



8th July 2013

Secretary to the Prime Minister,
Prime Minister Secretariat,
Islamabad.

Sub: Efforts to amend application of Public Procurement Rules 2004 to award Contracts without inviting tenders to Chinese Contractors

Dear Sir,

Transparency International Pakistan has received a complaint that Chairman PPRA, Secretary Finance is again working on a proposal to amend the Public Procurement Rules 2004, so as to allow the award of contract without inviting open tenders.

This is to inform the Prime Minister that in June 18th 2011 also the same Chairman PPRA (Secretary Finance) tried to accommodate award of contracts based on the MoUs with foreign organizations during President's and Prime Minister's foreign trip, (particularly Safe City Contract dated 2009) an amendment quoted below, on the application of Rule 5 was made, and an SRO 719(I)2011 was issued namely Public Procurement Regulations 2011.

3. International and inter-governmental commitments of Federal Government.- "Whenever a sponsoring Ministry/Division is of the view that prospective procurement are required to be made by invoking rule-5 of public Procurement Rules, 2004, it shall bring a case to the ECC after undertaking due consultations with the stakeholder Ministries/Divisions/Departments etc. as prescribed in the Rules of Business, 1973. The ECC shall consider such case(s) and authorize, or otherwise the sponsoring Ministry/Division whether or not to proceed in terms of rule-5 of the Public Procurement Rules, 2004".

However, due to consistent monitoring of all contacts by TI Pakistan, and various decisions of the Supreme Court of Pakistan e.g. Safe City, the previous government could not approve any contract based on MoU signed with Chinese and Turkish Contractors. It is requested that the Prime Minister shall ensure that no such effort be repeated by the Secretary Finance, as similar advises by the Secretary Finance has caused many corruption cases against the previous government, and he did not act to stop illegal awards of contracts by EOBI, NICL, NADRA, Pakistan Railways, CDA, NHA, according to the mandate entrusted to him as Chairman PPRA.

The law requires that open tenders have to be invited for all projects for which MoUs worth billion of dollars have been signed with Chinese Contractors during the Prime Minister of Pakistan, Chief Ministers of Punjab and Balochistan.

Amendment in the Rules are unconstitutional and is against the PPRA Rule No 4, and any contract awarded without competitive bidding is illegal. Rule 4 is follows:

4. Principles of procurements.- Procuring agencies, while engaging in procurements, shall ensure that the procurements are conducted in a fair and transparent manner, the object of procurement brings value for money to the agency and the procurement process is efficient and economical.



TI Pakistan sent this complaints objecting to the said amendment in Rule 5 of Public Procurement Rules 2004 to the Secretary Finance on 28-3-2011 and also to the Principal Secretary to the Prime Minister on 4 April 2011 and 17 June 2011.

Niether the Secretary Finance nor PSPM responded to TI Pakistan's letters, but it is reported that agreeing with TI Pakistan, the ex Prime Minister refused to approve the summary and returned the summary to PPRA, but it was reported to TIP that later on the Chairman PPRA on his own imitative changed the Law.

Transparency International Pakistan in 2011 received a complaint that this amendment was proposed in order to accord the post facto approval of US \$ 124 million Safe City Contract awarded to a Chinese Contractor M/s Huawei Technologies in the third week of December, by the ex Prime Minister of Pakistan, at alleged 3 times the market price. The Award of Contract without Tendering had reportedly been approved by the ex Prime Minister and was endorsed by the Cabinet in a Meeting held on 14th March 2011. Refer to minutes of the cabinet Case No 55/06/2011. The Contracts to M/s Huawei Technologies was awarded to M/s Huawei Technologies on 17 December 2010 under the Loan Agreement on the Safe City Islamabad Project signed between Pakistan and EXIM Bank of China by Secretary EAD Sibtain Fazal Haleem and Vice President, China Exports and Import Bank Li Jun. The real cost of safe city Islamabad project expressed in Planning Commission's standard criterion i.e. Net Present Value (NPV) terms is competitive prices @ \$ 72 million, instead of the nominal amount of \$ 124.7 million.

