

Brushless DC Fans: (Suo Motu Case No 03 of 2014)

Decision Date: 18.01.2017

Keywords: *bid rigging; leniency petition*

Issue: Whether the OPs' conduct amounts to bid rigging? What should be the extent of leniency granted to OP1?

Rule: Sec. 3 and 45 of the Competition Act, 2002

The present case involved allegations of Bid rigging case (Explanation to 3(3)), and was taken up by Commission suo moto on the basis of information from Superintendent of Police.

Allegation that 3 firms (OP 1-3) had cartelized tenders floated by Indian Railways and BEL, for supply of BLDC Fans. After analysing email, call data records and statements of OPs, DG concluded that there had been collusion for rigging the bids pertaining to tenders. Consequently, OP1 had moved leniency petition under Sec 45, read with Reg 5 of Lesser Penalty Regulations.

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.

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.

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- 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.

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.

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. Suo Moto Case No. 03 of 2014 Page 50 of 57 The evidence and submission of OP 1 further substantiated the evidence in the possession of the Commission and also completed the chain of events.

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.

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.

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.

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.

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