-mail was initiated by Shri Sandeep Goyal to Shri Ashish Jain with the following comments:

*“Dear Ashish,
I have made the distribution for your reference. Please see and then we can discuss.
Thanking you,
With warmest regards*

Thereafter, Shri Ashish Jain forwarded the e-mail to Shri Gulshan Kapoor, an office executive of OP 3 with the following remarks:

“Sir, please put the said mail with attachment on the table of Sir Ji”

On receipt of this e-mail, Shri Gulshan Kapoor forwarded the e-mail to Shri Ramesh Parchani on the same day. It is from the inbox of Shri Parchani that the CBI retrieved this e-mail.

6.27 As noted earlier, OP 1 has accepted that the e-mail was sent in pursuance of an agreement between the OPs; however, OP 2 and OP 3 have denied any such agreement. With respect to the forwarding of the e-mail, Shri Ashish Jain of OP 2 has contended that though he had received and forwarded the e-mail he had done so because Shri Sandeep Goyal had threatened him with dire consequences. In case of OP 3, both Shri Gulshan Kapoor as well as Shri Ramesh Parchani denied knowledge of the contents of the e-mail. Shri Gulshan Kapoor feigned ignorance as to how Shri Ashish Jain got hold of his e-mail address and Shri Parchani submitted that he had first come to know of the e-mail dated 17.03.2013 only in June 2013 when CBI found it in his inbox. He stated that he was not informed of this e-mail even by Shri Gulshan Kapoor.



6.28 Dealing first with the contention of OP 2, it is surprising to note that while Shri Ashish Jain has explained that he had forwarded the e-mail dated 17.3.2013 to Shri Gulshan Kapoor of OP 3 under the threat from OP 1, yet the call data records show that he continued to call Shri Sandeep Goyal even thereafter. In fact, around 25 calls were exchanged amongst Shri Ashish Jain and Shri Sandeep Goyal during the period 18.03.2013 to 01.04.2013 in which most of the calls were made by Shri Ashish Jain. Another strange fact is that Shri Ashish Jain has explained that these calls were about joint procurement of 'die'. If Shri Sandeep Goyal had in fact threatened him, then rationally Shri Ashish Jain should not have made even one call thereafter, let alone talked to him several times about joint procurement of 'die'. In view of the foregoing, the Commission finds the explanation given by OP 2 to be inconsistent with the actual conduct of OP 2 as exhibited from the call data records. This is clearly an attempt to subvert the fact that the e-mail had been knowingly and consciously forwarded under an arrangement amongst OPs.

6.29 As regards the submissions made by Shri Gulshan Kapoor, it is interesting to note that when Shri Gulshan Kapoor, who claims that he did not know Shri Ashish Jain, received an e-mail from Shri Ashish Jain with instructions to put it on table of "Sir Ji", he did not ignore the e-mail and rather immediately forwarded the same to his superior, Shri Ramesh Parchani. It is inconceivable that any prudent person would forward an e-mail from an unknown source with unknown contents without opening or reading the same, unless he knew the sender and/ or the contents of the e-mail. Further, the call data records of Shri Ashish Jain show that there were nine calls made between Shri Ashish Jain and Shri Gulshan Kapoor from 27.02.2013 to 31.03.2013 with three calls being exchanged on the date of the e-mail itself *i.e.*, 17.03.2013. Thus, considering the above conduct of Shri Gulshan Kapoor, his statement that he did not know Shri Ashish Jain is without credence.



6.30 Further, as regards the contention of Shri Ramesh Parchani that he came to know the content of the e-mail dated 17.03.2013 only in June 2013, it is noted that this contention is contradictory to the call data records which show that Shri Parchani received long calls from Shri Ashish Jain on 17.03.2013, both prior to and after forwarding of the e-mail to Shri Parchani by Shri Gulshan Kapoor. Given that Shri Ashish Jain and Shri Parchani were talking to each other close to the time of forwarding of the e-mail, it is highly unlikely that the upcoming tenders and the contents of the e-mail were not discussed amongst them during the phone calls and that Shri Ashish Jain would not have mentioned about the e-mail itself. Thus, the position taken by Shri Parchani in his statement that he was unaware of the e-mail stands negated in light of the clinching evidence available against OP 3.

