

Antitrust - Section 27 Disclaimer: The ... vs Honda Siel Cars India Ltd. & Ors. ... on 25 August, 2014

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COMPETITION COMMISSION OF INDIA
Suo Moto Case No. 03 of 2012

Re: Alleged cartelization in the matter of supply of spares to Diesel L
Modernization Works, Indian Railways, Patiala, Punjab.

Against

1. M/s Stone India Limited
16, Taratalla Road
Kolkata- 700088
West Bengal
Opposite Party No. 1
2. M/s Faiveley Transport Rail Technologies India Limited
P. B. No. 39
Harita, Hosur- 635109
Tamil Nadu
Opposite Party No. 2
3. M/s Escorts Limited
SCO 232 1st Floor
Sector-20, Panchkula
Haryana-134109
Opposite Party No. 3

CORAM

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. M. L. Tayal
Member

Mr. Justice (retd.) S.N. Dhingra
Member

Mr. S. L. Bunker
Member

Appearances: S/ Shri Manas Kumar Chaudhari, Sagardeep Rathi and Anuj Shah, advocates for the opposite party No.1.

Shri A N Haksar, Senior Advocate with Ms. Nisha Bhatnagar, advocate for the opposite party No. 2.

Shri Ramji Srinivasan, Senior Advocate with Shri Abhishek Parsheera and Shri Samir Agrawal, advocates for the opposite party No. 3.

Order under Section 27 of the Competition Act, 2002

1. The present case was registered as a suo moto case consequent upon receipt of a letter dated 31.05.2012 by the Commission from Senior Materials Manager, Diesel Loco Modernization Works, Patiala, Punjab (DLMW) alleging cartelization by M/s Stone India Limited („the opposite party No. 1 / SIL), M/s Faiveley Transport Rail Technologies India Limited („the opposite party No. 2 / FTRTIL) and M/s Escorts Limited („the opposite party No. 3 / EL) in response to Tender No. 201320510 (opened on) floated for procurement of feed valves.

2. The letter was considered by the Commission in its ordinary meeting held on 30.10.2012 and vide its order of even date the Commission noted that the conduct of the parties in quoting identical price prima facie displayed Public Version concerted action. It was also observed that the act of quoting identical price not only adversely affected the tender process but also prima facie showed that the tender process was manipulated. Accordingly, after recording a prima facie finding of contravention of the provisions of section 3 of the Competition Act, 2002 („the Act), the Commission passed an order under section 26(1) of the Act directing the Director General (DG) to undertake an investigation into the allegations of bid rigging and cartelization against the named parties.

3. In terms of the aforesaid order of the Commission, an investigation was conducted by the DG and the investigation report was submitted to the Commission on 06.03.2013. The DG report was considered by the Commission in its meeting held on 21.03.2013. On consideration of the report, the

Commission decided to forward copies of the report (non-confidential version) of the DG to the informant and the opposite parties for filing their respective replies/ objections thereto, if any. The opposite parties were also ordered to file their profit and loss accounts/ balance sheets/ turnovers for the last three financial years. The parties were also granted opportunity of oral hearings.

4. Before advertng to the findings of the DG and replies/ objections thereto by the parties, it would be appropriate to briefly record the factual matrix of the case.

5. Diesel Loco Modernization Works (DLMW) is a unit of Indian Railways at Patiala, Punjab. It undertakes repair and maintenance of diesel locomotives. For this purpose, it regularly procures parts for the locomotives by floating tenders in which vendors approved by Research Designs & Standards Organization (RDSO) of the Indian Railways can bid. The present case relates to Tender No. 201320510 which was floated by DLMW for procurement of feed valves used in diesel locomotives. The tender was opened on 27.04.2012. The Tender Committee evaluated the offers received from the Public Version opposite parties herein who were the only bidders in the instant tender. It was noticed by the Committee that all the three RDSO approved venders who are the opposite parties herein quoted an identical rates of Rs. 17,147.54 for the feed valves per piece. This rate was further found to be 33% higher than the last purchase rates. Accordingly, suspecting cartel, the Committee recommended the matter to be intimated to the Commission. Based on such communication, the present case was registered as a suo moto case and the DG was directed to investigate the matter.

6. On the basis of the evidence and material gathered during investigation, it was observed by the DG that the opposite parties acted in concert in rigging the bid by quoting identical bids on the same date. Furthermore, the collusive action was also found to be strengthened from the past conduct of the parties where they were found to have quoted more or less similar price for the tenders of different zonal railways. Accordingly, the DG concluded that the opposite parties have contravened the provisions of section 3(3)(d) of the Act.

