

COMPETITION COMMISSION OF INDIA

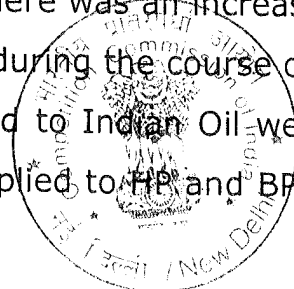
Dated: 24.2.2012

Case No. 03 of 2011

In re: suo-moto case against LPG cylinder manufacturers

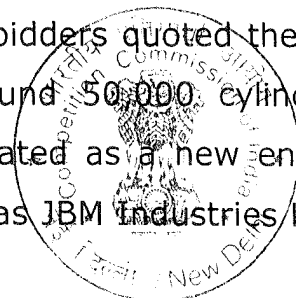
As per R. Prasad (separate order)

I have perused the orders passed by the majority of the members. I am in agreement with them that there is a case of bid rigging. But there is also a case of price fixing present in this case. Indian Oil had come out with the tender for the supply of 14.2Kg. gas cylinders. Nearly 50 persons applied for the tenders and the DG found that at the time of submitting the tender documents the application on their behalf was submitted by six agents of the different suppliers. These agents were the agents of the cylinder manufacturers and the tender documents must have been filled in by them after interacting among themselves as well as the principals. There are only three buyers of 14.2kg cylinders and they are IOC, BP and HP. Before the tenders were opened all the members used to meet and discuss the details of the tenders submitted by them and naturally the rates at which the tenders were given. Indian Oil in the tender documents took upon itself the right of allotting cylinders to the L1 bidder but the rates were normally lowered by Indian Oil to a rate below the bid price. As each of the bidders did not have the capacity to supply all the cylinders demanded by the Indian Oil, Indian Oil used to contact L2 and L3 bidders and asked them to supply gas cylinders at the rates fixed for the L1 bidder. Investigation has revealed that the rates increased from the financial year 2006-07 to 2010-11 by an amount of 36%. Even between the years 2009-10 to 2010-11 there was an increase in the rates of supply. Incidentally it was discovered during the course of hearing that the rates at which cylinders were supplied to Indian Oil were lower than the rates at which the cylinders were supplied to HP and BP. Incidentally



HP and BP handle the tenders through a process of E-bidding. The DG also found that the cylinder manufacturers had an Association and further that the manufacturers used to hold a meeting prior to the opening of the tender. In the view of the D.G., holding of such a meeting amounted to an agreement in respect of fixing prices or bid rigging. But it was argued during the course of hearing that only 19 persons had attended the meeting held prior to the opening of the bid, whereas the tenderers were 50 in number. It was therefore argued that all the persons could not be part of a consortium for bid rigging. The majority has held that though the other persons who did not attend the dinner could not be identified but the quoting of the same price in the bids shows that there was a meeting of minds even though the persons did not attend the dinner. Thus, there appears to be a case of price-fixing also.

2. In the case the JBM Industries Ltd. and the Punjab Cylinders Ltd. it has been held that they were not members of LPG Cylinder Manufacturers Association. It was also held by the majority that there was no evidence of verbal communication with the other bidders for the supply of gas cylinders. In the case of 29 other parties, leaving out the 19 who attended the dinner, there was no material to hold that they attended the dinner meeting. There is also no material to hold that JBM Industries Ltd. and Punjab Cylinders Ltd. attended the meeting at Mumbai on 01.03.2010. Thus the view which has to be taken in the case of 29 parties has to be taken in these two cases also. In the course of the hearing it was stated on behalf of JBM Industries Ltd. that the LPG business constituted only 4.8% of total turnover and for this reason there was no necessity for the company to be a part of any cartel. This company did not participate in the bidding in the Financial Years 2008-09 and 2009-10. The rates quoted by this company were similar to the rates quoted by other manufacturers in the State of U.P. It was explained that this could be due to the fact that due to corporate espionage the other bidders quoted the same rate. JBM Industries Ltd. got an order of around 50,000 cylinders in the Financial Year 2010-11 because it was treated as a new entrant in the bidding process. The majority view is that as JBM Industries Ltd. was not