6.31 Therefore, the evidence adduced from the call data records establishes that forwarding of the e-mail was not an incidental event as OP 2 and OP 3 have tried to project but a well thought out conduct pursuant to an understanding/ arrangement arrived at amongst the OPs to rig the tenders floated by Indian Railways and BEML.

6.32 Another contention that OP 3 has raised regarding the rates quoted by it in the aforesaid tenders for BLDC fans is that, though there is no express agreement with CGL, OP 3 is an exclusive agent of CGL in India. Thus, the rates to be quoted for BLDC fans are advised by CGL to OP 3 and the firm is bound by the price given by CGL. In this regard, the Commission takes note of the statement of Shri Asif Ali, marketing manager of CGL, recorded by the DG on 18.02.2015 where he has stated as follows:

“Generally, the notified tenders of railways are communicated to us by M/s Western Electric & Trading Company and then we issue authorization letter for specific tender before the opening of tender. Thereafter, we issue a separate letter wherein the suggested rates are mentioned (based on certain factors including tender trends, tender



quantity etc.) to be quoted by M/s Western Electric & Trading Company in the railway tenders. The rates mentioned in the said letters are just an advice and are competitive price. We mention one figure as a rate for quoting in the tenders. After issuance of authorization letter, Crompton Greaves Ltd. hand over the products i.e., BLDC fans to M/s Western Electric & Trading Company and charge the total price for the supply... M/s Western Electric & Trading Company issues us periodic order for bulk quantity on fix price independently of railways orders. Crompton Greaves invoices to Western Electric & Trading Company upon supply of BLDC fans and receives payment from the later independent of railway payment to Western Electric & Trading Company....Thereafter, M/s Western Electric & Trading Company bid in the railway tenders and after getting orders from railways, supply the same to the railways and charge the price from the railways. Railways have to pay to M/s Western Electric & Trading Company and M/s Western Electric & Trading Company has to pay to us. We do not claim any money from railway directly regarding supply of BLDC fans as billing is raised by M/s Western Electric & Trading Company ...”

From the above submission of Shri Asif Ali it is apparent that the relationship between OP 3 and CGL is not one of principal-agent, as claimed by OP 3. Further, the statement of Shri Asif Ali also shows that the price suggested by CGL is merely an advice. Thus, the contention of OP 3 that it is bound by the prices suggested by CGL has no substance and is liable to be rejected.

6.33 Shri Parchani has also contended that he had quoted the same rates as given to him by CGL. To support his contention he supplied a letter dated 18.02.2013, wherein the rates were advised by CGL for the four tenders that are subject matter of this case. He also provided another letter dated 15.03.2013 of CGL



wherein rates for tender dated 20.03.2013 were revised by CGL. However, when the DG examined the rates suggested by CGL, it was found that the rates proposed in the e-mail dated 17.03.2013 and the rates advised by CGL in letter dated 18.02.2013 (final price after adding 5% CST) were same. This raises the issue how Shri Sandeep Goyal of OP 1 became privy to the rates suggested by CGL to OP 3. When confronted by the DG in this regard, Shri Ramesh Parchani. stated that it may be possible that the rates were leaked from CGL or some employee of OP 3. He denied having interacted *via* phone, mail or even known any employee/partner of any other firm participating in the tenders, before or after quoting the bid. However, this statement of Shri Parchani was found to be in total contravention of the call data records which clearly show that he had communicated with Shri Ashish Jain even prior to 27.2.2013 and also Shri Sandeep Goyal on several occasions. This refutes the claim of Shri Ramesh Parchani that he had no communication with any employee/ partner of OP 1 and OP 2. Further, the fact that OP 1 knew the rates which CGL had communicated to OP 3 and that there are call data records which show communication amongst OPs during the period of tenders establishes complicity of OP 3 with other two OPs.

