



## COMPETITION COMMISSION OF INDIA

Suo Moto Case No. 01/2018

**In Re:**

**Alleged cartelisation by two bidders/firms in procurement/tender for purchase of surgical disposal items on two-year contract basis by AIIMS**

**CORAM**

**Mr. Ashok Kumar Gupta**  
**Chairperson**

**Ms. Sangeeta Verma**  
**Member**

**Mr. Bhagwant Singh Bishnoi**  
**Member**

***Appearances in the hearing held through Video Conferencing on 14.10.2020:***

<i>OP-1:</i>	<i>Mr. Arya Ashok Kumar, Advocate</i>
<i>Ms. Pragati Awasthi, Official of OP-1:</i>	<i>Mr. Abhinav Jaganathan, Advocate</i>
<i>Mr. Tarun Kumar, Distributor of OP-1:</i>	<i>Mr. Arun Wighmal, Advocate</i>
<i>OP-2 and its officials viz. Mr. Ravinder Singh Ahluwalia, Mr. Pushparaj Shetty:</i>	<i>Mr. Manas Kumar Chaudhuri, Advocate</i> <i>Mr. Sagardeep Rathi, Advocate</i> <i>Ms. Swati Bala, Advocate</i> <i>Mr. Om Jamdar, Official of OP-2</i> <i>Mr. Pushparaj Shetty, Official of OP-2</i>
<i>Ex-Official of OP-2 viz. Mr. Atanu Mitra:</i>	<i>Mr. Sagardeep Rathi</i>



## ORDER

### Facts in brief

1. This matter originated from a letter (Complaint) dated 10.07.2017, of the Assistant Store Officer of All India Institute of Medical Sciences (hereinafter referred to as “**AIIMS**”), alleging cartelisation by two firms, viz. Romsons Scientific & Surgical Industrial Pvt. Ltd. (hereinafter, referred as “**Romsons/OP-1**” and BSN Medical Pvt. Ltd. (hereinafter, referred as “**BSN/Essity/OP-2**”) in respect of a tender invited by AIIMS vide no. XX-03/SO(DO)/Surgical Disposable & Dressing items/2016-17/St. dated 26.05.2016 (hereinafter, referred as the ‘**Tender for Surgical Tape/ Impugned Tender**’) (OP-1 and OP-2 are collectively referred to as ‘**OPs**’). The Commission, under Section 19(1) of the Competition Act, 2002 (hereinafter referred to as the “**Act**”), conducted a *suo moto* inquiry into the matter.
2. The Commission noted that the Tender for Surgical tape was an open tender, invited under two bid system, viz. technical bid and financial bid by Store Section (DO) of AIIMS to procure eight items. Item Nos. 1 to 4 pertained to surgical tape *with dispenser* of size – ½ inch x 9.10 meters (24 rolls per box); 1 inch x 9.10 meters (12 rolls per box); 2 inch x 9.10 meters (6 rolls per box) and 3 inch x 9.1 meters (4 rolls per box). Item Nos. 5 to 8 pertained to surgical tape *without dispenser* of size – ½ inch x 9.10 meters (24 rolls per box); 1 inch x 9.10 meters x (12 rolls per box); 2 inch x 9.10 meters (6 rolls per box) and 3 inch x 9.1 meters (4 rolls per box). The specification of the tapes mentioned above is *surgical tape of non-woven, viscose rayon porous backing (micro pore type paper tape)*. The tender fee was ₹ 500 (rupees five hundred) with the Earnest Money Deposit (“**EMD**”) of ₹ 50000 (rupees fifty thousand) to be submitted by interested bidders.
3. The Technical Specification Selection Committee (“**TSSC**”) formed by the procurer (AIIMS) further formed Sub-Committee for technical evaluation of



samples received from participating bidders. The role of the Sub-Committee was to provide selection/rejection remarks to main committee for tendered items. Samples of Item Nos. 1 to 8 under Tender for Surgical Tape were put up before the sub-committee for providing selection/rejection remarks.

4. Thirteen firms participated in the impugned Tender and out of them, only three firms were found to be technically qualified by the sub-committee for opening of their financial bid. These firms were (a) BSN, (b) Mediserve, and (c) Romsons. The Sub-Committee rejected the samples of other ten bidders on the ground of poor quality.
5. TSSC unanimously decided to consider all selection/rejection remarks provided by respective sub-committee and recommended opening of financial bids of the technically shortlisted firms as aforementioned, viz. BSN, Mediserve and Romsons, whose financial bids were opened on 10.02.2017. As per financial bids submitted, BSN was the L1 bidder for Item Nos. 1 to 4 (surgical tape with dispenser) whereas, for Item Nos. 5 to 8 (surgical tape without dispenser), BSN and Romsons were found to have quoted the lowest, but identical rates, upto two decimal points.
6. After going through the proposal received, the Chief Procurement Officer, AIIMS, provided his remarks deducing 'collusion' as Romsons and BSN had quoted same rates upto two decimal points for Item Nos. 5, 6, 7 and 8. In view of suspected collusion, AIIMS decided that the items were to be re-tendered. Simultaneously, the case was proposed to be submitted to the Commission with a request for examination and appropriate action.
7. The Commission, after being satisfied that *prima facie* there appeared to be a case of contravention of provisions of the Act, suggested AIIMS to file a 'reference' in this matter under Section 19(1)(b) of the Act. However, *vide* letter dated 17.03.2018, AIIMS intimated that it took cognizance of the replies of BSN and Romsons to its 'Show Cause Notice' in response to which, both the firms



stated that “*matching price was a mere coincidence*”. In view of the said justification put forth by the parties, AIIMS decided not to file a reference.

8. However, during the preliminary inquiry, the Commission noted that as per the publicly available information, both BSN and Romsons were medical device manufacturing companies, having global presence. Romsons was based in Agra, Uttar Pradesh with offices in Delhi and Noida, whereas BSN was based in Mumbai. As per the Commission, it was highly improbable for two companies which operate from different regions and have separate labour costs, raw materials, transportation, *etc.*, to quote identical rates to the extent of last two decimal places for four out of eight items covered in the Tender for Surgical Tape. The Commission was of the *prima facie* view that the same could not be the result of mere coincidence.
9. The Commission observed that the aforesaid conduct of the OPs coupled with the presence of facilitating factors conducive for cartelisation, such as limited number of players, homogenous product, *etc.*, do indicate possibility of cartelisation/ collusive bidding, which merited a detailed investigation in the matter.

#### **Order under Section 26(1) of the Act**

10. The Commission in its order dated 06.06.2018, based on the observations made in the preliminary inquiry, was of the view that there existed a *prima facie* case of contravention of the provisions of Section 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act. Accordingly, the Commission directed the Director General (“**DG**”) to cause an investigation into the matter and submit its report.
11. In pursuance of the directions of the Commission, the DG investigated into the matter and submitted an Investigation Report dated 20.03.2020.



