BEFORE THE

COMPETITION COMMISSION OF INDIA

[Case No. 06/2011]

Date of Order:- 16.04.2012

Coal India Limited (CIL)
10, Netaji Subhas Road,
Kolkata - 700001

- Informant

1. Gulf Oil Corporation Ltd. (GOCL), Hyderabad, Andhra Pradesh
2. Ideal Industrial Explosives Ltd. (IIEL), Secundrabad, Andhra Pradesh
3. Solar Industries India Ltd. (SIIL), Nagpur, Maharashtra
4. Blastec India Private Ltd. (BIPL), Satya Niketan, New Delhi
5. Indian Explosives Ltd. (IEL), Kolkata, West Bengal
6. Emul Tek Private Ltd. (ETPL), Satya Niketan, New Delhi
7. Regenesis Industries Pvt. Ltd. (RIPL), Secundrabad, Andhra Pradesh
8. Techno Blasts India Ltd. (TBIL), Secundrabad, Andhra Pradesh
9. Black Diamond Explosives Private Ltd. (BDEPL), Dhanbad, Jharkhand
10. Keltech Energies Ltd. (KEL), Bangalore, Karnataka
11. Explosives Manufacturers Welfare Association (EMWA), Kolkata, West Bengal
12. Explosives Manufacturers Association of India (EMAI), Secunderabad, Andhra Pradesh
13. Other Explosives Suppliers in India.

- Opposite Parties

**Order under section 27 of the Competition Act, 2002**

The information in the instant case has been filed before the Commission by M/s Coal India Limited (hereinafter referred to as the “Informant or CIL”) on 10.02.2011 under Section 19 (1) (a) of the Competition Act, 2002 (hereinafter referred to as “the Act”) against explosive manufacturers/suppliers in India along with their associations, Explosives Manufacturers Welfare Association (hereinafter referred to as “EMWA”) and the Explosives Manufacturers Association of India (hereinafter referred to as “EMAI”) for their alleged anti-competitive acts.

2. The facts and allegations as contained in the information, in brief, are as under:

2.1 The informant, M/s Coal India Limited, a Public Sector Undertaking (PSU) of Government of India is engaged in the business of production of coking and non-coking coal of various grades through mining operations in different parts of India on its own and also through its subsidiaries.
2.2 According to information, the explosive manufacturers/suppliers (Opposite Parties Nos. 1 to 10 named in the information and other explosive suppliers in India) are engaged in the activity of manufacturing and supply of different types of explosives such as bulk explosives, cartridge explosives and related accessories in India. EMWA (the Opposite Party No. 11) and EMAI (the Opposite Party No. 12) are the associations of these explosive manufacturers/suppliers (hereinafter referred to as explosive suppliers). Till the year 2009, EMAI was communicating with the informant on behalf of the explosive suppliers. However, since 2009, another association by the name of EMWA has been active, writing to the informant on various issues concerning the explosive suppliers.

2.3 The informant has submitted that it has been using different kinds of explosives for its coal mining operations depending upon the type of coal mines where the explosives are to be used. It procures explosives from explosive suppliers for that purpose through a process of public tender involving two stages - submission of techno-commercial bids followed by the submission of price bids by the short listed bidders. Prior to 2007-08, both the techno-commercial bids and the price bids were required to be submitted in paper form. However, with effect from 2007-08, system of Electronic Reverse Auction is being used for price bids in accordance with
the guidelines and orders issued by the Central Vigilance Commission of India (CVC) on the issue.

2.4 The informant has further submitted that it has always endeavoured to conduct the process of tender in a fair and transparent manner, with the objective of ensuring maximum participation by the qualified bidders. It has sought to promote the competitive process and reduce chances of collusion by the bidders through introduction of system of Electronic Reverse Auction.

2.5 It has been alleged that the leading explosive suppliers named in the information control about 75% of the total market share and since they have formed a cartel, 75% of the market has been cartelised. This cartelised behaviour of the explosive suppliers has caused and is continuing to cause harm to the informant in purchase of explosives. According to the informant, the collective illegal actions of the explosive suppliers have resulted in an appreciable adverse effect on competition in India in several relevant markets, including the market of bulk explosives, cartridge explosives and fuses and detonators.

2.6 As per the informant, cartelisation among the explosive suppliers has been in existence since 2005 and continues to exist till date. It has been alleged that the explosive suppliers have contravened the provisions of
section 3(3)(a), 3(3)(b) and 3(3)(d) of the Act through their various acts like collectively boycotting the Electronic Reverse Auction organised by the informant for finalisation of Running Contracts in January 2010 and writing identical letters to the informant in this connection, collectively stopping supplies and threatening to stop supplies of explosives to the informant in the years 2006, 2007, 2009 and 2010, collectively fixing bid prices in 2009 and submitting identical price bids in response to the tender for the procurement of explosives in 2005-06.

2.7 According to the informant, the anti-competitive practices of the Opposite Parties have not only been adversely affecting its business operations but also affecting the interests of the end customers in terms of higher prices of the final products produced and also in terms of lower availability of output in markets.

3. **Prima –facie Order**

3.1 The Commission considered the information in its meeting held on 24.02.2011. Having examined the facts and averments, the Commission formed a *prima facie* opinion and referred the matter under section 26 (1) of the Act to the Director General (hereinafter referred to as “the DG”) for carrying out investigation into the matter.
4. Investigation by DG

4.1 Pursuant to the orders of the Commission, DG conducted investigation into the matter and submitted his report of investigation dated 28.09.2011 to the Commission. The findings of the DG, in brief, are as under:

4.2 After taking into account various factors listed in section 19(5) read with section 19(6) and 19(7) of the Act, DG has delineated the relevant market in the present matter as the "consumption of bulk and cartridge explosives within the territory of India."