6.34 The sequence of events conclusively shows that the rates were shared by Shri Ramesh Parchani with Shri Ashish Jain and Shri Sandeep Goyal, either directly or indirectly, through telephone. Thereafter, the OPs bid for tender dated 27.02.2013 as per mutually agreed rates and then met in New Delhi to confirm their arrangement. As stated by Shri Sandeep Goyal, it was at this meeting that he was asked to prepare a sheet and send to Shri Ashish Jain of OP 2. It appears that once the sheet was sent by Shri Sandeep Goyal through e-mail on 17.03.2013, Shri Ramesh Parchani received the letter dated 15.03.2013 from CGL communicating revised rates to OP 3 for the tender dated 20.03.2013. The same appears to have been communicated by Shri Parchani to other OPs. There is sufficient evidence in the form of call data records and also statement of Shri Sandeep Goyal to show that the OPs agreed



to deviate from the rates proposed in the e-mail for this tender as OP 3 wanted to be L1 in this tender. Thereafter, in the subsequent tender dated 25.03.2013, the OPs followed their arrangement as per the e-mail. However, the arrangement was not followed for the fourth tender, as CGL directly bid for the same. In fact, after 26.3.2013, the call data records show that the frequency of calls amongst the OPs also fell. The above sequence of events that emanate from the evidences in this case clearly show that there existed an arrangement amongst the OP 1, OP 2 and OP 3 to rig the four tenders for BLDC fans as mentioned in the e-mail dated 17.03.2013 and that they in fact rigged three of these tenders by arriving at an understanding amongst themselves.

6.35 In terms of evidence, it is observed that in the present matter, the exchange of e-mail along with its attachment amongst OP 1, OP 2 and OP 3 is the direct evidence of agreement/ arrangement/ understanding amongst OP 1, OP 2 and OP 3 to rig the bids in the tenders of Indian Railways and BEML. This e-mail has not been forwarded to any other OP participating in these four tenders. The fact that the parties quoted identical/similar rates to those shown to be agreed in the e-mail in two out of four tenders, establishes collusive agreement amongst them. The exchange of numerous calls amongst OP 1, OP 2 and OP 3, which began much before the first tender and continued during the period of the tenders, lends further credence to the subsistence of an arrangement as depicted in the e-mail. Lastly, the fact that one of OPs *i.e.*, OP 1 has admitted to being part of the cartel amongst the three OPs and brought out the purpose and *modus operandi* of the cartel which is corroborated by other evidence as well, adds strength to the finding that there existed an agreement amongst the parties to allocate tenders and rotate the bids. Resultantly, based on the aforesaid facts and evidence, the Commission is of the view that the OP 1, OP 2 and OP 3 entered into an agreement/ arrangement to rig the bids and to share the market by mutual allocation of the tenders amongst themselves in contravention of the provisions of Section 3(1) read with Section 3(3) (c) and 3(3)(d) of the Act.



6.36 Additionally, OP 3 has also raised certain other contentions such as (a) conclusion of alleged cartel is against economic theory as it was for a short duration of one month and not for making profit; (b) since OP 3 was a dealer and not manufacturer like OP 1 and OP 2, hence, an agreement between OP 3 and these two firms would not constitute a horizontal agreement within the meaning of Section 3(3) of the Act; and (c) agency agreements are outside the purview of competition law since a principal and agent constitute a single economic unit for the purposes of competition law. In this regard, it is observed that (a) under the provisions of Section 3(3)(d) of the Act, bid rigging shall be presumed to have adverse effect on competition independent of duration or purpose and, also, it is immaterial whether benefit was actually derived or not from the cartel; (b) since all the OPs are competing for the tenders to supply BLDC fans to railways, the question of vertical relationship does not arise as all are competing in the same market and (c), as pointed out earlier, the statement of Shri Asif Ali shows that there does not exist any principal-agent relation in the instant case, and, therefore, the argument of single economic entity does not seem relevant in this case.

6.37 Having found contravention of Section 3 of the Act in this case, the Commission notes that in terms of the provisions contained in Section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void. Further, by virtue of the presumption contained in subsection (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or



association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which - (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

6.38 Thus, in case of agreements listed under Section 3(3) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut the presumption would lie upon the OPs.