Replies of the OPs SIL

7. As noted earlier, pursuant to the order of the Commission, copies of the DG report were sent to the parties. The opposite parties filed their replies/ objections to the report of the DG. DLMW also filed its comments to the report. The same are summarised in the following paras.

8. SIL submitted chapter wise reply to the report of the DG. Disputing the findings of the DG, it was submitted that the basic price of the feed valve was the price at which SIL has to supply the same to DLMW and the remaining components added to it were statutory taxes. It was submitted that the basic price of the product as quoted by SIL was dissimilar with other competitors, Public Version hence the allegations were devoid of merit. Referring to the identical quotes submitted by the competitors, it was sought to be argued that the same could be due to coincidence or corporate espionage. It is the case of SIL that „it did not need to discuss or exchange information with the other two opposite parties before finalizing and submitting the bids to DLMW. SIL denied that it caused any entry barriers for the new entrants in the relevant product market. It has denied driving

existing manufacturers out of market relatable to the product. It has also denied that it caused foreclosure of competition by hindering entry into the market of the product.

9. It was further argued that DLMW in spite of filing information with the Commission alleging cartelization invited SIL to negotiate the bid price after SIL was found to be the only eligible bidder amongst all the bidders fulfilling all conditions of the tender process. Consequent upon negotiations, a purchase order for the 67 valves was placed upon SIL by the Indian Railways and SIL agreed to supply the same quantity at the reduced negotiated price. It has been pointed out that the delivery thereof has been completed on 09.04.2013. As such, the present enquiry is stated to have become infructuous.

10. Reiterating its pleas, SIL argued that being the only eligible bidder to the impugned tender notice issued by Indian Railways, the theory of cartelization fails since at least two or more parties are essential to constitute a cartel and there has to be an agreement amongst the suppliers/ bidders which leads to such cartelization. Reference was also made to the various orders of the Commission in support of the pleas taken.

11. Assailing the finding of the DG, SIL argued that the DG has not been able to find any „smoking gun“ evidence whereby meeting of minds amongst the opposite parties could be concluded. It was also pointed out that the opposite parties do not have an industry association and thus, they do not have a common platform to discuss commercial issues including bid price amongst Public Version them. It was also sought to be highlighted that the tender was offered electronically and therefore the price bids were known only after the bid prices were made available in the public domain. Fluctuating market share of SIL in respect of the product in question was also sought to be canvassed as a factor to negate the existence of any cartel like behaviour.

12. Based on all the aforesaid submissions, SIL disputed the findings of the DG and consequently any liability by way of penal action against it based on such findings. However, seeking a lenient view in the event of any adverse finding by the Commission, it was submitted that SIL was never found in breach of any provision of the Act previously.

FTRTIL

13. FTRTIL in its reply to the report of the DG raised some preliminary objections. It was argued that as per the terms of General Conditions of Contract for Stores Department, Indian Railways have introduced a pre- condition that if it were to find any cartel or any semblance of cartelization, it may reject the offer and place orders on any party as it may deem fit. Thus, it was sought to be canvassed that an in-built mechanism existed in the General Conditions to deal with cartel like situation and accordingly Indian Railways ought to have taken recourse to such mechanism specially design to meet the specific situation.

14. On merits, FTRTIL stated that it has not acted in any manner which can be termed as cartelization or bid rigging. It has been argued that all tenders submitted and supplies made have been done on a fair and reasonable basis, based on commercial consideration alone. It denied

having entered into any agreement with the other opposite parties in respect of quantification of price in bids to be submitted to the Indian Railways. It was further submitted that the bid and tenders submitted by it are based on the costing of the respective Public Version products keeping in mind the elements such as prevailing market price. It was pointed out that the DG did not dispute the claim made by it to the effect that the bid was based on and identical to the last purchase order dated 18.01.2012. Referring to IRS Standard Conditions of Contacts Clause 0300, it was urged that FTRTIL's bid could be and was based on its last tender in consonance with the prevailing practice in the Indian Railways.

15. Dealing with the similarity in the quoted price, it was argued that prior to the tender in question, there were many other tenders submitted by it with respect to the said product wherein bids were made at the consistent price of Rs. 14,534.52. It was also argued that due to impact of taxes, the quoted price came to be Rs. 17,147.54.