12. The Commission considered the said Investigation Report in its ordinary meeting held on 11.05.2020 and decided to forward the same to Romsons (OP-1) and BSN (OP-2) to file their respective responses latest by 08.07.2020. The hearing in the matter was fixed on 21.07.2020.
13. On a request dated 29.06.2020 received from OP-1 seeking extension of time for filing objections, the Commission directed the OPs to file their response by 20.08.2020 and scheduled hearing in the matter on 09.09.2020.
14. Thereafter, OP-1 moved another application dated 11.08.2020 seeking further two weeks' time for filing submissions/objections to the Investigation Report. The Commission considered the same in its ordinary meeting held on 18.08.2020 and acceded to the extension request. The Commission rescheduled hearing in the matter on 29.09.2020.
15. OP-1, OP-2 and their officials filed their respective objections/suggestions to the Investigation Report on 20.08.2020 in public and confidential version. The counsel of Mr. Atanu Mitra, ex official of OP-2, separately filed objections/suggestions to the Investigation Report on 20.08.2020 in public and confidential version. Further, the individuals found to be liable by the DG under Section 48 of the Act viz. Mr. Tarun Kumar and Ms. Pragati Awasthi of OP-1, Mr. Ravinder Singh Ahluwalia and Mr. Pushparaj Shetty of OP-2 and Mr. Atanu Mitra, ex-official of OP-2, have requested to grant confidentiality in terms of Regulation 35 of the Competition Commission of India (General) Regulations, 2009 (hereinafter, "**General Regulations, 2009**"), on their respective ITRs submitted in pursuance of the directions of the Commission.
16. On 29.09.2020, the matter was listed before the Commission for oral hearing of the parties on the Investigation Report. The counsel for OP-1 was duly present, however, none appeared on behalf of OP-2. The Commission noted that the counsel for OP-2, vide email dated 28.09.2020, moved an application seeking adjournment in the matter by eight weeks. The adjournment was sought citing



COVID-19 pandemic and difficulty in travelling by officials of OP-2. The Commission having considered the belated adjournment request of the counsel of OP-2 and in view of the continuing exigencies caused by COVID-19 expressed therein, decided to hold the hearing in the present matter through video conferencing ('VC') on 14.10.2020.

17. On 14.10.2020, the Commission heard the counsel for OP-1 and OP-2 at length and decided to pass an appropriate order in due course. OP-1 and OP-2 also filed synopsis of their arguments on 13.10.2020 and 27.10.2020, respectively.

#### **Findings of the DG**

18. In order to analyse the allegations/issues in the matter, the DG issued probe letters /notices to the OPs and also sought additional information from AIIMS. The statements of the senior officials of AIIMS as well as that of OP-1 and OP-2 were also recorded on certain aspects. OP-2, *i.e.* BSN was acquired by Essity in 2017, accordingly the responses have been submitted on behalf of OP-2 by Essity before the DG as well as before the Commission. The DG sought the data from the OPs pertaining to the period from 2015-16 to 2017-18.
19. The DG also obtained details of tender documents submitted by other bidders in respect of the Tender for Surgical Tape. AIIMS intimated that Mr. Tarun Kumar, authorised distributor of OP-1 and Mr. Ravinder Ahluwalia, Manager of OP-2 were involved in interactions/ discussions with AIIMS in respect of the Tender for Surgical Tape.
20. With respect to the issue of not filing a reference with the Commission, AIIMS stated that the matter was referred to the legal cell and the Standing Legal Council (SLC) of AIIMS opined that "*..in case inquiries conducted has shown sufficient evidence that there has indeed been a collusion between the two firms, the right course would be to issue Show Cause Notices to the two firms and after*



*considering the replies, if any, to blacklist the said firms from participating in further tenders notices.” Accordingly, AIIMS served show cause notices upon both the OPs and upon receipt of their respective replies again sought the opinion of the SLC, which opined that “the present case is not a fit case for reference to CCI.....attention is drawn to clause 43 of the General Instructions for Tenderers which prohibits Corrupt and Fraudulent Activities ..., and empowers AIIMS to declare the erring firm as ineligible, either indefinitely or for a stated period of time.” The competent authority considered the matter and noted that since both the firms are renowned multinational companies and price of both the firms is equal in respect of one item for assorted sizes and had this been a case of collusion, the firms might have quoted slightly different rate; accordingly, it was decided to withdraw the complaint filed before the Commission. AIIMS also stated that the Tender for Surgical Tape was scrapped and all the eight items were retendered through a fresh tender. The tendered items were procured by suitably extending the previous rate contract and in the meantime, the fresh tender was finalised. The products were made available under the fresh tender with effect from 29.08.2018. AIIMS also stated that OP-1 and OP-2 did not participate in the fresh tender. Also, AIIMS returned the EMD of all the bidders of the Tender for Surgical Tape except OP-1 and OP-2 as the matter was under investigation by CCI. The official of AIIMS also submitted in his testimony that there is a practice at AIIMS for awarding 50% rate contract to each of the firm when rates are same between two firms for the same item.*

21. The key issue to be investigated by the DG was whether OP-1 and OP-2 colluded to fix the prices of the tendered items in the Tender for Surgical Tape in contravention of the provisions of Section 3(3)(d) of the Act. Before analysing the same, the DG examined the prices quoted by the OPs. The DG noted that the tender was invited for surgical tape with dispenser and without dispenser and in four different sizes *i.e.* ½ inch, 1 inch, 2 inch and 3 inch. Thirteen bidders took part in the Tender for Surgical Tape out of which ten were



technically disqualified on grounds of poor quality. Accordingly, the financial bids of three bidders, namely Romsons (OP-1), BSN (OP-2) and Mediserve were opened on 10.02.2017. For item nos. 1 to 4, *i.e.* surgical tape with dispenser in the aforesaid four sizes, one of the three technically qualified bidders, *viz.* Mediserve quoted the rates per box whereas OP-1 and OP-2 quoted rate per unit and OP-2 emerged as L-1 bidder. However, for item nos. 5 to 8, *i.e.* Surgical tape without dispenser, OP-1 and Mediserve quoted rate per box whereas OP-2 quoted rate per unit. Upon conversion of the rate per box quoted by OP-1, the resultant per unit prices were similar to the rate per unit quoted by OP-2. The table referred to in the Investigation Report is extracted below:

**Table 1: Rates (exclusive of VAT @5%) quoted in the financial bid by technically qualified bidders for items 5-8 in the Tender for Surgical Tape**

Surgical tape without dispenser	Quotation of Mediserve	Quotation of OP-1	Quotation of OP-2
½ inch*9 M	₹ 261 per box of 24 rolls	₹175 per box of 24 rolls	₹7.29 per roll
1 inch*9 M	₹ 261 per box of 12 rolls	₹175 per box of 12 rolls	₹14.58 per roll
2 inch*9 M	₹ 261 per box of 6 rolls	₹ 175 per box of 6 rolls	₹ 29.16 per roll
3 inch*9 M	₹ 261 per box of 4 rolls	₹175 per box of 4 rolls	₹ 43.75 per roll

*Source: Reply dated 05.12.2019 of AIIMS*



22. For the purpose of comparison, the DG converted the per box rate of OP-1 into per unit and also per unit rate of OP-2 into rate per box.