4.3 DG has submitted that the informant requires bulk explosives and cartridge explosives together with other accessories to operate its Open Cast (OC) and Underground (UG) coal mines which are procured from the explosive suppliers (Opposite Parties in the matter) through a process of public tender. The informant enters into Running Contracts (RC) with the explosive suppliers for the supply of explosives at a specified price for a specified period. The informant also empanels some suppliers in reserve so that when a particular RC holder fails to supply the explosives, it may place orders on them in order to get assured supply of explosives.

4.4 As regards the allegation of collectively fixing the sale prices of explosives, on the basis of the statements provided by the informant, DG
has found out that although the explosive suppliers are spread across the country and participated in a process of sealed tender, there was a similarity in the price quoted by different explosive suppliers during 2005-06 which reflects meeting of minds and concerted action of the explosive suppliers.

4.5 According to DG, it has been argued by the explosive suppliers that identical price quoted by them in the tender during the period 2005-06 was on account of unprecedented increase of Ammonium Nitrate in the year 2004, which is one of the raw materials for manufacturing explosives. The explosive suppliers had also approached the Chairman, CIL to get some relief in this regard. According to the explosive suppliers, the then Chairman, CIL had suggested them to quote the enhanced price in the subsequent tender bid so as to compensate the loss incurred during 2004 and as suggested by the Chairman, CIL all the explosive suppliers quoted identical price of Rs. 19500/- per MT in the tender of 2005-06, jump of 45% over the Last Purchase Price (LPP) of Rs. 13282/- per MT for bulk explosives.

4.6 However, according to DG, the aforesaid submissions of the explosive suppliers are not verifiable since there is no documentary proof made available by them and the informant company has also denied that there was such understanding made by the then Chairman with the explosive suppliers during the year 2004. Considering the fact that the explosive
suppliers submitted identical price bids, DG has concluded that there was concerted action amongst the explosive suppliers while bidding for the tender for the year 2005-06.

4.7 However, while concluding that the explosive supplies were engaged in the concerted action of submission of identical financial bids in 2005-06, DG has also submitted that it did not continue in contracts for subsequent years. According to DG, since the enforcement provisions of section 3 were notified only in May 2009, the acts of quoting identical bid rates and bid rigging in Financial Year 2005-06 do not get covered under the provisions of section 3(3) of the Act.

4.8 As regards allegations of collective fixation of bid prices post notification of the enforcement provisions of the Act, DG has considered the letter dated 13th October 2009 cited by the informant and has concluded that no attempt was made by EMWA through its letter dated 13th October 2009 to fix the price of explosives sold to the informant as has been alleged.

4.9 According to DG, the letter dated 13th October 2009, addressed to the Chairman, CIL was an appeal by the President, EMWA not to curtail the duration of the period of previous contract since they were making regular supplies of explosives without any disruption. It was also stated in the letter
that the explosives manufacturers had built up sufficient capacity to cater to the committed quantity for the next three years in view of the assurances given in Notice Inviting Tender issued in the year 2008 and if orders were short closed, they would be facing substantial financial loss.

4.10 In the aforesaid letter, EMWA also assured CIL that they would be agreeable to amend the price variation clause and also review the prices for the second year i.e. with effect from 1st December 2009 as per their mutual consent. EMWA also made an appeal in the aforesaid letter to call the explosive suppliers for discussion so that the sanctity of the Notice Inviting Tender issued on 04.07.2008 could be maintained.

4.11 According to the DG, the informant has treated this letter as a notice for price fixing and has ignored the context and contents of the letter. DG has brought out that the informant had expressed its inability to continue RCs of three years due to downward trends of price of Ammonium Nitrate. To sort out this issue, the explosive suppliers had held a number of meetings with management of the informant company including with its Chairman. In the meetings, Chairman of the informant company had requested the members of EMWA to give in writing their acceptance on the issue of review of the price variation clause. Consequently they had written letter dated 13.10.2009 giving justification for continuation of the Running
Contracts. The said letter, according to DG, does not establish that the explosives manufacturers had formed a cartel to fix the prices.

4.12 Taking into account all the relevant facts, DG has reported that no evidence could be found in the case suggesting collective fixation of the sale price of explosives by the explosive suppliers except for 2005-06. However, since the contract for the financial year 2005-06 was executed and completed within the financial year 2005-06 itself, the concerted action ceased to exist well before the notification of section 3 of the Act. Based on above, DG has concluded that the Opposite Parties have not contravened the provision of section 3 (3) (a) of the Act.

4.13 The allegations of limiting and controlling the market of the supply of explosives have been investigated by the DG considering them into three distinct periods as mentioned in the information; viz. 12.04.2006 to 16.04.2006, 31.01.2009 to 01.02.2009 and 21.03.2010 and April 2010 to June 2010.

4.14 For the period between 12.04.2006 and 16.04.2006, it has been reported by DG that the documents submitted by the Informant tend to substantiate the fact that certain notices for stoppage of supply of explosives were issued by the explosive suppliers and supply was also
disrupted during the period. It has been noted by the DG that one of the suppliers has also admitted the fact of stopping the supplies to protest against the unilateral amendment of penalty clauses based upon weighted average powder factor.

4.15 On the basis of facts on record, DG has concluded that some of the Opposite Parties mentioned in the information indeed acted in a concerted manner to stop the supply of explosives during the period 12.04.2006 to 16.04.2006. However, according to DG, since the provisions of section 3 were notified only in May 2009, even if the bidders acted in a concerted manner in Financial Year 2006-07, the same cannot be held as violative of section 3(3) (b) of the Act.

4.16 As regards allegations of stoppage of supplies during 31.01.2009 to 01.02.2009 and 21.03.2010, DG has concluded that evidence is not sufficient to establish that the explosive suppliers had actually stopped supplies collectively during this period. According to DG, the fax dated 16.07.2010 relied upon by the informant to support its aforesaid allegations simply states that the supply of bulk loading explosives was ‘nil’ to one of the subsidiaries of the informant company on the specified dates and does not indicate any collective stoppage of supply. Further, the said stoppage
only pertains to only one subsidiary and therefore it cannot be uniformly applied to supplies in respect of explosives to all other subsidiaries.