16. Referring to the minutes of Tender Committee, it was pointed out that despite having been found to be technically suitable, the Committee did not find the offer of FTRTIL commercially suitable. Thus, it was sought to be suggested that the price is not the sole component of bid and there are several other factors which go into decision making process. It was further submitted that the moment it is found that the offer was different in respect of other components viz. warranty and payment ipso facto it indicates that the offer of FTRTIL vis-à-vis other opposite parties was substantially different. It was further elaborated that the answering party offered 18 months warranty to run either from the date of delivery or 12 months from the date of commissioning, whichever is earlier. However, the conditions of tender stipulated 30 months warranty from the date of delivery or 24 months from the date of placement in service, whichever is earlier.

17. It was argued that there was no agreement at all between the opposite parties leave alone any anti-competitive agreement. Hence, the allegation of cartel or collusive bidding is baseless being a figment of imagination of the Indian Railways.

Public Version

18. Adverting to the making of offers by the opposite parties on the same day, it was sought to be explained away by arguing that in commercial matters submissions of offers even on the last day happens usually due to variety of reasons and the same cannot be any ground to attribute any motive. It was sought to be highlighted that the time of submissions was different. A case involving an allegation of cartel amongst arch rivals in the market place cannot be based on strange coincidences. It was submitted that if the parties indeed intended to have any agreement on the sly, the answering party would not have offered materially different warranty and payment terms which were unique and had substantial value and financial implications.

19. The answering party refuted having entered into any anti-competitive agreement or cartel and further submitted that even if there is such agreement, it should have been established that there was an intention to cause or that the agreement in question has the effect of causing or is likely to cause an appreciable adverse effect on competition within India. The report of the DG fails to

establish the same, submits FTRTIL. Furthermore, it was canvassed that the statutory presumption under section 3(3) of the Act is rebuttable.

20. After making para wise submissions, the answering party submitted that the DG did not apply the statutory guiding factors contained in section 19(3) of the Act before concluding that the trade practice has appreciable adverse effect on competition. The party after making elaborate reference to the factors contained in section 19(3) of the Act sought to demolish the presumption of appreciable adverse effect on competition.

21. Lastly, it was submitted that the present inquiry is academic in nature as the Indian Railways has decided the issue by already punishing the answering party. While concluding, the answering party sought closure of the Public Version case qua it and argued that no case is made out for imposition of penalty as it has not acted in collusive manner as alleged.

EL

22. EL after giving a factual background and detailing facts sought to elaborate upon the nature of relevant market. In this regard, role of RDSO and Railway Procurement System were explained. It was also pointed out that the prices quoted by the various parties are openly displayed on the website and therefore the same are known to each other. In particular, it was sought to be argued that the quoted price of Rs. 17,147.54 translates to basic rate of Rs. 14500 based on 12.36% of excise duty and 5.25% of CST. Further, this basic rate is stated to be quoted by EL on four previous occasions.

23. Finding faults with the procurement system adopted by the Indian Railways, EL pointed out that the practice followed to rely on the last purchase price while negotiating with the lowest bidder forces the vendors to refer to the prices quoted by competitors to various zonal railways before deciding on their bid prices. Reference was also made to „fall clause wherein if a vendor supplies the product at a particular price to a zonal railway, which happens to be the lowest price offered for that product in India by the vendor, then the said price will have to be mandatorily matched by such a vendor in executing running/ existing contracts for the supply of the said product. It was also submitted that feed valves are de facto commodity product. In such commodity markets, there is inter-dependence amongst competitors while deciding on their prices. Such inter-dependence or price parallelism which is a nature of an oligopolistic market and hence, it is not per se illegal, asserts EL.

24. It was further contended that parallel behaviour cannot be a conclusive proof where other explanations for such parallel behaviour are present. The Public Version various plausible explanations, as noted above, are sought to be advanced for parallel pricing by the parties in the present case.

25. Assailing the indirect evidence relied upon by the DG, EL reiterated its earlier pleas. Specifically, it was argued that the timing of submissions of bids is of no relevance and it cannot be considered as evidence of collusion amongst the opposite parties. It was also sought to be argued that EL has not

been party to any cartel and its pricing decisions are arrived at after considering a variety of factors such as the last quoted/ awarded price, price quoted by the competitors in the previous bids, quantity to be supplied, inventory etc.

26. In view of the above submissions, it was submitted by EL that it has not engaged in any concerted activity with its competitors and, hence, has not contravened any provision of the Act.