a member of LPG Cylinder Manufacturer Association and as there was no evidence to hold that it had attended the meeting on 01.03.2010, no case is made out against JBM Industries. In my opinion no material has been found by the DG that other 29 participated in the bid process had participated in the dinner on 01.03.2010. But it has been held in their case that as they had quoted identical rates, they were part of a cartel or part of an anti-competitive agreement which led to bid-rigging and price fixing. In this case of JBM Industries Ltd. as the rates quoted was the same as in the case of the other bidders there is material to come to the conclusion that it had participated in the bidding after consulting the other bidder. Further a consistent view has to be taken and no other view can be taken on similar facts for any other bidder. Otherwise, all the bidders would claim that they suffered from industrial espionage and they were not involved in bid-rigging. Another fact to be noticed is that the tender papers in all the cases were deposited by six brokers in Mumbai. This also is an indication of bid rigging. Under the provisions of Section 3(3) of the Act as JBM Industries Ltd. had not been able to discharge the onus cast on it to establish that it had not indulged in bid rigging, it has to be held that it had indulged in price fixing and bid rigging.

3. As far as the Punjab Cylinders Ltd. is concerned it was argued that it had not participated in the bidding for the Financial Year 2009-10. It was also stated that it had not received any orders in the last four years. It was also stated that its bid were not matching the price offered by the other bidders. A perusal of the bid document shows the following facts for different regions:

Table 1: Submission of bids by various parties for the State of J& K

S. N.	Name of Bidders	Offered Qty (In cylinders)	J&K	
			Qty.	NDP
			62000	
1.	Gopal Cylinders	220000		1115
2.	Punjab Gas Cylinders Ltd.	168000		1116

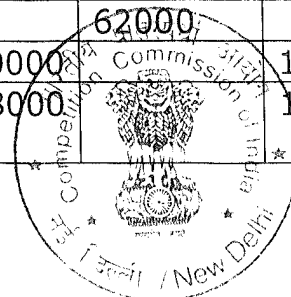
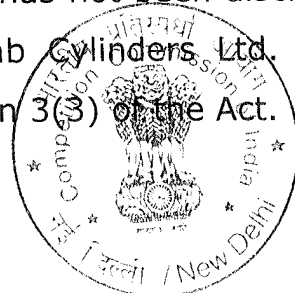


Table 2: Submission of bids by various parties for the State of Himachal Pradesh

S. N.	Name of Bidders	Offered Qty (In cylinders)	Himachal Pradesh	
			Qty.	NDP Amount (In Rs.)
			155500	
1.	Krishna Cylinders	190000		1090
2.	Punjab Gas Cylinders Ltd.	168000		1090.5

Bid documents for various regions where Punjab Gas Cylinders Ltd. submitted its bids shows that the arguments advanced are not correct. A perusal of the rates quoted by Punjab Gas Cylinders Ltd. is concerned, it is seen that in the States of Jammu & Kashmir and Himachal Pradesh its bid price had matched the prices of the other bidders which were Gopal Cylinders and Krishna Cylinders respectively. In the case of Rajasthan, its bid was the highest among all the seven bidders. Further if the quantity of cylinders supplied was higher the lower would be the bid price. Punjab Cylinders may not have attended the meeting on 01.03.2010 and may not be a member of Cylinder Manufacturers Association but the fact is that its price is similar to that all other bidders in Jammu & Kashmir and Himachal Pradesh. In the case of 29 bidders no material was not found about their participation in the dinner meeting but the Commission has held that by disclosing identical prices they were part of bid rigging. Similar view has to be taken in the case Punjab Cylinders Ltd. As the price offered in the bids by Punjab Cylinders Ltd. was the same as in the case of other bidders, there is material to hold that it had indulged in bid rigging. Further the explanation furnished by Punjab Cylinders Ltd. was not correct and the onus cast on it by law has not been discharged. There is therefore material to hold that Punjab Cylinders Ltd. had indulged in anticompetitive behaviour under Section 3(3) of the Act.



4. Under section 3(3) of the Competition Act any agreement entered between enterprises / association of enterprises or persons / association of persons or between any person or enterprise is presumed to cause an appreciable adverse effect on competition provided clauses (a), (b), (c), and (d) of the section are found to exist. The section also presumes and brings into force a legal fiction according to which a decision taken by an association of enterprises / persons or a practice carried on by them is placed on par with agreement. The section then brings in a rebuttable presumption according to which the infraction of law is established. But if the parties discharge the onus cast on them by law that they are not covered under the relevant provisions of the Act, then the onus shifts on the Commission. The explanation to the section reads as follows:

Explanation – For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (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.