4.17 According to DG, the other fax messages relied upon by the informant also do not establish any concerned action of the suppliers in stopping the supplies during the specified period. On the other hand, the explosive suppliers have submitted data to show that the supplies have been made regularly by them. Any disruption of supply for a day or so was due to specific reasons of an individual supplier. However, there is no case of any collective stoppages by all the suppliers at a given date. DG has concluded that in the light of evidences available on record, no case is made out of stoppage of supplies by the opposite parties on the specified dates - 31.01.2009 to 01.02.2009 and 21.03.2010 which may be said to be in contravention of provisions of section 3(3)(b) of the Act.

4.18 For the period April 2010 to June 2010 also, taking into account the replies of the explosive suppliers, DG has concluded that there might be stoppage for day or two by an individual company due to shortage of raw materials and financial crunch. However, there is no evidence of collective decision taken by the explosive suppliers to stop the supply of explosives. According to DG, therefore, the allegations of the informant of limiting supplies and controlling the market of explosives during April to June 2010
do not stand established and no case is made out against the explosive suppliers in violation of section 3(3)(b) of the Competition Act, 2002.

4.19 On the issue of collective threat to stop supply of explosives, it has been reported by the DG that the allegation is based on the fact that some explosive suppliers had issued identical letters for stopping supplies from a particular date of 25.10.2010. However, the allegations have been denied by the aforesaid parties and it has been submitted that there was no stoppage of supply of explosives with effect from 25.10.2010 as has been alleged in the information.

4.20 DG has also reported that non-supply on a particular day cannot be treated as stoppage of supply collectively by all explosive suppliers under an agreement. According to DG, the information regarding regular supplies made by the explosive suppliers has been corroborated by the contract orders and supply statements furnished by them. DG has also submitted that explosive suppliers have attempted to make more than 90% of the supplies to become eligible for the subsequent tenders floated by the CIL.

4.21 According to DG, although the contents of the alleged letters are identical, the subject matter relates to common interest of the explosive suppliers with regard to safety, security and transportation of explosives in
compliance of the guidelines of Petroleum and Explosive Organisation (PESO), which the informant has treated as a threat to stop the supply of explosive by the aforesaid companies w.e.f. 25.10.2010.

4.22 On the basis of aforesaid, DG has concluded that there is no evidence on record to show that there was a collective threat of stoppage of supplies and that the supply of explosives had also actually stopped with effect from 25.10.2010. The cardinal issue in all the letters relied upon by the informant is compliance of PESO guidelines especially with regard to safety, security and transportation of the explosives which was a legitimate claim of the explosive suppliers since they were handling a hazardous product. Considering all these facts, DG has concluded that there is no case of cartelized behaviour on the part of the explosive manufacturers towards controlling or limiting supplies by way of issue of collective threats in violation of section 3(3)(b) of the Act.

4.23 On the issue of collective boycott of Electronic Reverse Auction in 2010, DG has submitted that for the said auction, the explosive suppliers who were technically qualified for the supply of explosives were given ID number by the informant to log in to the system to submit their financial bids. Thereafter, all the explosive suppliers logged in on a particular date and time but except for two bidders namely Sri Krishna Explosive and
Premier Explosive Limited, no other supplier submitted price bids because of the incorrect ceiling fixed by the informant, which was not commercially viable to them.

4.24 According to DG, in spite of the fact that the two explosive suppliers submitted their price bids, contract was not awarded by the informant to them, which was against the norms of NIT. Further, the fact that all other bidders participated in the rescheduled electronic auction held on 15.01.2010 also indicates that they had no intention to boycott the reverse auction in spite of the high ceiling price fixed by the informant.

4.25 According to the DG, identical letters dated 07.01.2010 written by the two explosive suppliers highlighting certain issues relating to reverse auction do not establish any concerted action among them. The letters were actually in form of requests to the informant to review the different issues as regards Electronic Reverse Auction and therefore these letters cannot be treated as concerted action. In light of these facts, DG has concluded that it cannot be said that the explosive manufacturers and suppliers had collectively boycotted Electronic Reverse Auction.

4.26 Considering the facts of the case in entirety, DG has concluded that the action of the explosive manufacturers/suppliers cannot be held to be violative in terms of sections 3(3)(a) & 3(3)(d) of the Competition Act, 2002.
4.27 DG has also stated that the informant and the explosive manufacturers have long pending contractual dispute amongst them and therefore, allegations and counter allegations have been made by both the informant and the explosive manufacturers on different occasions. The allegations in the present case are nothing but the counter allegations of the informant against the explosive suppliers who had filed information before the Commission against the informant in case no. 04/2010.

4.28 Summarising his findings, DG in his report has concluded that although evidences do suggest that the explosive suppliers were engaged in anti-competitive acts of fixation of bid/sale price for the supply of explosives and limiting the supply of explosives during 2005-2006 and 2006-2007, since the provisions of section 3 the Act were not in force during that period, the explosives manufacturers/suppliers are not liable for violation of the provisions of section 3 (3) (a), 3(3) (b) and section 3 (3) (d) of the Act for the said acts.

4.29 As regards the allegations of cartelisation for the period post notification of provisions of section 3 of the Act, DG has reported that no such evidence has been found against the explosive manufacturers/suppliers. Accordingly, DG has concluded that the explosive manufacturers/suppliers cannot be held in contravention of the provisions
of section 3 (3) (a), 3(3) (b) and section 3 (3) (d) of the Act in the whole matter.

5. The Commission after considering the report of the DG decided to send a copy of the report of DG to the informant and the Opposite Parties for filing their replies/objections, if any, to the Commission.