6.39 In the present case, the OPs have not been able to rebut the said presumption. Further, it has also not been shown by the OPs how the impugned conduct resulted into accrual of benefits to consumers or made improvements in production or distribution of goods in question.

6.40 As a result, the Commission is of the view that the OP 1, OP 2 and OP 3 had shared the market by way of allocation of tenders of Indian Railways for BLDC fans amongst themselves under an agreement/ arrangement and indulged in bid rigging/ collusive bidding contravening the provisions of Section 3(1) read with Section 3(3)(c) and 3(3)(d) of the Act.

6.41 Lastly, the Commission notes that the DG did not find any contravention of the provisions of Section 3 of the Act by OP 4, OP 5, OP 6 and OP 7. The Commission agrees with the finding of the DG for the reasons as have been recorded above.



7. Application under Section 46 of the Act read with Competition Commission of India (Lesser Penalty) Regulations, 2009 (Lesser Penalty Regulations):

- 7.1 In the present matter OP 1 filed an application under Section 46 of the Act, read with Regulation 5 of the Lesser Penalty Regulations on 10.03.2015. This application was received in the Commission when the investigation in the matter was in progress and the report from the DG was pending.
- 7.2 In the said application OP 1 pointed out that a notice dated 08.01.2015 under Section 41(2) of the Act had been received from the office of the DG wherein certain information/documents had been sought. It was stated that the reply to the notice along with all the requisite information/documents was submitted to the office of the DG by OP 1 on 13.01.2015. OP 1 further submitted that it had extended full co-operation to the office of the DG.
- 7.3 OP 1 submitted that, in furtherance of the aforesaid, it was submitting detailed submissions/ information in relation to the existence of a cartel/ bid rigging in the tenders floated by the Indian Railways for BLDC Fans in contravention of Section 3(3) of the Act to the Commission. Further, it was stated that the information/documents provided in the application constituted full, true and vital disclosure under Section 46 of the Act. OP 1 gave an undertaking that it would continue to cooperate with the Commission till the completion of the proceedings before the Commission. It was also stated that OP 1 had ceased to have any further participation in the said cartel from 03.05.2015 and *inter alia* prayed for grant of priority status as per Regulation 5 of the Lesser Penalty



Regulations. On 12.03.2015, the Commission decided to mark OP 1 as 1st in the priority status in terms of the Lesser Penalty Regulations.

- 7.4 In its application dated 10.03.2015, OP 1 had prayed that the application be considered as vital disclosure for benefit of hundred percent reduction in the penalty or in the alternate, the application be considered as having provided significant added value to the evidence already in the possession of the Commission/ DG for the purposes of Regulation 4(b) of the Lesser Penalty Regulations. The Commission heard OP 1 on its application under Section 46 of the Act on 28.04.2016
- 7.5 OP 1 submitted that they had cooperated fully and expeditiously on a continuous basis throughout the investigation/ inquiry into the matter by the office of the DG as well as the Commission and had provided all information and evidence in its possession or available to it. Further, it had already ended its involvement at the time when it submitted its evidence to the Commission. Also, it did not take any steps to coerce other cartel participants to participate in the cartel.
- 7.6 OP 1 further stated that it was the Applicant who for the first time explained the functioning of the cartel during his deposition and revealed the role of the various parties operating the cartel, the design and *modus operandi* of the cartel, duration of the cartel, incentives for formulating cartel, mode and manner for deciding the prices of BLDC Fans to be quoted for forth-coming tenders of railways and mode of deciding about the name of the proposed winners in the forth-coming tenders for BLDC fans. Further, the partner and ex-partner of the OP 1 have also co-operated with the office of the DG during the course of investigation. Shri Sandeep Goyal, ex-partner of the OP 1, also made himself available for cross-examination of his statements on oath.