27. EL also made submissions on quantum of penalties. In this regard, it was submitted that in mature competition law jurisdictions, the calculation of fines is based on the turnover arising from the product market in which cartelization takes place in the case of a multi-product company. It was averred that the railway product division of EL forms a very small part of the business. Hence, in the event of any penalty being imposed on EL, only the turnover generated by railways products division of EL should be taken into account as this would form the „relevant turnover“ for the purposes of competition law.

28. The Commission examined the information, the report of the DG and the replies/ objections of the parties thereto besides perusing the material available on record. The following point falls for consideration before the Commission:

Public Version Whether the opposite parties have contravened the provisions of section 3 of the Act?

29. The present case relates to Tender No. 201320510 which was floated by DLMW for procurement of feed valves used in diesel locomotives. The tender was opened on 27.04.2012. The Tender Committee evaluated the offers received from the opposite parties herein who were the only bidders in the tender. It was noticed by the Committee that all the three RDSO approved vendors who are the opposite parties herein quoted an identical rates of Rs. 17,147.54 for the feed valve per piece. This rate was further found to be 33% higher than the last purchase rates. Accordingly, suspecting cartel, the Committee recommended intimating the Commission. Based on such communication, as noted earlier, the present case was registered as a suo moto case and the DG was directed to investigate the matter.

30. From the information provided by DLMW, the quotes of the parties who participated in the tender under consideration alongwith the break-up of levies are as follows:

S. No. Particulars M/s Escorts Ltd, M/s Faiveley Transport M/s Stone India Faridabad India Ltd, Hosur Limited, Kolkata

(a) Basic Price 17,147.54 14,534.52 14,674.28

(b) Add Excise Inclusive @ 12% @ 12% i.e. Rs. @12% i.e. Rs.

1744.1424

(c) Add Cess on ED Inclusive @3% on ED of @3% on ED i

		12%	52.3243
(d)	Sub Total	17,147.54	16,330.9867
(e)	Add CST	Inclusive @5.25%	@5% i.e. Rs
(f)	Total unit price in Rs.	17,147.54	17,147.54

31. From the above, it is indisputable that the total unit price quoted by all the opposite parties was Rs. 17,147.54/-. Irrespective of the justifications advanced by the parties to support such identical quotes right up to the last paisa and which shall be examined in detail in the latter part of the order, it Public Version may be observed here itself that in absence of any plausible economic justification, this circumstance alone is a very strong indicator towards a possible collusion amongst the bidders. However, in some cases for establishing such collusion, the factum of identity of quotes may further require to be supported by some corroborative evidence.

32. It may be observed that the definition of „agreement“ as given in section 2(b) of the Act requires inter alia any arrangement or understanding or action in concert whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. The understanding may be tacit, and the definition covers situations where the parties act on the basis of a nod or a wink. There is rarely a direct evidence of action in concert and in such situation the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other.

In the light of the definition of the term „agreement“, the Commission has to find sufficiency of evidence on the basis of benchmark of „preponderance of probabilities“.

33. In view of the above and further considering the fact that since the prohibition on participating in anti-competitive agreements and the penalties the offenders may incur being well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstruct certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence Public Version of any other plausible explanation, constitute evidence of the existence of an agreement.

34. Applying the aforesaid tests to the present case, it may be noted that EL quoted an all-inclusive quote of Rs. 17,147.54/- per unit whereas the other parties viz. FTRTIL and SIL quoted basic prices of Rs. 14,532.52/- and Rs. 14,674.28/- respectively to reach a total unit price of Rs. 17,147.54/- which is identical to the all-inclusive quote of Rs. 17,147.54/- made by EL. It may be observed that though FTRTIL and SIL quoted different basic prices yet the total unit price reached by them was identical with each other as also with the quote made by EL. As the central levies i.e. Excise Duty and CST are to operate at a uniform rate, this mathematical feat was achieved by the parties notwithstanding different quoted basic prices by working backwards to reach identical quotes towards total unit price by using different CST rates.

35. The Tender Committee during evaluation and consideration of the bids suspected cartel. However, as per General Conditions of Contract for Stores Department it is provided that wherever all or most of the approved firms quote equal rates and cartel formation is suspected, railways reserves the right to place order on one or more firms with exclusion of the rest without assigning any reasons thereof. Accordingly, after considering the implications of e-tendering, the Committee decided to enter into negotiations with SIL. Consequent upon negotiations, SIL reduced its basic price and offered discount of Rs. 554.15/- each on basic price i.e. it offered revised basic rate of Rs 14,120.13/- each +ED+ CST as per its offer. At this stage, it may be observed that though the offer of EL was found technically suitable, its offer was passed over as it did not submit the cost of tender documents. Similarly, the offer of FTRTIL was found technically suitable, yet its offer was passed over as the firm did not accept the warranty clause as per IRS conditions of the contract.