6.1 In their replies to the report of DG, written submissions were filed by seven of the Opposite Parties. The OP-2, M/s Ideal Industrial Explosive Limited in its replies submitted that it had never engaged in any activity of bid-rigging or manipulation of bid process. It was also not engaged in boycott of Electronic Reverse Auction held by CIL in January, 2010 and has never given any threat to stop the supplies of explosives and accessories to CIL or to any of its subsidiaries at any point of time.

6.2 The OP-10 (M/s Keltech Energies Ltd.) in its replies also denied that it was ever involved in any anti-competitive activity.

6.3 M/s Gulf Oil Corporation Limited (OP-1), M/s Solar Industries India Limited (OP-3), M/s Blastec India Private Limited (OP -4), M/s Indian Explosive Limited (OP-5), M/s Emul Tek (P) Limited (OP -6) , Black Diamond Explosives Private Limited (BDEPL) (OP-9) did not submit their replies on
substantive issues and only submitted their financial details for the financial
year 2008-09, 2009-10 and 2010-2011.

6.4 Oral arguments were also advanced by the representatives of M/s
Indian Explosives Ltd. and M/s Blastec India Private Limited in which
allegations levelled against them by the informant were denied.

7. Objections of the Informant to DG's Report

7.1 The informant filed its objections to the findings of the DG vide its
submission dated 08.12.2011. Besides, oral arguments were also advanced
by its legal counsels before the Commission. The objections of the
informant, in brief, are as under:

7.2 In its reply, the informant reiterated all the allegations levelled against
the Opposite Parties in the information and expressed its disagreements
with the findings of DG.

7.3 The informant has stated that an analysis of price bids for the years 2004-
05, 2006-07, 2007-08 and 2008-09 clearly show that the explosive suppliers
had engaged in cartelisation and bid rigging during these years. According to
the informant, identical bids are not a pre-requisite for bid-rigging as has
been contended by DG, but the relevant focus is whether the bidders agreed
on a particular type of conduct, which is the case in the matter. Even on
extremely narrow restrictive understanding of bid-rigging as taken by the DG, the analysis of data carried out by the DG is flawed.

7.4 The informant has submitted that following common features were present in bids submitted by the explosive suppliers in each of these years:

i. The difference in bids was very small, around 1% to 5% of bid amount.

ii. Despite the difference in the bid amounts being less, all the explosives manufacturers were willing to supply after negotiations which suggests that the initial bids were being artificially kept at a high level. If the original bids had been made in competitive market conditions, they would have approximated the competitive price. However, the fact that all the explosive manufacturers were ultimately willing to supply for substantially lower amounts strongly suggests that the initial bids were not at competitive prices.

iii. Different explosive manufacturers won different bids, showing that there was potential market sharing by the explosive manufacturers.

7.5 The informant has further submitted that several of the bidders quoted identical prices in their bids for the year 2004-05 and 2006-07, which shows there was cartelisation in the years other than the year 2005-06 also. Further, the bid prices for the year 2007-08 and 2008-09 were within 0.05%
and 0.2% which shows that the explosive manufacturers were not making pricing decisions in an independent manner.

7.6 To support its allegation that the explosive suppliers were engaged in collective fixing of prices in 2009, the informant, in its reply has relied upon the letter dated 13th October, 2009 from EMWA to the informant to contend that EMWA was taking decisions with regard to pricing, as it was agreeing, on behalf of its members, to amend the price variation clause and also was collectively negotiating with the informant which is against the tenets of the section 3(3) of the Act as the said provision of the Act prohibits trade associations from discussing pricing issues and the members of the association are required to take decisions regarding pricing independently without collusion.

7.7. As regards its allegations of stoppages in the year 2009 and 2010, the informant has submitted that DG has ignored various letters written by the informant and its various subsidiaries during April 2010 to July 2010 which provide contemporaneous evidence of shortages and stoppages in supplies of explosives by the explosive suppliers.

7.8 According to the informant, DG has concluded that the explosive suppliers were supplying the minimum quantity required to be eligible for submitting bids in a subsequent year and therefore, there was no question
of stoppage of supplies or sluggish supplies. This conclusion of DG is entirely misconceived since a plain reading of the data referred to by the DG makes it clear that supplies were extremely erratic, with several suppliers failing to supply 90% of the tender amount, which is allegedly the amount the explosive suppliers needed to supply in order to be eligible to re-tender. The data reveal that the contention of the explosive suppliers that they have always supplied at above 90% of the contract quantities is entirely false since there have been several instances of supplies falling below even 60% and on more than half of the occasions, the explosive suppliers have supplied less than 90% of the contract quantities offered by the informant. That there was interruption in supplies by the explosive suppliers is also recognized in the order of the Commission in case no. 4 of 2010 concerning CIL and the explosive suppliers.

7.9 The informant company has also submitted that from 2005 onwards it has effectively been at the mercy of the explosive suppliers and has often not received the quantities of explosives that it was supposed to receive from them. As a result, it has been forced to give in to several of their unreasonable demands, regarding prices as well as the quality of explosives, causing an AAEC in the market. One example of a compromise that the informant has had to make is with regard to powder factor which it had sought to impose in its contracts with the explosives manufacturers.
However, the explosives manufacturers, realising that this would require them to improve the quality of their products, have refused to implement this stipulation.

7.10 The informant has also contested the conclusions of DG that the allegations of collective threats to stop supplies and identical letters sent by independent explosive manufacturers have no merit as they are only against a few of the manufacturers and because supplies were not actually stopped. Stating that the conclusions of DG are fundamentally flawed, the informant has submitted that the fact that the supplies were not actually stopped on those dates is entirely irrelevant. The mere fact that the supplies of explosives were not actually stopped does not mean that the offence under the Act was not committed. That there was a collective threat of disruption in supplies by the explosive manufacturers is enough to establish that there was an anti-competitive agreement among the competitors.