- 7.7 OP 1 has also submitted that the information submitted by it materially contributed to establishing the existence of the cartel. Prior to the filing of the application by OP 1, other parties had denied the existence of the cartel. The evidence submitted by OP 1 provided the missing links to the investigation about the design of the cartel. Had OP 1 not identified and conveyed the information about the mode and manner of the functioning of the cartel, the incidence of matching of rates in the tender dated 27.02.2013 could not have been identified by the DG to be a result of an agreement amongst the parties since the e-mail evidence furnished by CBI showed that e-mail was forwarded on 17.03.2013. It is clear from the investigation report of the DG that the information and evidence furnished by the Applicant were relied upon to establish the existence of the cartel.
- 7.8 The Commission heard the arguments of OP 1 and also considered the information/ documents submitted by OP 1. The Commission notes that the OP 1 was the first and only party to accept the existence of a cartel/bid rigging in tenders for railways for BLDC Fans and submit information in support thereof. It is noted that the evidence submitted by OP 1 supported the evidence provided by CBI and played a significant role in revealing the *modus operandi* of the cartel.
- 7.9 The Commission is satisfied with the cooperation offered by OP 1 and acknowledges that the evidence and cooperation provided by it have strengthened the Commission's investigation in establishing the existence of a cartel.
- 7.10 It is noted that, at the time, when the application was made by OP 1, the Commission was already in possession of the e-mail evidence furnished by CBI which enabled the Commission to form a *prima facie* view regarding the existence of a cartel in contravention of the provisions of Section 3 of the Act.



The evidence and submission of OP 1 further substantiated the evidence in the possession of the Commission and also completed the chain of events.

7.11 The Commission notes that although OP 1 is the first to make a disclosure in this case, however, the Commission is also cognizant of the stage at which the Applicant approached the Commission *i.e.*, not at the very beginning but at a later stage in the investigation, and of the evidence already in possession of the Commission at that stage. Considering the co-operation extended by the OP 1, in conjunction with the value addition provided by OP 1 in establishing the existence of cartel, the Commission decides to grant a 75 percent reduction in the penalty to the Applicant than would otherwise have been imposed on it had it not cooperated with the Commission.

ORDER

8.1 In view of the above finding of contravention against OP 1, OP 2 and OP 3, the Commission directs them to cease and desist from indulging in such anti-competitive conduct in future.

8.2 As regards the penalty to be imposed under Section 27 of the Act, the Commission finds that OP 1, OP 2 and OP 3 entered into an arrangement to rig the bid pertaining to tenders of BLDC fans in Northern Railway, North East Railway, South Central Railway and BEML, as brought out hereinabove, and are, hence, responsible for the infringement of the provisions of the Act and liable for penalty. While OP 1 has accepted that it had an understanding/arrangement with OP 2 and OP 3 to rig the bids, OP 2 and OP 3 have preferred to justify their conduct on various grounds.

8.3 Considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty in terms of proviso to Section 27 (b) of the Act which reads as follows:



“Provided that in case any agreement referred to in Section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of upto three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.”

- 8.4 It is noted that the cartel by OP 1, OP 2 and OP 3 in the instant case pertains to the financial year 2012-2013. Accordingly, based on their net profit and turnover during that year, three times of their profit was compared with 10 percent of their turnover as follows:

Amount – In rupees

| S. No. | Opposite Parties | Net Profit for 2012-13 | Maximum Leviable Penalty (Three times of Net Profit) |
|--------|---|------------------------|--|
| 1. | M/s Pyramid Electronics (OP 1) | 62,36,634 | 1,87,09,902 |
| 2. | M/s R. Kanwar Electricals (OP 2) | 17,31,102 | 51,93,306 |
| 3. | M/s Western Electric and Trading Company (OP 3) | 2,09,14,961 | 6,27,44,883 |

Amount – In rupees

| S. No. | Opposite Parties | Turnover for 2012-13 | Maximum Leviable Penalty (Ten Percent of Turnover) |
|--------|--------------------------------|----------------------|--|
| 1. | M/s Pyramid Electronics (OP 1) | 9,62,43,802 | 96,24,380 |



| | | | |
|----|--|---------------|-------------|
| 2. | M/s R. Kanwar Electricals (OP 2) | 6,67,00,395 | 66,70,040 |
| 3. | M/s Western Electric and Trading Company (OP 3) | 37,48,11, 813 | 3,74,81,181 |

8.5 It is evident from the above that the penalty leviable on OP 1 and OP 3 on the basis of three times of their profit would be higher. Whereas in case of OP 2 the penalty leviable on the basis of ten percent of its turnover would be higher. Accordingly, in terms of proviso to Section 27(b) of the Act, the Commission decides to impose a penalty on OP 1 and OP 3 based on their net profit and on OP 2 based on its turnover.