Public Version

36. Much was made by SIL of the fact that the other two bidders having been found ineligible by the Tender Committee, the entire case falls as for establishing a cartel, the law requires at least two entities to be involved in the alleged anti-competitive agreement/ conduct. The Commission has examined the plea in law and on facts. As shall be shown presently, the plea is legally untenable and factually incorrect.

37. The Commission may observe that stratagem adopted by some of the bidders in filing defective bids is not unknown to competition agencies. Complementary/ cover bids are filed by some of the bidders in response to a tender inquiry to provide comfort to the procuring authorities that there are various bids in response to the tender inquiry to avoid any question being raised on the absence of competition in the tender process. Such entities do not participate in the bid process to actually compete with the successful bidder but submit „complementary or „cover or „courtesy bids only so that the procurement process does not get stalled due to lack of enough competition. Complementary bidding is done when some competitors agree to submit bids that are either too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the acceptance of a procurer, but are merely designed to give the appearance of genuine competitive bidding. Complementary bids tend to defraud procuring entities by creating a camouflage of genuine competition to conceal the inflated bid prices. The present is such text-book case, as shall be shown presently, where EL and FTRTIL submitted complementary bids in response to the tender inquiry under consideration as they were not, as a matter of fact, competing with SIL

in the procurement process.

38. Factually also, the submission is thoroughly misconceived. It is true that offers of EL and FTRTIL were „passed over“ due to non-submission of the cost of tender documents and non-acceptance of the warranty clause respectively. Yet, the Tender Committee very categorically found the bids to Public Version be technically suitable. Moreover, the Committee noted that though the offer EL without tender document cost was liable to be rejected, there was further provision for considering such offers of RDSO approved firms for exemption on merits of the case. However, given that there were two more offers from RDSO approved sources with the identical rates, the Committee in its wisdom did not deem it necessary to exempt EL from complying with the tender condition.

39. Similarly, with respect to the non-acceptance of the warranty clause by FTRTIL, the Committee noted that under normal conditions the firm would have been asked to accept these commercial deviations but since all the three RDSO approved firms quoted identical rates, it was decided to consider the offer of FTRTIL as commercially unsuitable. Therefore, in view of the facts of the present case, the Commission is of considered opinion that EL and FTRTIL were not ineligible to participate in the tender as argued by the parties. Both were RDSO approved vendors and their bids were found to be technically suitable. The defects, if any, were of technical and curable nature. In the circumstances of the case, it was futile for the procurer to condone such defects and deviations and thereby putting further premium over the collusive act. In the result, the arguments advanced by the parties in this regard are misconceived and cannot be sustained.

40. In this regard, it may also be observed that during the course of the arguments, the Commission put a specific query to the counsel appearing for EL as to the steps taken by the company to remedy the defect in relation to non-submission of cost of tender documents. No explanation or reason was offered by the counsel either at the hearing or in the written submissions in this regard.

41. The other pleas taken by the opposite parties justifying the rates quoted on diverse grounds are also without force and merit rejection. So far as the Public Version case of EL is concerned, though it has taken the plea that the price quoted by it i.e. Rs. 17,147.54/- translated to basic rate of Rs. 14,500/- based on 12.36% of excise duty and 5.25% CST and this basic rate of Rs. 14,500/- was quoted by it on four earlier occasions. As rightly noted by the DG, the prices quoted by EL were based on the quotes in its earlier bids and not on the prices in any purchase orders placed by any zonal office of Railways or DLMW. There is nothing on record to show that EL offered bids based on any ascertainable calculations. Thus, no fault can be found with the findings of the DG that EL offered the unit price Rs. 17,147.54/- just to match the bids placed by other bidders. Hence, no sustenance can be drawn therefrom by EL on this count as well. In fact, EL tried to trivialize the entire issue of identical quotes by arguing in its reply that Indian Railways has the final say in deciding the outcome of the tenders irrespective of the rates quoted by the participants in the tender. This plea is devoid of any substance and the Commission is of the view that bid rigging is possible even if contracts are awarded at negotiated rates. Bid rigging can still take place if bidders collude and keep the bid amount at a pre-determined level. Such pre-determination is by way of intentional manipulation by members of the bidding group. So even if the successful bid was subject

to negotiation post tender, this cannot be said that there will be no impact on price, simply because if the successful tender price was inflated as a result of collusion then the impact would be carried over to the negotiations as they would commence at an inflated level. Once they become successful, this will also create a new bench mark for subsequent tender and thereby will have a ripple effect in long term if the same bidders are involved in repeated procurement.