**Table 2: Rates quoted in the financial bid by OP-1 and OP-2 for items 5-8 in the Tender for Surgical Tape**

Surgical tape without dispenser	Rate per piece (₹)			Rate per box (₹)		
	OP-1 (converted to per unit)	OP-2	Difference	OP-1	OP-2 (converted to per unit)	Difference
½ inch*9 M	7.2916 (175/24)	7.29	0.002	175	174.96 (7.29*24)	0.04
1 inch*9 M	14.583 (175/12)	14.58	0.003	175	174.96 (14.58*12)	0.04
2 inch*9 M	29.166 (175/6)	29.16	0.006	175	174.96 (29.16*6)	0.04
3 inch*9 M	43.75 (175/4)	43.75	-	175	175 (43.75*4)	-

23. From the above conversion and comparison, the DG observed that the rates of first three items were identical up to two decimal points and exactly identical in respect of the fourth item. The same was admitted by Mr. Tarun Kumar, authorised distributor of OP-1 in his testimony. Mr. Pushparaj Shetty, Director (Finance) of OP-2 submitted during recording of his statement that OP-2 calculated the landing cost per box and wherever requirement was per piece, it divided the price of the box by number of units/pieces.

24. The DG also noted that the requirement of AIIMS was to quote ‘per piece’ rate and the rates quoted by OP-1 and OP-2 when converted to rate per piece were identical in respect of Item Nos. 5 to 8. Accordingly, the DG concluded that quoting of price for the tendered items in two different patterns (OP-1 quoting rate per box and OP-2 quoting rate per piece) appeared to be a pre-decided strategy to win the bid and consequently to share the quantity.

25. The DG then proceeded to examine if the identical rates in respect of Item Nos. 5 to 8 were a result of collusion by OP-1 and OP-2. The DG examined the rates



of supply of OP-1 and OP-2 for the tendered items for 2015-16, 2016-17 and 2017-18 (**'period under consideration'**) and noted that during these years, the lowest rate of OP-1 and OP-2 were ₹ 181.79 and ₹ 177 per box, respectively. The DG further noted that the rates quoted by OP-1 and OP-2 in the impugned tender was around ₹ 175 per box which was neither concordant with the rate in previous financial year nor the succeeding financial year. As per the DG, the OPs were not been able to give any justification for such slashing of rate for quoting in the impugned Tender.

26. The DG also compared the rates at which the tendered items were supplied by the OPs to other hospitals. OP-1 submitted that it did not supply to any government hospital against tenders during the period under consideration. With regard to OP-2, the DG noted that OP-2 made supplies of the tendered items (1" variant) to Tirupati Hospitals during 2017 and 2018 at ₹ 170 per box (₹ 14 per piece) and ₹ 173 per box (₹14 per piece), respectively. The DG further noted that during the period under consideration OP-2 had also supplied the tendered items to Hospital Supply Solutions at rates varying from ₹ 161-₹168 per box in 2016, ₹ 153 per box in 2017 and ₹ 158 per box in 2018.

27. During investigation, the DG found that OP-1 was engaged in the manufacture of the tendered items whereas OP-2 was importer of the tendered items. The DG compared the cost of production of OP-1 to the landing cost of OP-2. The DG noted that as per submission of OP-1, cost of production was dependent on material cost, packing material, labour and manufacturing cost and logistics cost. On the other hand, the landing cost was contingent upon exchange rate, clearance charges, customs duty, freight charges. The DG opined that input factors of both the OPs were so variant that the question of identical prices did not arise.

28. The DG further proceeded to examine the geographical locations of the OPs and noted that OPs operate from two different location. OP-1 operated from Agra, Uttar Pradesh and OP-2 was based in Mumbai, Maharashtra. As per the DG,



distance is an important criterion in quoting a rate for a given tender. In the present case, OP-1 was around 240 km from Delhi (*i.e.* procurer AIIMS) and OP-2 was around 1420 km.

29. The DG also took note of the 'evasive justification' given by the OPs in response to the query regarding the manner of arriving at the rate quoted in the tender. For instance, Mr. Tarun Kumar (OP-1) stated in his testimony that "*Company has quoted this price after considering the production cost, margin of consignment agent, margin for distributors and sustainability factors for supplying the product till the validity of rate contract.*" However, enquiring upon what is distributor margin on the tendered item, he replied that "*I don't know what my margin was for the impugned product in the impugned tender since the rate contract was not finalised.*" Also, Mr. Tarun Kumar mentioned during the recording of his statement by the DG that apart from the cost of production, OP-1 takes into consideration the *ongoing AIIMS rate contract and at what price the selected product is presently being supplied in the running rate contract of AIIMS.* However, in response to the query pertaining to ongoing rate contract of AIIMS, he stated that "*As per my knowledge we have not referred the ongoing rate contract of the AIIMS for the impugned product.*" When Ms. Pragati Awasthi of OP-1 was deposed with respect to how the price of OP-1 was similar to OP-2, she explained certain calculations performed on the box price of the tendered product as per price list of 2016 *i.e.* ₹ 210 and explained how she arrived at ₹ 175 per box, but as per the DG the said calculations resulted in a price of ₹ 170 per box and not ₹ 175 per box. Whereas, Mr. Ravinder Singh Ahluwalia, Manager of OP-2, stated that the prices quoted by OP-2 were based upon prices quoted with other institutes such as PGI Chandigarh and also quoted by its distributor, *viz.* Ansh Healthcare in a tender floated by AIIMS for surgical tapes without dispenser in FY 2015-16.

30. Similarly, Mr. Pushpraj Shetty, Director (Finance) of BSN/OP-2 responded to the query by stating that generally 10-15% margins for tenders depending upon



the volume of the business is kept. He further stated that first the landed cost per box is calculated and then the unit price is calculated depending upon the requirements of a given tender. It was also stated in the reply dated 22.01.2020 of BSN/OP-2 that “..we had quoted the price of Rs. 175 per box, however, as per the tender requirement we had to quote the price per unit/per piece. Hence, we have submitted the prices after recalculating according to the tender requirement.” The DG rejected the contention of OP-2 as the product (dressing paper with cutter) for which OP-2 quoted in PGI Chandigarh was different from the tendered product, *i.e.* surgical tape without dispenser.

