Ref: Reference Case No. 01 of 2012 filed under Section 19(1)(b) of the Competition Act, 2002 by Director General (Supplies & Disposals), Director General of Supplies & Disposals, Department of Commerce, Ministry of Commerce & Industry, Government of India, New Delhi.

REF. CASE NO 01/2012

Nature of Infringement: Bid-rigging, market allocation and limiting and controlling of the supply of product in contravention of the provisions of the Competition Act, 2002.

Legal Provisions: Section 2(b), Section 3, Section 19 (1)(b), Section 27, of the Competition Act, 2002.

Order: Order passed under Section 27 of the Competition Act, 2002.

Key Words: Preponderance of Probabilities, Bid-Rigging, Collusion, Market Allocation, Rate Contract.

FACT OF THE CASE

The informant involved in the case is Director General (Supplies & Disposals), Directorate General of Supplies & Disposals (DG S&D), Department of Commerce, Ministry of Commerce & Industry, Government of India, New Delhi ('the informant'). The informant, by virtue of the present reference, filed under Section 19(1)(b) of the Act, alleged that the Opposite Parties have resorted to bid rigging and market allocation in violation of the provisions of section 3 of the Act.

The Wool and Leather (WL) Directorate of DG S&D had floated a Tender dated 14.06.2011 for the purpose of concluding new Rate Contracts (a contract to the effect that during the period stipulated by the contract, the supplier shall supply a good at a price stated in the contract itself) for the period from 01.12.2011 to 30.11.2012 for polyester blended duck ankle boots rubber sole ('the product'). While examining the tenders, it was found that the prices quoted by different bidders fell within a narrow range and that, except for one, all the bidders, have stipulated a restriction on the quantity to be supplied by them during the Rate Contract Period. This was alleged to be an indication of collusion and cartelisation among the bidders amounting to a direct violation of various provisions of the Competition Act, 2002.

The Commission, being of a *prima facie* opinion that there may be a contravention of the provisions of the Competition Act, directed the DG to conduct an investigation into the matter. The DG, consequent to the investigation, submitted a report to the Commission. The DG, in his report, opined that the small number of supplier companies and repetitive bidding by them is conducive to bid rigging practices, and such has been the case in the matter at hand. The DG stated that the parties had quoted identical or nearly identical prices of products in response to the various tenders of DG S&D, that too in disregard of variations in

cost of productions among them. This, coupled with some direct evidences indicating the sharing of some information among the parties, led the DG to conclude that the parties were indulged in bid-rigging in contravention of the provisions of section 3(1) read with sections 3(3)(a) and 3(3)(d) of the Act. The act of the parties of putting a restriction on the total quantity of product to be supplied during the Rate Period as well that of putting a restriction on the order quantity per District Demand Officer (DDO), according to the DG, were aimed at limiting and controlling the supply of the product and sharing the market by way of mutual allocation. This, in view of the DG, amounted to a violation of the provisions of section 3(1) read with section 3(3)(b), 3(3)(c) and 3(3)(d) of the Act. However, the DG stated that the allegation as to the violation of the provisions of Section 3(4) of the Act is not maintainable due to the fact that the parties were not operating in different stages or levels of the production chain in different markets, but were rather at the same level of production chain and in the same market for supply of the said product.

The DG report was assailed by the Opposite Parties and all the findings against them were denied. The parties replied that although they have different installed capacities, turnovers and geographical locations, but the fact that they were in the same trade and have similar plants & machineries, source & cost of raw material, product specifications, delivery time, etc. resulted in similarity of the rates of the product. The parties also disputed the finding of the DG that since one of the opposite parties was in possession of some of the documents of the other opposite parties, there has been a sharing of information; the parties stated that such a finding of the DG was based on a mere presumption, and being so, is not valid in the eyes of law.

COMMISSION'S DECISION

The Commission came to the conclusion that regardless of all the justifications put forth by the parties, the fact that the prices quoted by the parties are absolutely identical, raises a strong presumption of a possible collusion among the parties. However, the Commission did observe the need of corroborative evidence to support the presumption of collusion. The standard of evidence to be followed in such a case, according to the Commission, should be "preponderance of probabilities". The Commission noted that the players in the market, being aware of the penalties which is the likely outcome of an anti-competitive agreement or practices, resort to such agreements and practices in a surreptitious manner. Thus, finding evidence in such cases is a difficult affair and even if the Commission happens to lay its hands on some evidence, they are, most often, inadequate to prove the case against the parties. Hence, the Commission has to rely on inferences deduced from a number of coincidences and indicia, which, if taken together, may constitute an evidence of an anti-competitive agreement, unless such coincidences and indicia can be explained by any veritable reason.

The Commission agreed with the conclusions arrived at by the DG in his investigation report that given the variations in the installed capacities, turnovers, and geographical

locations of the parties, there is not an iota of doubt regarding the fact that the cost of production incurred by the parties would vary. Being so, if at all the tender was responded to competitively by the parties, whichever party is able to manufacture the product at a lower cost of production would, in order to grab the deal, would have quoted a price lower than its counterparts, which was not a case in the matter at hand. Therefore, there is a strong presumption that the parties colluded among themselves to rig the bid. Also, the fact that the parties were privy to the information regarding the bids of the other parties further bolsters the presumption that there has been collusion among the parties.

The Commission, taking into consideration the issue of limitation of the supply of the product during the Rate Contract Period, observed that the parties have put a restriction on the supply of products even though their installed capacity allows them to supply the product in a quantity much more than the quantity to which they have limited their quotation. The parties could not justify such a limitation on the quantity of supply and this, according to the Commission, is indicative of the fact that the parties colluded in order to mutually share the market among them.

Taking all the above mentioned reasons into consideration, the Commission, therefore, came to the conclusion that the parties resorted to collusion and anti-competitive agreements in violation of the provisions of Section 3(3) of the Act. The Commission observed that after it has been established that any agreement as listed in Section 3(3) of the Act exists, a presumption raises that the agreement, in fact, has an appreciable adverse effect on the competition, and thereafter it is for the Opposite parties to rebut the presumption which, according to the Commission, the parties in the present case failed to do.

However, the Commission agreed with the conclusion of the DG that since the parties were not operating in different stages or levels of the production chain in different markets, but were rather at the same level of production chain and in the same market for supply of the said product, the allegation as to the violation of the provisions of Section 3(4) of the Act is not maintainable against them.

Therefore, the Commission, by way of its order under Section 27 of the Act, directed the parties to cease and desist from indulging in such anti-competitive activities in the future. As for the quantum of penalty, the Commission imposed a fine at the rate of 5% of the average turnovers of the respective suppliers.