7.11 The informant has also submitted letters dated 25.10.2010 of three explosive suppliers to support its contention that they had collectively resorted to issue of threats to stop supplies. The informant has also stated that certain letters were sent by the explosive suppliers in November 2011 as well which stated that uninterrupted supplies would not be possible by them if certain conditions regarding prices were not agreed to.
7.12 According to the informant, DG has failed to contact any other purchaser of explosives to enquire about the effect of cartel of the explosive manufacturers/suppliers on their business or any other explosive manufacturer even when the information clearly lists “other explosive manufacturers” as contravening parties.

7.13 The informant has also contended that on the issue of boycott of reverse auction in 2010, DG has ignored the fact that but for two explosive suppliers none other participated in the reverse auction. Some of the explosive manufacturers wrote back to the informant explaining the reasons for not participating in the reverse auction. The letters written by some of them on the issue to the informant were identical and demonstrated that the explosive manufacturers were acting in concert. The failure of the explosive manufacturers to be part of reverse auction on 4-5th January, 2010 constituted boycott of the reverse auction which is in violation of section 3 (3) read with section 3(1) of the Act. On 15th January, 2010 the explosive manufacturers did place bids which were below the reserve price in the reverse auction, despite the fact that the same reserve price was used in both the reverse auctions. The bid prices fell upto 32.08% below the ceiling price for certain explosives on 15th January 2010, proving that it was clearly economical to sell below the ceiling price. Thus, observations of the DG
justifying the boycott of reverse auction on 4-5th January, 2010 on the grounds that quoting a price below the ceiling price was not commercially viable is not logical.

7.14 According to informant, the DG has not attempted to show that there was a lack of concerted action. Instead, the report of DG only focuses on providing a justification for that action. If any individual manufacturer unilaterally decided to boycott the auction, there would be no violation of section 3(3) read with section 3(1) of the Competition Act. However, the fact that all the bidders except two decided not to submit bids on 4-5th January 2010 suggests that there was concerted action among them.

7.15 According to the informant, the existence and conduct of the cartel among the explosive suppliers has caused and continues to cause an appreciable adverse effect on competition in India, by harming its coal mining operations and business, and by increasing the cost of explosives procured by it.

7.16 The informant has also submitted that the explosive suppliers continue to act in a concerted manner to resist quality control benchmarks for explosive supplies. Each of the aforesaid consequences has appreciably impacted competition in the markets for explosives in India, adversely
affecting the level of competition, technical development and benefits to the informant company and its ultimate consumers. According to informant, the negative impact on its business also impacts its production of coal and its consumers, which, to a great extent, include entities in the infrastructure sector (i.e., power generation and steel production). Given that it is amongst the larger coal producers in India, a negative impact on these vital infrastructure sectors would be detrimental for the country’s economy and development as a whole. For every day that it does not produce coal, it suffers loss of approximately Rs. 113.95 crore. This makes it abundantly clear that there is an AAEC caused by the actions of the explosive suppliers.

7.17 The informant has submitted that any disruption in mining, production and the supply of coal to the industries as a result of repeated illegal collective boycott by the constituent members of the informant can have a severe adverse follow-on impact on the economy as a whole since adverse impact on mining and production of coal has a significant spillover effects on various economic activities in the country.

7.18 According to the informant, there exists unequivocal and coherent evidence that explosive suppliers and/or their trade association were and still are engaged in conduct which was clearly in violation of the section 3 of the Act and the DG has failed to consider the evidence properly.
7.19 Based upon arguments advanced as aforesaid, the informant has submitted that the Commission must reject the DG’s conclusions, find the explosive suppliers and/or their trade associations guilty of entering into anti-competitive activities in violation of the Act and impose severe penalties on them.

Decision of the Commission

8. The Commission has carefully gone through all the materials and evidences available on record and has also considered the written and oral arguments of the informant and the Opposite Parties advanced during the proceedings in the case.

8.1 The Commission notes that the informant procures explosives of different categories and other related materials from the explosive suppliers through a process of open tender to operate its Open Cast (OC) and Underground (UG) coal mines. It enters into a system of Running Contracts (RC) with successful bidders for the supply of explosives at a specified price for a specified period. The allegations in the case basically relate to two broad issues, namely, a) fixation of bid price of explosives and b) stoppage of supplies or attempt to limit the supplies of the explosives collectively by the explosive manufacturers under different tenders issued by the
informant. It has also been alleged that the associations of the explosive suppliers have also been active in such activities.

**Issue for Determination**

8.2 In view of above, the issues that arise for determination in the case are as under;

a) Whether the explosive suppliers have indulged in fixation of bid prices under an agreement as has been alleged in the information?

b) Whether the explosive suppliers under an agreement also have engaged in the act of controlling and limiting the supply of explosives to the informant company?

c) Whether the explosive suppliers have caused manipulation of the bidding process in contravention of the provisions of section 3(3) read with section 3(1) of the Act?

**Issue 1: Whether the explosive suppliers have indulged in fixation of bid prices under an agreement as has been alleged in the information?**

8.3 The Commission notes that facts of the case reveal that the explosive suppliers had submitted identical bids in the tenders during the financial year 2005-06 as has also been reported by the DG. However, since the enforcement provisions of Act relating to anti-competitive agreements and
abuse of dominance (section 3 or section 4 of the Act) were notified only with effect from 20.05.2009, DG has concluded that the acts pertaining to the years 2005-06 would not get covered within the ambit of the Act, more so when such acts do not continue to be in effect after the said enforcement provisions got notified.

8.4 The informant in its objections to the findings of DG has submitted that several of the bidders have also quoted identical prices in their bids for the years 2004-05 and 2006-07, which shows that there was cartelisation in the years other than 2005-06 also. Further, the bid prices for the years 2007-08 and 2008-09 were within close range of each other which establishes that the explosive suppliers were not making pricing decisions in an independent manner.

8.5 The Commission on the basis of the records observes that the bids quoted by some of the explosive manufacturers including the Opposite Parties were indeed identical for the years 2004-05 and 2006-07, apart from the year 2005-06 as reported by the DG. However, the details submitted by the informant reveal that for the years 2007-08 and 2008-09, there was a variation in the rates quoted by the Opposite Parties.