31. With regard to reason for not taking part in fresh tender, Ms. Pragati Awasthi, Marketing Manager of OP-1 told the DG that she was not aware of the reasons for non-participation in the fresh tender and further stated that “*It was not the conscious decision to not be present in the fresh tender but due to work load or non-availability of the people, it must have got missed.*” On the contrary, when the DG posed the same query to Mr. Tarun Kumar, the authorised distributor of OP-1, he stated that “*Romsons has not participated in the fresh tender, reason being that Romsons has neither received any supply order nor EMD has been released.*” Thus, as per the DG, both the persons involved in decision making for OP-1 gave evasive and rather contradictory justification for non-participation.
32. The DG also took note of the fact that the fresh tender was a new tender and that it would be expected that both OPs would participate in the fresh tender given the fact that they participated in the earlier tender. However, non-participation by both the OPs in the fresh tender in addition to contradictory reasons explained by the officials of OP-1 for non-participation was viewed negatively by the DG.
33. During the course of investigation, the DG also found out two instances of sharing the tendered quantity by OP-1. OP-1 shared the tender quantity with Paras Surgical Company for the product –Jet Nebulizer Disposable and with



Delhi Pharma for the product –Sealed Water Drainage Bottle (Adult) in the two tenders floated in FY 2015-16. The DG noted that in both the tenders, OP-1 had quoted identical rates up to two decimals (₹303.80+ VAT and ₹33.00 + VAT, respectively), due to which it shared quantity with the other successful bidder to supply to AIIMS.

34. During investigation, the DG also found that the fresh tender invited in 2018 for surgical tapes was awarded to M/s Hospimax Healthcare for ₹135 per box +GST @ 12%. Further, it was also known that earlier AIIMS had procured these items at the rate of ₹163 + VAT @ 5.25% through a tender floated in FY 2013-14.
35. Considering all the factors discussed above and the judgement passed by Hon'ble Supreme Court in *Excel Crop Care Ltd. v. Competition Commission of India* AIR 2017 SC 2734 (hereinafter, '**Excel Crop case**'), the DG concluded that different parties, at different geographical locations with different cost of production and profit margins quoting identical rates, independently, would be too much of coincidence, which is difficult to believe. Accordingly, the DG concluded that OP-1 and OP-2 colluded and acted in contravention of provisions of Section 3(3)(a) and Section 3(3)(d) read with Section 3(1) of the Act.
36. Based on the information provided by the OPs regarding key personnel involved in the decision making and execution in relation to the impugned tender, the DG found Ms. Pragati Awasthi, Marketing Manager of OP-1 and Mr. Tarun Kumar, Proprietor of Divine Healthcare and authorised distributor of OP-1; and Mr. Ravinder Singh Ahluwalia, Sales Manager-Public Market, Mr. Atanu Mitra, Business Unit Director, Mr. Pushparaj Shetty, DGM-Finance of OP-2 to be responsible under Section 48 of the Act.
37. During the course of investigation, the DG also obtained and examined the mails of the officials of OP-1 and OP-2 but could not find any email relevant for the purpose of investigation. Further, on request of OP-2, the DG granted



confidentiality over the contents of the mail boxes in terms of Regulation 35 of the General Regulations, 2009, considering the grounds urged by OP-2 in support of confidentiality claims over the said content.

### **Analysis by the Commission**

38. The Commission gave a careful consideration to the investigation report, material gathered during investigation by the DG and also the written and oral submission of OP-1 and OP-2. Based on all the material available on record, the Commission identifies following two issues for determination:

**Issue No. 1: Whether OP-1 and OP-2 quoted identical rates in the Tender for Surgical Tape?**

**Issue No. 2: In case answer to Issue No.1 is affirmative, whether such rates are a result of concerted action on the part of OP-1 and OP-2?**

**Issue No. 1: Whether OP-1 and OP-2 quoted identical rates in the impugned tender?**

39. In this regard, OP-1 has submitted that the rate quoted by it is not identical with OP-2 as it quoted ₹ 175 per box for item nos. 5 to 8, *i.e.* surgical tape without dispenser in sizes 1/2", 1", 2" and 3," whereas OP-2 has quoted per piece rate in respect of the said items. OP-1 further stated that there was no clarity in the tender as to whether the rate to be quoted was on 'per box' basis or 'per piece' basis and OP-1 had quoted based on 'per box' price as per prevalent industry practice. OP-2 submitted that it quoted per unit price to meet the tender requirement, and the same was not an eyewash as concluded by the DG. OP-1 alleged that the assertion of the DG that in the impugned Tender bidders were required to quote on 'per piece' basis is incorrect and the tender conditions were



ambiguous in this regard. OP-1 averred that the prices quoted by both the OPs were not identical and the DG ignored the basic mathematical principles and also the fact that even a difference in decimal places plays a critical role in tenders. OP-2 stated that the prices of OP-1 and OP-2 were not identical *per seas* acknowledged/admitted by the DG and the prices of impugned products only *'if converted into price per piece'* were identical. The OPs further stated that AIIMS has awarded its contract on rate per box basis.

40. At the outset, the Commission notes that OP-1 itself quoted rates on *per piece* basis for item nos.1 to 4 and on *per box* basis for item nos. 5 to 8 in the impugned Tender. On the other hand, OP-2 has quoted rate on 'per piece' basis for all the eight items in the impugned Tender to meet the tender requirement. The Commission notes that there seemed to be some lack of clarity in respect of the requirement of procurer vis-à-vis the industry practice. The Commission further takes note of the arguments of the OPs that the prices quoted by them were not identical as claimed by the DG. In this context, the Commission notes that out of thirteen bidders taking part in the impugned Tender, seven had quoted rates on 'per box' basis and six had quoted rates on 'per unit' basis, and AIIMS converted all the price bids of technically eligible bidders to 'per piece' rates for the purpose of determining L-1 bidder. The Commission is of the view that this indicates that the manner of quoting the rates was immaterial, as the technical eligibility was to be determined based on evaluation of samples by the tender committee. Further, award of tender by AIIMS to the eligible bidder would have depended upon the price bid even if not submitted in the requisite form, as it would have been calculated appropriately by the procurer either on per box basis or per piece basis, as the case may be. The Commission notes that it is a matter of fact that the quote of OP-1 for item nos. 5 to 8 is ₹175 per box. The Commission also takes note of the submissions dated 22.01.2020 of OP-2 made before the DG that *"..we had quoted the price of Rs. 175 per box, however, as per the tender requirement we had to quote the price per unit/per piece. Hence, we have submitted the prices after recalculating according to the tender*



*requirement.*” The Commission is, thus, of the view that the prices quoted by OP-1 and OP-2 were identical irrespective of the fact that one has quoted in per box format and the other in per piece and it is a matter of minor calculation on the part of the procurer (AIIMS) to convert the quotes into comparable terms. Thus, the Commission agrees with the finding of the investigation in respect of Issue No. 1.