42. In the case of FTRTIL though the DG accepted the claim made by it that its bid in the impugned tender was based on the last purchase order dated 18.01.2012 at a basic price of Rs. 14,534.52/-. In the opinion of the Commission, this plea of FTRTIL was also red herring and could not have been accepted. From the details of tenders awarded/ bids submitted to FTRTIL Public Version and placed by FTRTIL on record, it is evident that FTRTIL selectively picked the figure of Rs. 14,534.52/- out of long and varying list to suit its convenience. In this regard, it is instructing to note that FTRTIL relied upon the purchase order dated 18.01.2012 and 29.12.2012 in its support, yet it conveniently ignored the other purchase orders of 18.01.2012 of lower price i.e. Rs. 12,770.37/- as can be seen from the details available in the report of the DG. Hence, the plea of FTRTIL is found to be misleading and without any substance.

43. The DG, however, did not accept the claim made by SIL that its bid prices were based on the basic price of Rs. 14,674.28/- of the earlier purchase orders dated 14.12.2011 and 08.11.2011. Suffice to note, as observed above, it is not discernible as to how these two orders were picked up by SIL in support of its contention ignoring the other bids and purchase orders. Furthermore, even at this basic price, as calculated by the DG, the total unit price would be Rs. 17,312.42/- and not Rs. 17,147.54/- i.e. the actual quoted price. Be that as it may, there is nothing on record placed by SIL to justify the rate quoted by it in pursuance of the impugned tender and the only plausible explanation which may be drawn from the identical figure and lack of justification is that the rate was quoted to match the bid price of the other bidders acting in collusion and concert.

44. The other aspect which further strengthens the finding of collusion is the examination of the cost of production of the valves vis-à-vis the bid price. In this connection, it may be noticed that the DG called for the cost audit report/ cost production data from the parties. From the information submitted, it was noticed by the DG that EL's cost of each feed valves was Rs. XXX/- whereas it has quoted the basic price of Rs. 14,500/- in the present tender. In the case of FTRTIL, it was found that it had a cost of each feed valve of Rs. XXX/- against which it quoted the basic price of Rs. 14,534.52/- for the tender in question. Similarly, SIL's cost of each feed valve was Rs. XXX/- but its Public Version quoted the basic rate of Rs. 14,674.28/-. In these circumstances, when all the opposite parties have their manufacturing unit located at different places i.e. Haryana, West Bengal and Tamil Nadu with different cost of production, it was not possible to supply the feed valves at identical unit price of Rs. 17,147.54/-. Further, no justification or explanation was provided by the parties in this regard. In such a scenario, the Commission agrees with the findings of the DG that such facts and figures clearly evidence meeting of minds and concerted action taken by the opposite parties.

45. Various conspiracy theories including „corporate espionage“ were also sought to be advanced by SIL to justify the identical quotes as resulting from „corporate espionage“. An argument was

advanced by the parties that quoted prices of the bids might be leaked or made available to the competitors through other sources and they cannot be held responsible if the bidding parties derive benefit out of such leakage and quote the same price. The plea is thoroughly misconceived besides being mutually contradictory. Even if for the sake of argument the Commission were to assume that the details on the price quoted by one party were available to its rivals, there is no logical reason for such rivals to quote exactly the same price when they could have easily chosen to quote a lower price, even if by only one paisa, to win the bid.

46. In the aforesaid backdrop, the filing of the electronic bids by the opposite party bidders on the same date i.e. 26.04.2012 cannot be brushed aside as mere coincidence or a common practice.