8.6 The Commission further observes that in many cases the difference between the quotes of explosive suppliers for the years 2007-08 and 2008-
09 was to the tune of Rs. 100 and in some cases it was even about Rs. 2000 per MT. Thus, the bid prices quoted by the explosive suppliers were not identical during these years. There is also no evidence on record which suggests meeting of minds or an agreement to keep the bid prices closer with each other. The informant has also not submitted evidence of any agreement or understanding among the explosive manufacturers with a purpose to manipulate the price of the bids for 2007-08 and 2008-09.

8.7 On the basis of aforesaid, the Commission holds that there are no evidences on record to establish that the explosive manufacturers had submitted identical bids or had submitted near to identical price bids under an agreement to manipulate the bid prices during the years 2007-08 and 2008-09.

8.8 However, as far as bids for the years 2004-05, 2005-06, 2006-07 are concerned, the Commission observes that since the bids quoted by the explosive suppliers were identical, it is clear that they were not taking their decisions in an independent manner and there was meeting of mind among all of them to manipulate the process of bidding and fixing the bid rates. However, all these years are prior to the date of notification of section 3 and 4 (20.05.2009), these actions therefore, cannot be held as violation of section 3 and 4.
8.9 The Commission notes that the informant has brought forth certain letters written by the explosive manufacturers to bring out that even post 20.05.2009, the explosive manufacturers were collectively engaged in determination of bid price for supply of explosives to the informant.

8.10 On the issue of the collective fixation of prices post 20.05.2009, informant has drawn attention towards the letter dated 13.10.2009 written by the EMWA to it to support that the explosive suppliers were setting prices for supply of explosives and also setting other terms of supplies in a collective manner. The Commission has gone through the contents of the said letter carefully, which has been written by EMWA to the Chairman of CIL (the informant). The subject matter of the letter happens to be issues relating to on-going contract for the supply of explosives for the period 2008-11.

8.11 The Commission notes that the aforesaid letter indicates that in terms of Notice Inviting Tenders issued in July 2008, tender for supply of explosives was to be for a period of three years. However, the tender was going to be short closed and the explosive suppliers were concerned with the proposed measure as they had built up sufficient infrastructure capacity to cater to the committed quantity for the next three years. It was also
mentioned that issue of new tender would be detrimental to the interest of the explosive suppliers as well as the informant.

8.12 The explosive manufacturers also agreed to amend the price variation clause and also review the prices for the second year of the contract to mutual comfort of the informant and the explosive suppliers. These concerns were expressed by the association through its letter dated 13.10.2009 which also made an appeal to call the members of the association for a discussion so that the issues relating to Notice Inviting Tender could be sorted out.

8.13 The Commission observes that the aforesaid letter from an association is not indicative of fixing a price for supplies in a contract on behalf of the members. It only articulates the grievances of explosive manufacturers and also that the prices under contracts could be reviewed as per mutual comfort of the informant and the explosive suppliers.

8.14 The Commission observes that the informant is correct in its contention that trade association should not associate itself with the decisions on prices on behalf of the members. However, it is not that the members had met using the platform of the association to arrive at a common understanding to bid at a common fixed price or pre-fix price for supply of explosives. This is not the case since the contracts were already
awarded. The issues raised in the instant letter relate to clauses of NIT in respect of earlier contracts awarded to the explosive suppliers and acceptance of prices subject to comfort of the informant and the explosive supplier, apart from acceptance of price variation clause which could have meant lesser payments to the suppliers in case of falling input prices.

8.15 The Commission also observes that the aforesaid facts do not substantiate that the association was engaged in taking a decision to fix bid rates. The letter does not bring forth anything to suggest that the explosive suppliers were using the platform of the association to determine bid prices secretly, clandestinely and without knowledge of the informant. The letter of the association is more about sorting out contractual matters between the informant and the explosive suppliers in respect of ongoing contracts.

8.16 In view of aforesaid, the Commission holds that the letter dated 13.10.2009 as such cannot be said to be an evidence to establish that the explosive suppliers through their association- EMWA had collectively agreed to fix prices for supply of explosives to the detriment of the informant within the meaning of section 3(3) of the Act.
Issue 2: Whether the explosive suppliers under an agreement also have engaged in the act of controlling and limiting the supply of explosives to the informant company?

8.17 The Commission notes that DG in his report of investigation has also submitted that the explosive suppliers apart from fixing bid rates had also stopped supplies of explosives to the informant for certain days during the year 2006-07 between 12.04.2006 and 16.04.2006. Based upon analysis of details submitted by the informant company, DG has concluded that certain notices for stoppage of supply of explosives were issued by the explosive suppliers and supply was also disrupted during the period. It has been noted by the DG that one of the suppliers – Indian Explosives Limited had also admitted the fact of stopping the supplies to protest against the unilateral amendment of penalty clauses based upon weighted average powder factor.

8.18 On the basis of facts as reported by DG, the Commission observes that some of the explosive suppliers had acted in a concerted manner to stop the supply of explosives during the period 12.04.2006 to 16.04.2006. However, since the provisions of section 3 were notified only in May 2009, even if the bidders acted in a concerted manner in Financial Year 2006-07, the same cannot be held as violative of section 3(3)(b) of the Act which prohibits any act of controlling and limiting supplies in the market.
8.19 The Commission notes that to support its contention that the explosive suppliers had indulged in the act of collective stoppage of supplies or issuing collective threats to stop supplies even after 20.05.2009, since when the enforcement provisions of the Act came into effect, the informant company has submitted as an evidence certain letters issued by it and its subsidiaries to the explosive suppliers and also letters from certain explosive suppliers to the informant company and its subsidiaries. The informant has also submitted that supplies under the ongoing contracts had been quite erratic which shows that the explosive suppliers were acting collectively.