**Issue No. 2: In case, answer to Issue No.1 is affirmative, whether such rates are a result of concerted action on the part of OP-1 and OP-2?**

41. With regard to Issue No.2, OP-1 has submitted as follows:

41.1. At the outset, the existence of an agreement between OP-1 and OP-2 in order to hold them liable under Section 3(1) of the Act cannot be presumed by the DG in the absence of any cogent/corroborative evidence of existence of such agreement. Despite an in-depth investigation and examination of email communications, the DG did not find any corroborative evidence pointing towards collusion between the OPs.

41.2. Out of thirteen bidders that participated in the impugned tender, the DG found only two of them acting in collusion, such a finding is devoid of any rationale. It is a matter of fact that thirteen bidders submitted their technical and financial bid at the same time, out of which price bids of only three were opened and the rest were disqualified by the evaluation committee. The finding of the DG which assumes that OP-1 could foresee such chronology of events in order to collude with OP-2 is far-fetched as it was impossible to have knowledge of the outcome of technical evaluation committee which comprised eleven members belonging to different departments of AIIMS and even if one of those technically disqualified bidders had been considered for price bid, it could have swept away the tender on account of quote lower than by



any of the three technically qualified bidders. The presumption as to existence of a collusive agreement between OP-1 and OP-2 to quote similar prices cannot be sustained in light of the fact that there were thirteen participants and there is no evidence that any of the other bidders colluded with OP-1.

- 41.3. Item nos. 5 to 8 were essentially the same product but in different sizes and the respective prices per box quoted by each of the bidders, who quoted the prices on 'per box' basis in respect of these items was same *for* all the four sizes. The price per box remained constant and price per piece varied since the number of rolls per box decreased with increase in width. Moreover, AIIMS also stated in its response dated 14.01.2020 submitted to the DG that item nos. 5 to 8 were one item in different sizes (*i.e.* ½", 1", 2" & 3"). Thus, DG drew incorrect inference of prices being identical in respect of four items which were only one product in different sizes.
- 41.4. DG's finding that the rate quoted by OP-1 in previous years was found to be higher than the price quoted by OP-1 in the impugned tender is vehemently denied by OP-1 as the DG did not consider the VAT component in the rates of former years.
- 41.5. Based on the fact that the relevant products were last procured by AIIMS at the rate of ₹ 163 per box during 2013-14 and at ₹ 135 per box during 2017-18 through the fresh tender (invited in lieu of the impugned Tender), the DG held that the OPs colluded to earn super profits by quoting supracompetitive rate of ₹ 175 per box. In this regard OP-1 stated that the DG ignored the market conditions while deriving such inferences. In support of this assertion, OP-1 pointed out that the tender of relevant products was awarded to M/s Bhagat Jee and Sons in 2013-14 at the rate of ₹ 163 per box; whereas it quoted ₹ 156.25 per box in



the impugned tender floated in 2016-17, but was technically disqualified by the tender evaluation committee, whereas the quality of the product offered by OP-1 was better and at a reasonable price of ₹ 175 per box. Moreover, the products of M/s Bhagat Jee were not even found technically eligible in the fresh tender invited in 2017-18. Further, the DG failed to consider the fact that the relevant products were procured by AIIMS at the rate of ₹ 174 per box in tender invited in 2010-11, almost half a decade back from an authorised distributor (of OP-2) *i.e.* M/s Ansh Healthcare. The DG chose to ignore such rate on account that the same was quoted by an authorised distributor and not a manufacturer/ importer directly. As per OP-1, the rate of ₹ 175 per box is not just competitive but very reasonable. Thus, the ‘before and after’ method of comparing the tender rates by the DG in the absence of any analysis of the market conditions was fallacious.

- 41.6. In response to the assertion of the DG that AIIMS would have suffered loss of 23% by procuring the impugned product at ₹ 175 per box, OP-1 submitted that the DG failed to consider the data submitted by other hospitals including both the private and government hospitals which clearly indicated that such hospitals had purchased the same products at prices higher than what was quoted by OP-1. The DG completely disregarded the fact that private hospitals would have bought the products at most competitive rates and thus, the rate quoted by OP-1 was competitive and not supracompetitive.
- 41.7. Moreover, it is crucial to mention here that OP-1 quoted very different prices for item nos.1 to 4 in the same tender. The DG is silent on the issue as to why there is no collusion in respect of item nos.1 to 4 and collusion in respect of item nos. 5 to 8.



- 41.8. Further, the DG drew incorrect reference from the fact that despite being located at different and significantly distant locations from the procuring authority (AIIMS), both OP-1 and OP-2 still quoted identical rate. In this regard, OP-1 submitted that the DG failed to consider that the prices of the tendered products are exactly same throughout the territories of India. Ms. Pragati Awasthi categorically stated in her statement dated 15.01.2020 that “...*We charge the same prices pan India i.e. same price for a demand from Jammu & Kashmir to Kanyakumari.*” In its response dated 20.01.2020, OP-1 has also submitted the details of invoices pointing out that during 2016-17, the relevant products were supplied to various distributors across the length and breadth of the country at a rate of ₹ 183.73 irrespective of the location of supply. Furthermore, the said price was more than the price quoted by OP-1 in the impugned Tender.
- 41.9. The procuring authority, was itself of the opinion that OPs did not collude as the price of both the firms were equal in respect of one item having assorted sizes, and decided to withdraw the case before the Commission. There have been instances in the past where identical prices have been quoted and contemplating such situations, AIIMS had a prevailing practice of splitting the purchase order between the L-1 bidders, in cases where there was more than one L-1 bidder.
- 41.10. The DG has incorrectly concluded that cost of production of both the OPs was different since the input factors were different for OP-1 and OP-2 on account of the former being a manufacturer and the latter being an importer of relevant product. The cost of production of OP-1 included material cost, packing material, labour and manufacturing and logistic costs, whereas the landing cost of OP-2 comprised basic price, custom duty, clearance charges, inward freight, *etc.* The DG disregarded the fact that as per the data submitted by the OPs for 2016-



17 for the four impugned items, cost of production of OP-1 was in the range of ₹ 152.25- ₹ 155.95 whereas landing cost of OP-2 was in the range of ₹ 155.51-₹ 156.25. It is submitted by OP-1 that despite having near similar costs incurred by both the OPs, the DG gave a flawed finding where it assumed that cost of production of OP-1 cannot be similar to the landing cost of OP-2 just because the components forming such costs are different.