8.6 Further, taking into consideration all the relevant factors including the duration of the cartel, the volume of the tender affected by the cartel and the value thereof, the Commission decides to impose penalty on OP 1 and OP 3 calculated at 1.0 times of their profit respectively in the year 2012-13 and on OP 2 at the rate of 3 percent of its turnover for the year 2012-13 as follows:

Amount – In rupees

| S. No. | Opposite Parties | Net Profit for 2012-13 | Penalty at 1.0 times the Net Profit for 2012-13 |
|--------|--|------------------------|---|
| 1. | M/s Pyramid Electronics (OP 1) | 62,36,634 | 62,36,634 |
| 2. | M/s Western Electric and Trading Company (OP 3) | 2,09,14,961 | 2,09,14,961 |

| S. No. | OPs | Turnover for 2012-13 | Penalty at 3 percent of Turnover for 2012-13 |
|--------|-------------------------------------|----------------------|--|
| 3. | M/s R. Kanwar Electricals (OP 2) | 6,67,00,395 | 20,01,012 |



- 8.7 Considering that the Commission has decided to grant a 75 percent reduction in penalty to OP 1 under Section 46 of the Act, as recorded hereinabove, the total amount of penalty to be paid by OP 1 is Rs. 15,59,159/-
- 8.8 The Commission further directs these OPs to deposit the penalty amount within 60 days of receipt of this order.
- 8.9 So far as the individual liability of the office-bearers of OPs in terms of the provisions of Section 48 of the Act is concerned, it may be noted that the Commission *vide* its order dated 23.06.2014 had directed that, in case the DG finds the OPs in violation, the DG should investigate the role of persons who at the time of such contravention were in charge of and responsible for the conduct of business of the OPs so as to fix responsibilities of such persons under Section 48 of the Act.
- 8.10 Resultantly, the DG, after finding the three OPs *i.e.*, OP 1, OP 2 and OP 3 to be in contravention of the provisions of the Act, has investigated and highlighted the individual roles of key persons of these OPs for purposes of Section 48 as below:

a. *Role of key persons in OP 1:*

For OP 1, Shri Sandeep Goyal was the key person involved in the cartel, who was an active partner of the concern during the relevant period (he was a partner in OP 1 till 05.06.2013, but resigned thereafter). He was the person who originated the e-mail proposing the rate to be quoted by various parties in the upcoming tenders. Further, from the call data records it is seen that Shri Sandeep Goyal made/received calls from Shri Ashish Jain of OP 2 and Shri Ramesh Parchani of OP 3. As such on an individual basis, he played an active



role in this cartelization. He has also accepted this in his statements on oath.

b. *Role of key persons in OP 2:*

For OP 2, Shri Ashish Jain was the key person involved in the cartel and was the active partner of the concern involved in the decision-making. The e-mail proposing the rate to be quoted by various OPs in the upcoming tenders was sent to his e-mail ID and he further forwarded it to Shri Gulshan Kapoor, an executive in OP 3, to place it before Shri Ramesh Parchani of OP 3. As per the call data records of Shri Ashish Jain it is seen that he had made/ received several calls from Shri Ramesh Parchani and also spoke a number of times with Shri Sandeep Goyal of OP 1 as well as partners in other OPs. As such on individual basis he played an active role in this cartelization.