8.20 The Commission has carefully considered the contentions of the informant on the issue. The Commission notes that the informant has submitted letters issued by the informant company and its subsidiaries in certain months of 2010 (March 2010-July 2010) to the explosive suppliers which indicate that the issue under consideration in all such letters was non-supply of allocated quantity of explosives as per Letter of Intent and/or as per Running Contracts on different dates. The informant through these letters had asked the individual suppliers to make the supplies of the requisite quantity failing which the informant might resort to take action as per the terms of the RC. Further, there is no evidence to support that individual supplier stopped making supplies under an agreement.
8.21 Thus, the Commission observes that it is not a case where the explosive suppliers were acting in concert to limit supplies in the market in order to manipulate the market price of explosives. It is also a matter of record that some of the explosive suppliers had also supplied more than 90% of the quantity as stipulated in the contract. Moreover, in case of short supplies, the informant company was free to take actions as per contractual arrangements as is apparent from the letters of the informant and its subsidiaries in which it was mentioned that failure to supply the stipulated quantities would lead to making risk purchases and taking other actions as per terms of RCs.

8.22 The Commission on the basis of the aforesaid observes that the letters relied upon by the informant do not substantiate its allegations of collective action on the part of explosive suppliers to limit supplies in the market in the period as above, with a view to manipulate the bid price which could have been said to be violative of any of the provisions of section 3(3) of the Act.

8.23 The Commission notes that the informant has also relied upon letters dated 11.10.2010 and 13.10.2010 written by three explosive suppliers to support its allegations that the Opposite Parties had acted collectively which show meeting of minds among them. The Commission observes that in
these letters, the explosive suppliers have drawn attention of the informant company towards instructions from Petroleum and Explosive Organisation (PESO) regarding delivery of explosives and related security during transportation of explosives. The explosive manufacturers through these letters had informed the informant that the guidelines were so stiff that it would be difficult to continue supplies without committing any violations, indicating that if the conditions were not made practical they would be left with no option but to suspend supplies.

8.24 Given the background in which these letters were written, the Commission feels that it is possible that the explosive suppliers might have consulted each other, being a common issue faced by them. However, there is no indication in these letters that the opposite parties named in the information were deliberately limiting the supplies in the market. There is no evidence that they have restricted their output with a purpose to make profits. In fact, non-supplies by them would have made them face adverse consequences for not following the contractual obligations. Therefore, the three identical letters expressing concerns over PESO guidelines do not establish any anti-competitive agreement within the meaning of the section 3(3) of the Act.

8.25 Similarly letters written in November 2011 by the explosive manufacturers relied upon by the informant to say that the explosive
manufacturers collectively had issued threats of stopping supplies to the informant are also not indicative of any anti-competitive agreement among them with a view to limit supplies in the market to earn abnormal profits. The Commission notes that these letters have been written drawing attention of the informant to iron out certain problems with the price variation formula stipulated in the contracts. The explosive suppliers through these letters had made requests for including Ammonium Nitrate Index in Price Variation Formula in the tenders so that change in prices of imported Ammonium Nitrate could be accounted for. The Commission accordingly observes that these letters as such do not establish any anti-competitive agreement among the explosive suppliers in violation of section 3(3) of the Act.

8.26 Considering all the facts available on record, the Commission holds while there was a concerted action on the part of explosive suppliers to collectively stop supplies to the informant company during certain days of 2006-07, there is no evidence of such collective action in other years as has been alleged by the informant. However, since the enforcement provisions of the Act were not in force during that period, the explosive suppliers cannot be held in contravention of provisions of section 3(3)(b) of the Act.
Issue 3: Whether the explosive suppliers have caused manipulation of the bidding process in contravention of the provisions of section 3(3) read with section 3(1) of the Act.

Boycott of e-reverse auction

8.27 One of the evidence produced by the informant to substantiate its allegations that the explosive suppliers have acted collectively in order to influence the process of bidding for supply of the explosives is their act of collective boycott of electronic reverse auction conducted by the informant company during 4th – 6th January 2010. As regards allegations of collective boycott of reverse auction held on 4th and 5th January 2010 for bulk and cartridge explosives and on 6th January 2010 for accessories like detonators and cast boosters, the Commission notes that in accordance with a decision taken by Board of the informant company in its meeting held on 09.09.2009, fresh tenders were floated for procurement of explosives for the year 2010-11. Techno-commercial bids were opened in this respect in November 2009 and after scrutiny of techno-commercial bids, bidders were invited to take part in reverse auction held on 4th-6th January 2010. Although 20 eligible suppliers of bulk explosives and 26 eligible suppliers for cartridge explosives and accessories participated in mock bids held on 31.12.2009 to 02.01.2010, except for two, namely, Shri Krishna Explosives and Premier Explosives Limited, no other explosive suppliers including the Opposite Parties 1 to 10
named in the information, participated in the electronic reserve auction process for supply of bulk explosives.

8.28 For the reverse auction held on 5th January 2010, no bidder offered the price bids. In the auction held on 6th of January although a large number of bidders offered price bids for detonators and cast boosters, for other related items no body participated. The bidders logged in the system, however, they did not offer the price bids.

8.29 The Commission notes from the records that none of ten firms mentioned in the information participated in the reverse auction held on 4th and 5th of January 2010 for supply of bulk and cartridge explosives.

8.30 The explosive suppliers informed the management of the informant company that they were hesitant to participate in the auction since as per draft rule issued during that period issued by the Ministry of Home Affairs, Government of India, they were apprehensive that there will be huge cost incidence on account of the price of Ammonium Nitrate and they wanted some time before they could analyse the whole matter in order to participate in the reverse auction.