41.11. It is further submitted that the DG has wrongly placed reliance on the judgement of the Hon'ble Supreme Court in the case of Excel Crop case as the facts of that case were distinguishable from the present case on various counts. In the Excel Crop case, the Hon'ble Supreme court noted that the number of bidders were sixteen and there was a ten years history of quoting identical prices, *i.e. not even few paisa less or more*, in an oligopolistic market and found *too much of a coincidence, difficult to believe*. The DG failed to consider the facts of the present matter holistically as only two out of thirteen purportedly have been found to have colluded and rigged tender on account of quoting per box/ per unit prices. Moreover, the cost of production for all the four suppliers in the Excel Crop case was different, whereas the costs of OP-1 and that of OP-2 were very close to one another.

41.12. OP-1 further submitted that no evasive justification was given by the official of OP-1, *viz.* Mr. Tarun Kumar in response to query pertaining to factors considered by OP-1 in fixing competitive rates. In the statement given by Mr. Kumar on 20.08.2019, he mentioned that *"we also refer the rate of prevailing rate contract of the procurer for which we are quoting the tender, but the final decision is not made purely on this"* in response to the general query regarding the factors taken into account for pricing. Whereas in the statement dated 07.01.2020, in



response to specific query about the rate (procurer) prevailing at the time of the impugned tender, Mr. Tarun Kumar stated that “*as per my knowledge we have not referred the ongoing rate contract of the AIIMS for the impugned product*”. Hence, the response of the official of OP-1 was apt and unambiguous, and not contradictory.

41.13. The DG also incorrectly drew adverse findings against OPs for non-participation in the fresh tender invited in 2018, for not contacting AIIMS for release of their EMDs or not checking status of the matter after submitting their respective replies to show-cause notices issued by AIIMS. As per the DG, the OPs ought to have participated in the fresh tender since they participated in the impugned Tender. OP-1 submitted that the DG also viewed the contradiction in the statements of Mr. Tarun Kumar and Ms. Pragati Awasthi regarding non-participation in the fresh tender as an evidence to suggest anti-competitive activity/ cartelisation which is not the case. OP-1 submitted that there are numerous tenders and Ms. Awasthi might not have recalled the exact reason of not participating in the Tender as also in the instant case the DG inquired about a few years’ old impugned Tender. As such, there was no contradiction in the response of Mr. Tarun Kumar and Ms. Pragati Awasthi. Moreover, OP-1 submitted that any purported contradiction on the issue of non-participation in the fresh tender has no bearing on the germane issue, *i.e.* existence of alleged anti-competitive agreement.

41.14. The present case is not a case of weak circumstantial evidence rather it is a case of no circumstantial evidence whatsoever. OP-1 relied on the *OECD Policy Roundtables Prosecuting Cartels without Direct Evidence, 2006* and submitted that in cartel cases communication evidence, *i.e.* record of telephonic conversations (without describing the substance of communication), travel to common destination or participation in meeting *etc.*, are most common type of circumstantial



evidence. It is further averred that the decisional practice of the Commission also suggests that price parallelism itself is not sufficient to infer cartels and the competition authority need to showcase existence of other '*plus factors,*' *i.e.* proof of conscious parallel behaviour before affixing any liability for contravention of competition law. OP-1 asserted that the examination of email exchanges clearly showed that there was no communication of whatsoever nature between OP-1 and OP-2.

- 41.15. There was no Appreciable Adverse Effect on Competition (AAEC) in the instant matter. It is an established principle under competition legislation that an agreement falls foul of Section 3 only when such an agreement either causes or is likely to cause an AAEC on markets in India. OP-1 submitted that no evidence has been brought out in the Investigation Report in respect of factors required to be examined under Section 19(3) of the Act. Moreover, Hon'ble Supreme Court has held in the *Rajasthan Cylinders and Container Ltd. and others v. Union of India and Another*, that presumption of AAEC under Section 3(3) is a rebuttable presumption. In the instant matter, several new entrants have participated in the fresh tender, existing competitors are not driven out of market and also there is no foreclosure of competition. Moreover, OP-1 asserted that it is evident from the material available on record that OP-1 quoted a rate which was lower than what it charged to its own distributors and would have resulted in accrual of benefit to consumers of AIIMS. It is also to be noted that the MRP of the tendered product was ₹ 610, which was significantly higher as compared to the rate quoted by OP-1 in the impugned Tender. Further, the DG completely ignored the quote of the third technically qualified bidder, *i.e.* Mediserve who quoted a rate of ₹ 261 per box, much higher than what was quoted by OP-1. It is also to be noted that there cannot be an AAEC as the impugned Tender was cancelled and fresh tender was invited in



lieu of the same and as such no procurement took place under the impugned Tender. Hence, there was no AAEC in the present matter.

- 41.16. Since there is no evidence to indicate existence of any collusive agreement between OP-1 and OP-2 in contravention of Section 3 of the Act, no liability can be affixed to the officials of OP-1, viz. Mr. Tarun Kumar and Ms. Pragati Awasthi.
- 41.17. Without prejudice to the aforementioned submissions, OP-1 put forth submissions on liability/penalty. OP-1 asserted that penalty can be imposed by considering the last three preceding financial years of contravention, which in the present case are FY 2013-14, 2014-15 and 2015-16. Further, considering that OP-1 is a multi-product company, the penalty be imposed only on the relevant turnover in light of judgement passed by Hon'ble Supreme Court in Excel Crop case. OP-1 requested the Commission to take into account the mitigating factors such as OP-1 has never been accused of any activities in contravention of competition laws during the course of carrying out its decades old business, no actual harm being suffered by the procurer under the impugned tender, no profit being derived from the impugned Tender, OP-1 and its officials cooperated during the course of entire proceedings, etc.
- 41.18. *Vide* submissions dated 19.08.2020, confidential treatment was sought over the Income Tax Returns (ITRs) of the officials of OP-1, viz. Mr. Tarun Kumar and Ms. Pragati Awasthi and the contents of the mail boxes (inbox and outbox) obtained by the DG during the course of investigation, in terms of Regulation 35 of General Regulations, 2009, for a period of at least five years. With respect to ITRs, confidentiality is sought on the ground that such information is private in nature and disclosure of which would result in serious injury. Disclosure of such



personal information may result in violation of right to privacy acknowledged by the nine-judge bench of Hon'ble Supreme Court in the case of *Justice K.S. Puttaswamy (Retd.) vs. Union of India*, AIR 2017 SC 4161. Further, in respect of the contents of the aforementioned mail boxes, it has been submitted that the DG had not been able to find any evidence from the mail boxes, however, the same forms part of the DG records. The contents of mailbox are stated to contain commercially sensitive business information the disclosure of which may result in irreparable damage to OP-1.