Supreme Court in August 2012 ordered that the contract dated 29.12.2009 is illegal and invalid having been executed in violation of the mandatory provisions of the Public Procurement Rules, 2004, as the exemption therefrom purportedly granted under Rule 42 (c)(v) ibid was based on extraneous and irrelevant reasons and therefore of no legal effect or consequence. The entire transaction was carried out in a nontransparent manner and for a cost which appears to be inflated. Consequently, the respondent-Government is directed to reinstate the process for the procurement of the required equipment, software and services in a fair, just, rational and transparent manner, strictly in accordance with the provisions of the Public Procurement Regulatory Authority Ordinance, 2002 and the Public Procurement Rules, 2004 and the law. Needless to say that the respondent-Company would be at liberty to participate in such de novo process of procurement. The respondent-Government shall also take all necessary steps permitted by law to safeguard and protect itself from any liability under the Contract dated 29.12.2009

The apex court has also ordered let a copy of this judgment be sent to the Chairman, National Accountability Bureau, who shall ensure that appropriate proceedings are initiated in accordance with law.

The Supreme Court has also interpreted that the Loan Agreement dated 17.12.2010 also does not attract Rule 5 ibid as the Export-Import Bank of China is not an international financial institution. The latter term has not been defined in the Rules of 2004 or the Ordinance, 2002 whereunder the same were framed and therefore must be given its ordinary meaning as used in common parlance. The term refers to an International Organization and not a commercial bank based abroad. Reference is perhaps being made to the World Bank, the Asian Development Bank, International Monetary Fund and International Finance Corporation, etc.

This is to point out that according to PPRA Rules even the Pakistan State Companies, like NLC, FWO, NESPAK, Railcorp, etc can not be awarded unsolicited contracts. In the famous case of award of Rs 8 billion contracts to NLC bases on an MoU, in writ petition no.3387/2012, Islamabad High Court on 28 March 2013 ordered as under.



In view of the above discussion, Writ Petition Nos.3387, 3724/2012 and 582/2013 are allowed. I declare that assigning of work to Respondent No. 5 i.e NLC is illegal, unconstitutional, besides the PPRA Ordinance 2002 and PPRA Rules 2004, dictums laid down by the august Supreme Court, offensive to the universally accepted principle of fairness, honesty, transparency, openness and is result of colourable exercise of authority, irrelevant considerations, a naked corruption, polluted mannerism, offensive to public ex-chequer and an infringement to constitutionally guaranteed fundamental rights. It is also declared that assigning of work to NLC is glaring example of discrimination, favouritism, nepotism, ulterior motives and stinking approach to advance personal agenda.

It is further directed that copies of this judgment be sent to Chairman NAB for initiating proceedings against all those persons involved in big scam, including the then Prime Minister, his Principal Secretary, Secretary Ministry of Housing & Works and all the official of Pak PWD who abetted, aided and executed the illegal orders issued on behalf of the then Prime Minister and officials of NLC, who remained involved in obtaining assigning of work of development projects.

TI Pakistan request that the Regulations 2011 shall be cancelled, and an effort for the purpose to amend Public Procurement Rules, 2004 to circumvent rules and award unsolicited projects shall not be entertained by the Prime Minister.

The advantage of Public Procurement Rules, 2004 can be seen from performance of Punjab Government, who under advice of TI Pakistan adopted the Public Procurement Rules, 2004 and on 1 June 2009 notified Punjab Procurement Rules, 2009. In 2011/12, Laptop project, Ujala Project and the Metro Bus Project was implemented at the lowest cost, and the 27 Contracts of Metro Bus Projects were awarded in compliance to Punjab Procurement Rules 2009, and works completed in 9 months.

Instead of amending the PPRA Rules, Federal government may consult the Punjab Chief Minister on how to implement Rules Transparently and achieve the best results.

Transparency International Pakistan is striving for the **Rule of Law** in Pakistan which is the only way to stop corruption.

Regards,



Syed Adil Gilani
Adviser

Copies forwarded with urgent request for action to be taken to implement Rule of Law, before PPRA Ordinance and Public Procurement Rules 2004 are converted to an ineffective Ordinance and Rules to,

1. Chief Minister, Punjab, Lahore.
2. Chief Minister Balochistan, Quetta.
3. Registrar, Supreme Court Pakistan, Islamabad.
4. Director General NAB (A&P), Islamabad. With request to kindly take action as per IHC Orders of 28March 2013.
5. Managing Director PPRA, Islamabad.