8.31 The records also reveal that the suppliers approached the officers of the informant company in writing to say that the ceiling price was incorrectly fixed which had made bidding uneconomical. The two suppliers, GOCL and Blastec India Limited Pvt. Limited wrote identical letters dated 7th
January 2010 explaining why they did not participate in the aforesaid reverse auction. The fact that the bidders wrote identical letters reveal a meeting of mind among them. Later on, however, the bidders participated in the reverse auction held on 15th January 2010. In the said auction, the bid prices fell substantially below the ceiling price, which establishes that the argument of bidders that they had not quoted during reverse auction held during 4th-6th January 2010 was not valid.

8.32 In view of aforesaid the Commission observes that there was a concerted action among the Opposite Parties No. 1-10 named in the information not to participate in the reverse auction held during 4th-5th January 2010 for supply of bulk and cartridge explosives. This act of explosive suppliers has caused collective boycott of auction process and manipulation of the process of bidding which is in violation of the provisions of section 3(3)(b) of the Act.

8.33 The Commission holds that the aforesaid act of the Opposite Parties No.1 to 10 named in the information has resulted into violation of provisions of section 3(3)(d) of the Act besides the provisions of section 3(3)(b) of the Act. The provisions of section 3(3) of the Act state as under;

"(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels,
engaged in identical or similar trade of goods or provision of services, which—
(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding,

shall be presumed to have an appreciable adverse effect on competition:

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in subsection (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.”

8.34 The acts and conduct of the Opposite Parties of boycott of e-reverse auction when seen together with the past conduct of quoting identical rates and controlling the supply of explosives in the years 2004-05, 2005-06 and 2006-07, clearly establish that they are with a view to manipulating the process of bidding in violation of section 3(3)(d) of the Act. As a result of the action of the explosive suppliers, the e-reverse auction had to be rescheduled, thus, adversely affecting the bidding process. Such acts of the explosive suppliers have also caused limit in supplies of the explosives to the informant company in contravention of provisions of section 3(3)(b) of the Act.
9. The aforesaid act and conduct of the OPs has also caused Appreciable Adverse Effect on Competition in the market since the Opposite Parties No. 1 to 10 named in the information control about 75% of the market share as per data furnished by the informant and by boycotting a competitive bidding process a large part of the market has been foreclosed for a fair and free competition. Further, not only competition has been adversely effected but interest of the informant as a consumer has also been harmed since boycott of auction process has caused delay in finalization of contracts through a process of price discovery and has resultantly limited supplies of the explosives in contravention of provisions of section 3(3)(b) to the suppliers.

10. **Order under section 27 of the Act**

10.1 The Commission has found the act of boycott of e-reverse auction by the explosive suppliers as violative of the provisions of section 3(3)(b) and section 3(3) (d) of the Act. The informant in the information has given the details of only ten explosive suppliers as the contravening parties. The details of all other parties who were technically qualified but did not submit price bids during reverse auction held during 4th – 6th January 2010 are not made available. In present circumstances, the Commission deems it fit to
take action against the ten parties named in the information for contravention of the provisions of the Act.

10.2 Accordingly, the Commission decides to impose penalties at rate of 3% on average of three years turnover on the ten opposite parties named in the information under section 27(b) of the Act as under:

<table>
<thead>
<tr>
<th></th>
<th>Turnover in year ended on 31.03.2009 (in Rs.)</th>
<th>Turnover in year ended on 31.03.2009(in Rs.)</th>
<th>Turnover in year ended on 31.03.2010(in Rs.)</th>
<th>Average of three years Turnover (in Rs.)</th>
<th>3 % of penalty on average of three years turnover (in Rs.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Gulf Oil Corporation Ltd</td>
<td>8,332,152,000</td>
<td>9,958,884,000</td>
<td>10,656,594,000</td>
<td>9,649,210,000</td>
</tr>
<tr>
<td>2</td>
<td>Ideal Industrial Explosives Ltd</td>
<td>366,645,748</td>
<td>715,406,656</td>
<td>572,594,867</td>
<td>551,549,090</td>
</tr>
<tr>
<td>3</td>
<td>Solar Industries Ltd</td>
<td>1,822,900,000</td>
<td>4,499,910,000</td>
<td>5,020,248,000</td>
<td>3,781,019,333</td>
</tr>
<tr>
<td>4</td>
<td>Blastec India Private Ltd</td>
<td>311,357,183</td>
<td>313,801,396</td>
<td>223,935,659</td>
<td>283,032,746</td>
</tr>
<tr>
<td>5</td>
<td>Indian Explosives Ltd.</td>
<td>3,100,990,000</td>
<td>3,912,814,000</td>
<td>3,828,508,000</td>
<td>3,614,104,000</td>
</tr>
<tr>
<td>6</td>
<td>Emul Tek Private Ltd</td>
<td>837,860</td>
<td>1,332,494</td>
<td>687,241</td>
<td>9,52,532</td>
</tr>
<tr>
<td>7</td>
<td>Regenesis Industries Pvt Ltd</td>
<td>400,270</td>
<td>338,436,339</td>
<td>621,603,370</td>
<td>320,146,60</td>
</tr>
<tr>
<td>8</td>
<td>Black Diamond Explosives Ltd</td>
<td>56,703,000</td>
<td>354,777,000</td>
<td>519,423,000</td>
<td>310,301,000</td>
</tr>
<tr>
<td>10</td>
<td>Keltech Energies Ltd.</td>
<td>846,546,000</td>
<td>1,151,778,000</td>
<td>1,119,383,000</td>
<td>1,039,235,666</td>
</tr>
</tbody>
</table>
10.3 The information regarding financials of Regenesis Industries Pvt. Ltd., Black Diamond Explosives Ltd. and Techno Blasts India Ltd. has been obtained from MCA-21 since they were not provided by them in course of proceedings. Techno Blasts India Limited has been amalgamated with Regenesis Industries Ltd. with effect from January 2010. Details as available till 2009 have been taken for the purposes of its turnover.

10.4 The Commission also directs the Opposite Parties to ‘cease and desist’ from engaging in practices of manipulating process of bidding in any manner.

11. Secretary is directed to convey the decision of the Commission to the Parties accordingly.