42. With regard to issue No. 2, the submissions of OP-2 are on the same lines as that of OP-1 such as absence of direct evidence to establish agreement within the scheme of the Act, lack of even circumstantial evidence or plus factors, price matching purely out of coincidence, incidental price matching happened neither over long period nor on regular basis, no appreciable adverse effect on competition caused to the procurer, inappropriate reliance of the DG on Excel Crop case disregarding the facts of the present case, no collusion in respect of other four tender items, cost of production and location of OPs immaterial to determine collusion, procurer itself requested to withdraw information, illogical conclusions drawn by the DG from comparison of tender quotes with previous years' rates and non-participation in fresh tender. Therefore, for the sake of brevity, the same are not elaborated herein. The submissions that are found to be different from that of OP-1 are produced herein below:

42.1. The DG failed to demonstrate with corroborative evidences such as prior business relation, WhatsApp communication, emails, identical typographical errors, similar hand writing, past bidding patterns, etc., to support its finding of identical pricing as a result of collusive agreement under Section 3 of the Act among the OPs. Apart from one-



off instance of identical pricing there is complete lack of plus factors or additional evidence.

42.2. The DG failed to appreciate the fact that four items are essentially one product in different sizes and the price matching was purely out of coincidence as OP-2 determined the rate of ₹175 per box through an internal and independent decision-making process. OP-2 also asserted that the whole number such as ₹175 has potentially more likelihood of being quoted in commercial terms as it is a common knowledge that numbers ending with 0 and 5 are more likely when a person is estimating an amount or rate.

42.3. OP-2's business generated from contracts awarded through tenders is very low as compared to open market and institutional sales. OP-2 asserted that it quotes competitive rates for bigger tenders as against the standard rates for smaller tenders. Further, OP-2 typically follows a universal pricing approach under which it is guided by the rates it had previously quoted for bigger institutions when quoting for a new tender. Besides this, the tender rates quoted by OP-2 depend on several variable factors like last purchase rate, rate prevailing in the market, market intelligence based on publicly available information, expected order quantity along with pricing factors such as landing rate, import rate customs duty, clearance charges, freight, exchange rate, etc. Moreover, OP-2 explained before the DG that the rate quoted by it was based on historical pricing. Apart from the rates quoted for the same tender product by its distributor M/s Ansh Healthcare in a previous tender of AIIMS and rate quoted by OP-2 directly for PGI Chandigarh for similar product, OP-2 also placed on record additional evidence through its written submissions dated 20.08.2020 in the form of invoices of sales made to Amrita Institute of Medical Science and Research Centre (hereinafter, "**Amrita Institute**"). OP-2 averred that



it had supplied surgical tapes to Amrita Institute through a non-tender institutional sales process at ₹175 per box in 2015 as well as during the period under consideration in the present matter. Thus, OP-2 contended that the price of ₹175 per box was arrived at as a result of independent decision making of OP-2 and historical rates quoted by it including to private institutes.

42.4. Market conditions are not conducive to cartelisation as many as thirteen bidders participated in the impugned tender, it is characterised by low entry barriers, there is high bargaining power of the procurer (AIIMS) *vis-à-vis* the vendors and unpredictable and infrequent demand render the possibility of cartel very low.

42.5. Besides the above, OP-2 placed on record the Competition and Antitrust Policy of Essity, which had been in place since 2013, and continued to be followed by Essity post acquisition of BSN.

42.6. Without having any cogent evidence against OP-2 of having contravened the provisions of the Act, the DG was not justified in holding the officials of OP-2, *viz.* Mr. Pushpraj Shetty, Mr. Ravinder Singh Ahluwalia and also its ex-official Mr. Atanu Mitra to be liable under Section 48 of the Act.

42.7. The counsel for Mr. Atanu Mitra, ex-official of OP-2, submitted submissions/objections to the Investigation Report on the same lines as made by counsel of OP-2.

42.8. The counsel for the officials of OP-2, *viz.* Mr. Pushpraj Shetty, Mr. Ravinder Singh Ahluwalia and the ex-official of OP-2, *viz.* Mr. Atanu Mitra requested for grant of confidential treatment over their ITRs in terms of Regulation 35 of General Regulations, 2009, on the ground



that such information is private in nature and not available in public domain.

43. Before dealing with respective contentions of the OPs with respect to Issue No. 2, the Commission deems it apt to deal with the preliminary objections raised by OP-1 and OP-2. Both the OPs have averred that the Commission ought not to have passed an order under Section 26(1) of the Act when the procurer had decided to withdraw its complaint. OP-1 has also contended that even if the Commission was still inclined to proceed further, it ought to have given an opportunity to the parties to present their case before referring the matter to the DG for investigation. In this regard, the Commission observes that it is well within its powers conferred under Section 19(1) of the Act to initiate an inquiry on its own motion, notwithstanding that the procurer chose to withdraw its complaint, should the Commission form a *prima facie* opinion on the basis of the material available that there is contravention or likelihood of contravention of the provisions of Section 3 or 4 of the Act, as the case may be. The Commission while performing this function is not deciding a *lis* between the parties, but discharging the mandate of eliminating practices having adverse effect on competition, promoting and sustaining competition and protecting the interest of consumers and ensure freedom of trade carried on by other participants. Further, as per the scheme of the Act and General Regulations, 2009, the Commission need not hear the parties before forming a *prima facie* view unless it feels that there is such requirement. The Commission, accordingly, decides whether to hold a preliminary conference with the parties based on the requirements of the individual case and the facts and circumstances involved, and such a right of hearing is not inherent in any party. Therefore, the Commission finds the aforesaid contentions of the parties devoid of any merit.
44. With respect to Issue No. 2, the Commission notes that the impugned tender pertained to supply of surgical tapes without dispenser in four different sizes viz. ½ inch, 1 inch, 2 inch and 3 inch. OP-1 and OP-2 were amongst the three



technically eligible bidders. It was found by the investigation that both OP-1 and OP-2 have quoted rate per box and rate per piece, respectively, for the aforementioned items. The Commission further notes that OP-1 markets its product as *Kenpore* and OP-2 markets it in the name of *Leukopor*, available both with and without dispenser, in aforementioned four different sizes. Having noted in Issue No. 1 that OP-1 and OP-2 have quoted identical rates, though in different format (per box/ per piece basis), the next issue before the Commission is to determine whether quoting of such identical rate was based on collusive conduct of the OPs.

45. The Commission finds merit in the contention of the OPs that investigation has not provided any evidence to indicate collusion amongst them. The Commission is alive to the fact that mere existence of price parallelism or identical prices is not *per se* sufficient to hold the parties liable for act of manipulation of bids/ bid rigging. However, certain conducive conditions exist when the market is prone to anti-competitive conduct such as existence of few players, homogenous product, predictable demand, *etc.* Price parallelism coupled with existence of some plus factors may go towards indicating that the conduct of the OPs in quoting identical/ similar price bids is collusive. Therefore, it is important to analyse and understand the individual and collective behaviour of the market participants in the context of the market and its conditions before arriving at any findings. The Commission, based on the material available on record, observes that as many as thirteen players operating in the market participated in the Tender for Surgical Tape and offered their respective product variants (surgical tapes) at varying prices ranging from as low as ₹137 per box to as high as ₹261 per box. It appears to the Commission in the facts and circumstances of the present case that neither the product is homogenous, nor is there any foreclosure or barrier to entry which points towards the market not being conducive to catelisation.