47. The DG also examined the past conduct of these bidders with respect to the tenders invited by other railway zones. From the information so gathered, it was observed that though the production cost of the feed valves of the opposite parties were different but they quoted nearly identical price in the past in different zones of railway and in some cases there was difference of bid price of merely 88 paisa and/ or Rs. 9.14 paisa as in the case of Tender No. Public Version 26111569 dated 11.10.2011 where EL and FTRTIL quoted identical price for supply of 54 feed valves @ Rs. 14,535.40/- and Rs. 14,534.52/- respectively. Similarly, in Tender No. 43110361A dated 17.10.2011 EL and FTRTIL have quoted Rs. 14,525.38 and Rs. 14,534.52 respectively to Southern Railway. As such, the action of the opposite parties in bidding nearly identical amount in the tender was found to establish that the three bidders have resorted to collusive biddings for supply of feed valves to the railways in the past. Thus, taking into consideration the past conduct of the three bidders, it is further established that the opposite parties were used to such practice of sharing the price data and had accordingly also resorted to similar practice of collusive bidding in the e-tender in the present case as well.

48. On a careful consideration of entire circumstances i.e. quotation of identical prices despite these units having been located in different geographical locations and different cost of production; filing of the bids on the same date containing minor technical defaults and failure on the part of the opposite parties to provide any plausible explanation for any of the above and the past conduct of the bidders, it is sufficient to establish that the opposite parties entered into an agreement to determine prices besides rigging the bid.

49. 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 Public Version 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.

50. Thus, in case of agreements as listed in 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 this presumption would lie upon the opposite parties.

51. In the present case, the opposite parties could not rebut the said presumption. It has not been shown by the opposite parties how the impugned conduct resulted into accrual of benefits to consumers or made improvements in production or distribution of goods in question. Further, the opposite parties could not explain as to how the said conduct did not foreclose competition.

52. Various conspiracy theories including „corporate espionage“ were also sought to be advanced by SIL to justify the identical quotes as resulting from „corporate espionage“. Except propounding such theory, no material was placed before the Commission to support the thesis. Further, the Commission has already dealt with these submissions earlier in this order.

53. The Commission also notes that the subsequent action of the railways in entering into negotiations and consequent awarding of contract to one of the parties is of no significance and consequence as far as present proceedings are concerned. The tender inquiry pertained to procurement of feed valves, and Public Version hence the railways had no other option or source to procure the same. Resultantly, such action was actuated by expediency and nothing turns upon such development except to infer and notice the piquant situation in which the Railways was placed.

54. Lastly, a feeble attempt was made by SIL through its written submissions filed on 08.07.2013 to challenge the validity of the proceedings of the Commission by arguing that in view of the different compositions of the Commission during its ordinary meetings held on 18.06.2013 and 02.07.2013 when the arguments of SIL were heard, principle of natural justice „he who decide must hear“ got violated and the final order shall be in nullity.

55. The Commission observes that this plea is not sustainable. It may be noted that the Commission transacts its business in the meetings. As per the provisions contained in section 22 of the Act, the Commission has to transact its business through the meetings where all the questions coming up before the meetings are to be decided by a majority of members present and voting. The quorum for such meetings is three members. Reference may also be made to the provisions contained in clause (c) of section 15 of the Act which provides that "No act or proceeding of the Commission shall be invalid merely by reason of - any irregularity in the procedure of the Commission not affecting the merits of the case". No prejudice was caused or alleged in the present case or otherwise shown by the parties. It may be pointed out that as per regulation 29 of the General Regulations, 2009, the parties could declare to the Commission whether they would make oral submissions or file written arguments during the course of an inquiry. This is indicative of the fact that making oral

submissions was optional and it was not necessary that a party would make the oral submissions. Furthermore, regulation 40 of the General Regulations, 2009 provides that failure to comply with any requirement of these regulations shall not invalidate any proceeding, merely by reason of such failure, unless the Commission is of the view that such failure has resulted in Public Version miscarriage of justice. As noted above, it is not the case of SIL that due to such different composition its cause has been prejudiced in any manner leave alone causing of any miscarriage of justice. In this view of the matter, the Commission is constrained to note that the plea is without any merit particularly when the Commission had the benefit of written replies and submissions of SIL which were duly considered by the Commission.

56. In the result, the Commission is of the view that the opposite party bidders by quoting identical rates had, indirectly determined prices/ rates in the tenders and indulged in bid rigging/ collusive bidding in contravening of the provisions of section 3(1) read with section 3(3)(a) and 3(3)(d) of the Act.

ORDER

57. Accordingly, the Commission directs the opposite parties to cease and desist from indulging in such anti-competitive conduct in future.