The issue to be decided is whether in this bid rigging, if there was a bid-rigging, either competition has been eliminated or reduced. The next issue to be seen is, does the bid rigging adversely affects the process of bid-rigging or the manipulation the process of bidding. Further under the provisions of Section 3(3) of the Act as appreciable effect on competition is deemed there is no necessity to examine the provisions of section 19(3) of the Act. A perusal of the facts discussed above and the order of the majority of the members it is seen that in the process of bidding there has been no elimination of reduction of competition for bids. The next issue is to whether the bidding process has been adversely affected or manipulated by the bidders. Incidentally Indian Oil has not found that the bidding process had been adversely affected or manipulated. Otherwise Indian Oil would have cancelled the entire bidding process. It could also mean that Indian Oil was a party to the entire bidding process. Incidentally Indian Oil was not examined on this issue either by the DG or

by the Commission in this case. Incidentally an official of Indian Oil was examined in the case of Pankaj Cylinders case no. 10 of 2010 but the official was unable to explain the similar / identical price given in the tenders. This case has emanated from Pankaj Cylinders. In any case by fixing the prices and bidding there has been an adverse effect on the entire process of bidding.

5. This is so because the correct price of the product would not be known. The bidding would be at a price fixed by all the bidders. This defeats the main purpose of the bidding process and no gain is likely to accrue to the tenderer. In fact, it shows an anticompetitive behaviour on the part of the bidders. It is a pernicious behaviour on the part of the bidders. For this reason, the Parliament has placed such behaviour under Section 3(3) of the Act where the onus has been shifted from the Commission to the bidders.

6. Therefore a case is made out not only under section 3(3)(d) of the Act but also under section 3(3)(a) of the Act. Further this procedure of bidding is going on for the last many years and as this procurement practice is followed every year it can also be regarded as a practice under the Competition Act.

7. If it is a practice, then also it is covered under Section 3(3) of the Act. In case of price parallelism it is necessary to show plus factors. In this case, plus factors exist as the tenders papers were submitted by a total number of six brokers. Further, meetings were held at the time of the opening of the bids where prices and tender details were discussed. There was therefore in existence an idea on the part of the bidders to defeat the whole process of bidding by quoting the same rates. As far as practice is concerned, if the Commission establishes that there was a practice, then it is not necessary to establish that there was a concerted practice. Under the American and European jurisdictions, concerted practice can be regarded as an anticompetitive behaviour if it creates an anticompetitive situation. But under the Indian competition laws, it is not necessary to establish concerted behaviour. The only issue to be seen is

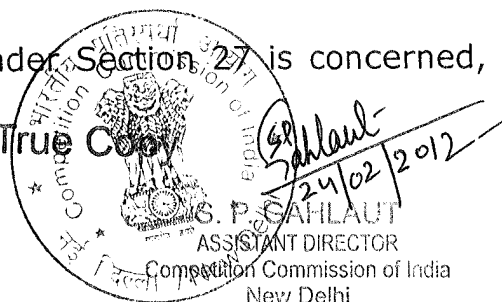


whether it creates any appreciable adverse effect on competition in India. But under Section 3(3) of the Act if practice and bid rigging are established, then the onus is on the opposite parties to establish that they have not indulged in such practice or bid rigging. If the onus is not discharged then appreciable adverse effect on competition is established.

8. The next issue to be decided is as to whether the bidders had discharged the onus that they had not entered into bid rigging and price fixing. In this particular case, on the basis of the material gathered there is material to hold that a practice was being followed by the bidders every year. Further, no reason was given as to why identical prices were offered in the bids. This is further compounded by the fact that the bidders held meetings before the bids were opened where prices were discussed. This leads to the conclusion that an agreement existed among the bidders. There is also material to hold that this practice was carried out by the bidders at the time of every tender. The onus cast by law has not been discharged by the cylinder manufacturers. As the onus has not been discharged, rebuttal does not exist. Therefore under the presumption in Section 3(3) of the Act, as price fixing and bid rigging are established, it has to be presumed that there has been appreciable adverse effect on competition. There is no necessity examine the factors mentioned in Section 19(3) of the Act. Thus, contravention of Sections 3(3)(a) and 3(3)(d) is established.

9. As far as the penalty under Section 27 is concerned, I agree with the majority view.

Certified True Copy



(R. Prasad)
Member