46. In the instant case, the Commission observes that quoting of identical/ similar rates may tend to raise a suspicion that OP-1 and OP-2 would have colluded and the suspicion can get legs to stand upon provided there is some corroborative evidence to establish collusion on the part of OPs. However, in the present case the OPs have justified the basis of quoting such rates based on rates quoted and supplies effected by them in other tenders and sales made to other institutional buyers across India. The OPs have contended that there has been no past conduct of theirs of quoting identical prices except the present one-off instance. The Commission notes that two past instances of identical quotes by OP-1 along with certain other bidders in respect of products other than the product under consideration was noted by the DG during the course of investigation, wherein the procurer, as per its then prevalent practice, split the order quantity among OP-1 and the other successful bidder. However, the Commission notes in the present case, the DG has not found any evidence to indicate that the identical rates were quoted by the OPs with the purpose of splitting the quantities among themselves. The Commission also observes that no instance has come to its notice of identical prices being quoted by the said opposite parties in any other tender during the period under consideration.

47. The Commission has also taken into account one of the reasons cited by the OPs for identical/ similar pricing which is similarity in the cost of production of OP-1 and landing cost of OP-2 during the period under consideration. The Commission notes that the per box cost of production of OP-1 and landing cost of OP-2 were in close range during 2016-17. The Commission also gives careful consideration to the submissions of the parties that the price charged by them are uniform across India irrespective of geographical location of its distributors/ buyers. Upon perusal of the material available on record in this regard, the Commission is of the opinion that it is difficult to accept the finding of the DG that the parties ought to have quoted different rates in the tender as they were at different locations and the nature of their costs were different.



48. The Commission has also considered the contention of the OPs that item nos. 5, 6, 7 and 8 are not four separate items, rather is a single product with merely difference in sizes, as the number of rolls in a pack directly corresponds to the width of the tape. OP-1 has quoted the 'rate per box' following the industry practice and that all the product related information is printed on the box itself and not on the loose units. Whereas, OP-2 asserted that it decided a rate of ₹ 175 per box which was divided by number of rolls in each pack to get unit price for each variant to meet the tender requirement. Upon converting the rates of those bidders which quoted on 'per piece' basis, the Commission notes from the examination of price bids of all the thirteen bidders, that eleven out of such thirteen bidders have respectively quoted same rate 'per box' for each of the four items. Therefore, the Commission finds merit in the contention of the OPs that the four items may be considered as one product in different sizes in the facts and circumstances of the present case. The Commission, in the facts and circumstances of this case, notes that similarity of price bid in respect of one product could be an outcome of coincidence rather than of concert.
49. The OPs have vehemently argued that the reliance placed by the DG on the Excel Crop case in its Investigation Report is misplaced. According to the parties, the DG has drawn parallels from the Excel Crop case to the present case to highlight factors such as difference in cost of production, identical pricing even when the geographical location of bidders is different, *etc.*, and termed these indicators pointing towards collusion which raises a presumption of causing AAEC in India. The Commission considers the submissions of the OPs in this regard and notes that the facts in issue in the present matter are different than the one in Excel Crop case. The Commission, while taking into account the assertions and contentions of OPs, is of the opinion that a presumption arises when the agreement in contravention of Section 3 of the Act is established based on the evidence gathered by the DG. In the present case, apart from analysing the identical prices, the investigation has not adduced any cogent evidence to



establish that identical prices were the outcome of collusion amongst OP-1 and OP-2.

50. The Commission notes that the parties have contended that there is no AAEC in the present case as the impugned tender was cancelled by AIIMS. In this regard, the Commission observes that a finding on AAEC employing factors under Section 19(3) of the Act, may not be relevant as the Commission holds that existence of an agreement by concert itself is not established in the facts and circumstances of the present case. Further, the Commission observes that AIIMS had to cancel the tender in the wake of identical quotes received from the OPs and it did not have the benefit of competitive price discovery till the new tender was floated in FY 2017-18 and items were made available with effect from 29.08.2018 at a price of ₹135 plus GST per box. Further, AIIMS had to continue procuring at the rate of ₹163 plus VAT per box under the existing rate contract of FY 2014-15.

51. In the instant case, the Commission notes that there is no evidence of any communications or meetings having taken place between the OPs or any other arrangement indicating a tacit collusion in respect of fixing the prices for the bids. Apart from the present instance of identical pricing during the period under consideration, the investigation report falls short of providing clarity as to how such pricing was an outcome of collusion. The conclusion has been drawn by the DG primarily on the basis that since the OPs have varying cost structure and different business establishments, they could not have quoted identical or similar prices. In the facts and circumstances of the present case, the Commission, is of the view that in the absence of cogent evidence, it cannot be conclusively said that OP-1 and OP-2 have contravened the provisions of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act. Therefore, as no liability has accrued on the OPs, consequently, no liability can be fastened on the persons/individuals identified by the DG under Section 48 of the Act.



52. Before parting with the order, the Commission notes that officials of OP-1 and OP-2 and also Mr. Atanu Mitra, ex-official of OP-2 had moved a request for seeking confidential treatment over their respective ITRs. The Commission further notes that OP-1 requested for confidentiality for a period of five years whereas no period is specified in case of individuals related to OP-2. The Commission has decided to grant confidential treatment on the ITRs of the individuals held liable by the DG under Section 48 of the Act, viz. Mr. Tarun Kumar, Ms. Pragati Awasthi, Mr. Pushpraj Shetty, Mr. Ravinder Singh Ahluwalia and Mr. Atanu Mitra, for a period of five years in terms of Regulation 35 of General Regulations, 2009 read with Section 57 of the Act. The Commission further considers the request of OP-1 for grant of confidential treatment on the two mail boxes and decides to grant confidential treatment to the same for a period of five years in terms of Regulation 35 of General Regulations, 2009, read with Section 57 of the Act.

### **ORDER**

53. In the facts and circumstances of the present case, there is lack of material to show any collusion on part of the OPs and the Commission, thus, concludes that it is not established that OP-1 and OP-2 have acted in contravention of the provisions of Section 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act. The Commission is, thus, of the view that no case of contravention of Sections 3(3)(a) and 3(3)(d) read with Section 3(1) of the Act is made out against the OPs in the present case. Accordingly, the matter is ordered to be closed.



54. The Secretary is directed to forward a copy of this order to the OP-1, OP-2 and the procurer (AIIMS), accordingly.

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

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

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

**New Delhi**  
**Dated: 14.01.2021**