58. As regards penalty under section 27 of the Act, the Commission notes that all the bidding companies who infringed the provisions of section 3 of the Act are responsible in equal measure and no mitigating circumstances were brought to the notice of the Commission by any of them. The Commission has taken note of the submissions of some of the opposite parties to the effect that they have never been found in breach of any provision of the Act in the past and have been facing the inquiries for the first time before the Commission. Basically, the other argument advanced is that it was first offence of the parties and therefore a lenient view should be taken. No doubt that the parties herein have been found guilty for the bid rigging for the first time by the Commission, however, while investigating the present bid rigging case, the Commission had opportunity to look into the past conduct of the parties in giving bids and the Commission has already noted in para 47 above as to what was the conduct of the parties. A distinction needs to be maintained between Public Version the „first time contraventions and the „first time established contraventions . As noted by the DG also, past conduct of the opposite parties is far from edifying. Though such past conduct was not brought to the attention of the Commission but that is hardly any solace for the opposite parties to take the plea of leniency on the count that it was never found in breach of any provision of the Act. In light of the above, the Commission is of the view that the argument of leniency for being the first offender is not available to the opposite parties in view of the past conduct as noted above. In fact, one of the opposite parties viz. FTRTIL even tried to brazen out the conduct by arguing that there is „no occasion for the Commission to levy any penalty upon it.

59. It may be observed that under clause (b) of section 27 of the Act, where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass inter alia an order imposing such penalty, as it may deem fit which shall be not more than ten per cent of

the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse. Furthermore, by virtue of the proviso to the said clause, it is 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 up to three times of its profit for each year of the continuance of such agreement or ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher.

60. There are no other mitigating factors significantly raised, except that the amount involved in the tender was very small and the order was only of a few lakhs. It must also be kept in mind that public procurement is a major concern of all competition authorities in the world. The Commission cannot ignore bid rigging in a case of small procurement nor can consider small Public Version procurements unimportant. The bid rigging practices are spread throughout the public procurement system. Various collusive methods are adopted in public procurements to deprive the State i.e. exchequer, of the real benefit of money paid by them. The contravention of the competition law cannot be considered non-serious only because the amount of the bid was small. The size of tender in itself is not a decisive factor for taking a lenient view. However, it may be taken into consideration as one of the factors while imposing penalty.

61. The Commission has bestowed its thoughtful consideration on the issue of quantum of penalty. The Commission is also not oblivious of the submissions made by the opposite parties to the effect that the turnover relatable to the product under consideration constitutes a small percentage of the total turnover. It has been submitted by FTRTIL that its turnover during the period in respect of feed valve was Rs. 58 Lakhs constituting 0.07% of the total turnover. SIL has also filed details of the turnover and profits for the relevant period for the whole business and the business related to feed valve separately. It has been mentioned illustratively that the turnover arising out of sales of the relevant product (Rs. 70.67 Lakhs during the period 27.04.2012 to 31.03.2013) constituted a small fraction of the total turnover (Rs. 9499.51 Lakhs during the same period). Similar plea has been taken by EL on the issue of quantum of penalty though no disaggregated figures were supplied.

62. Considering the totality of facts and circumstances of the present case including the size of the tender and the nature of contravention as also the revenues generated from the product under consideration, the Commission decides to impose a penalty on each of the contravening company at the rate of 2 % of the average turnover of the company. The total amount of penalty on each company is given in the chart below:

Public Version Gross Gross Gross Average @ 2 % of turnover turnover turnover
Turnover for average S.No. Name for 2009- for 2010- for 2011-

		10 (in Crores)	11 (in Crores)	12 (in Crores)
1.	M/s Stone India Limited	94.46	92.62	100.12

2.	M/s Faiveley Transport Rail Technologies India Limited	252.17	318.45	284.69
		2189.59 (Year	2764.77 (Year	3251.4 (Yea
3.	M/s Escorts Limited	ended 30.09.2009)	ended 30.09.2010)	ended 30.09.20

63. The directions contained in para 57 above, should be complied with immediate effect and the opposite parties are also directed to file an undertaking to this effect within a period of 30 days from the date of receipt of this order.

64. The Commission also directs the opposite parties to deposit the penalty amount within 60 days of receipt of this order.

65. The Secretary is directed to inform the parties accordingly.

Sd/-

(Ashok Chawla) Chairperson Sd/-

(Geeta Gouri) Member Sd/-

(Anurag Goel) Member Sd/-

(M. L. Tayal) Member Public Version Sd/-

(S.N. Dhingra) Member Sd/-

(S. L. Bunker) Member New Delhi Date: 05/02 /2014