c. *Role of key persons in OP 3*

- i. For OP 3, Shri Ramesh Parchani was the main person in the cartel and an active partner of OP 3 looking after the day-to-day functioning of OP 3. Shri Ramesh Parchani received the e-mail from Shri Gulshan Kapoor of OP 3. Although in his statement Shri Parchani has claimed that he neither knew about the e-mail/ the attachment nor had he spoken with his competitors/ contacted them, the call data records show that he made/received several calls from Shri Sandeep Goyal of OP 1 and Shri Ashish Jain of OP 2. The evidence refutes his claim and clearly establishes that he was actively involved on individual basis in the cartel.
- ii. Shri Gulshan Kapoor an executive/employee in the concern in OP 3 was found to be actively involved in the day-to-day functioning of the concern. The e-mail proposing the rates to be



quoted by various OPs, was sent by Shri Ashish Jain to Shri Gulshan Kapoor. He in turn forwarded the e-mail to Shri Ramesh Parchani. As such Shri Gulshan Kapoor was not only aware of the contents of the e-mail alleged but also of the alleged attempt by the parties to rig the bid. However, being an employee and not a partner in the firm, he was not found playing an active role in decision making pertaining to rigging of the bids.

8.11 On consideration of the investigation report, the Commission *vide* its order dated 07.05.2015 had directed forwarding the copies thereof to the OPs and also to Shri, Sandeep Goyal for OP 1, Shri Ashish Jain for OP 2 and Shri Ramesh Parchani for OP 3, who were identified as the persons under Section 48 of the Act and who at the time of the contravention of the Act were in charge of and responsible for the conduct of the business of the OPs.

8.12 It may be noted that by virtue of the provisions contained in Section 48(1) of the Act, where a person committing contravention of any of the provisions of the Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. By virtue of Explanation to Section 48 of the Act, the word "company" has been defined as a body corporate including a firm or other association of individuals. Further, by virtue of the proviso appended thereto, it is provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.



8.13 As the Commission has already held that the impugned acts/ conduct of OP 1, OP 2 and OP 3 are in contravention of the provisions of Section 3(1) read with Section 3(3)(c) and 3(3)(d) of the Act, the liability of the persons in-charge of OP 1, OP 2 and OP 3 flows vicariously from the provisions of Section 48 of the Act. In the present case, while Shri Sandeep Goyal for OP 1 has accepted that he played an active role in the cartelisation; Shri Ashish Jain for OP 2 and Shri Ramesh Parchani for OP 3 have denied the allegations and have taken bald pleas such as threat from OP 1, absence of knowledge of e-mail, attributing calls to combined procurement of 'die', *etc.* They have not been able to show or bring on record, either before the DG or the Commission, any evidence to absolve themselves from the liability in terms of the provisions of the Act.

8.14 Resultantly, considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty on Shri Sandeep Goyal for OP 1, Shri Ashish Jain for OP 2 and Shri Ramesh Parchani of OP 3. The penalty on these persons-in-charge imposed in terms of Section 27(b) of the Act calculated at the rate of 10 percent of the average of their income for the last three preceding financial years is as follows:

Amount – In rupees

| S. No. | Individuals | Income for 2011-12 | Income for 2012-13 | Income for 2013-14 | Average Income for 3 Years | @ 10 % of average Income |
|--------|--------------------------------|--------------------|--------------------|--------------------|----------------------------|--------------------------|
| 1. | Shri Sandeep Goyal (of OP 1) | 4,97,729 | 4,41,358 | 4,58,726 | 4,65,938 | 46,594 |
| 2. | Shri Ashish Jain (of OP 2) | 8,50,343 | 10,20,541 | 6,74,226 | 8,48,370 | 84,837 |
| 3. | Shri Ramesh Parchani (of OP 3) | 19,70,183 | 23,68,270 | 20,79,122 | 21,39,192 | 2,13,919 |



8.15 Considering that the Commission has decided to grant a 75 percent reduction in penalty to OP 1 under Section 46 of the Act, as recorded hereinabove, the Commission, also decides to allow the same reduction in penalty to Shri Sandeep Goyal for OP 1 under Section 46 of the Act. Thus, the total amount of penalty to be paid by Shri Sandeep Goyal is Rs.11,648/-.

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

8.17 The Secretary is directed to inform the parties accordingly.

Sd/-

(S. L. Bunker)
Member

Sd/-

(SudhirMital)
Member

Sd/-

(U. C. Nahta)
Member

New Delhi

Dated: 18.01.2017