



17th November 2011

Chairman,
Port Qasim Authority,
Port Qasim,
Karachi.

Subject: Complaint on alleged illegal Award of Oil Terminal on BOO to FOTCO in 1992 and efforts to award Second Oil Terminal to FOTCO without Open Tendering- TIP Letters to Chairman PQA dated 08-03-2011, 15-03-2011, 21-03-2011, 25-04-2011, 15-05-2011, 02-07-2011 & 08-03-2011 and PQA replies dated 14-03-2011, 18-03-2011, 01-04-2011 & 10-05-2011.

Sir,

With reference to the above subject, TI-Pakistan has been informing the Port Qasim Authority through a series of letters that its alleged action to award Oil Terminal to FOTCO without open tendering is in violation of the Public Procurement Rules 2004. Rule 21 is quoted below for your information;

21. Open competitive bidding.- *Subject to the provision of rules 22 to 37 the procuring agencies shall engage in open competitive bidding if the cost of the object to be procured is more than the prescribed financial limit which is applicable under the sub-clause (i) of clause (b) of rule 42.*

Kindly note that in case PQA awards this contract to FOTCO without following provisions of the PPRA Ordinance 2002, Public Procurement Rules 2004 and the Competition Act 2010, TI-Pakistan reserves its right to file a reference against Chairman and all Members of the Board of Port Qasim Authority for committing violation of Public Procurement Rules 2004 with the Supreme Court of Pakistan and / or National Accountability Bureau. Such acts also come under Rule 2(f) of the Public Procurement Rules 2004, quoted below for your reference;

2. Definitions.- (f) "corrupt and fraudulent practices" includes the offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official or the supplier or contractor in the procurement process or in contract execution to the detriment of the procuring agencies; or misrepresentation of facts in order to influence a procurement process or the execution of a contract, **collusive practices among bidders (prior to or after bid submission) designed to establish bid prices at artificial, non-competitive levels and to deprive the procuring agencies of the benefits of free and open competition and any request for, or solicitation of anything of value by any public official in the course of the exercise of his duty;**



TI Pakistan is for across the board application of the Public Procurement Rules 2004.

Regards,

Syed Adil Gilani
Adviser

Encl: TI-Pakistan's letter dated 08th August 2011.

Copies forwarded for the information of:

1. Chairman, Public Accounts Committee, Islamabad.
2. Chief of Army Staff, Rawalpindi.
3. Chairman, NAB, Islamabad.
4. Registrar, Supreme Court.
5. Auditor General, Islamabad.
6. Managing Director, PPRA, Islamabad.



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Advisory Committee

8th August 2011

Muhammad Saleem Khan,
Secretary,
Ministry of Ports & Shipping,
Government of Pakistan,
Islamabad

Sub: Complaint on alleged illegal Award of Oil Terminal on BOO to FOTCO in 1992 and efforts to award Second Oil Terminal to FOTCO without Open Tendering.
TIP Letters to Chairman PQA dated 8-3-2011, 15-3-2011, 21-3-2011, 25-4-2011, 15-5-2011 and 2-7-2011, and PQA replies dated 14-3-2011, 18-3-2011, 1-4-2011 & 10-5-2011

Dear Sir,

Transparency International Pakistan on 3th March 2011 has informed PQA about a complaint that PQA is in process of awarding Second Oil Terminal to FOTCO without inviting Public Tenders.

TIP Six letters and PQA four replies are enclosed. PQA has not been able to reply to the TIP letters dated 15 May 2011 and 2 July 2011, which has pointed out the Orders of CCP dated 29 June 2011 on the Violation of Competition Act 2010, Agreement between Port Qasim Authority and Engro Vopak Terminal Limited.

According to the CCP ACT 2010, PQA is not allowed to grant Exclusive rights to any one pursuant to any Implementation Agreement, as it create entry barriers for new entry and prevents competition, which is not allowed under CCP Act 2010.

PQA/FOTCO Agreement dated 8 December 1992 includes following Article, which was not included in the Tender Documents issued to Bidders in 1991.

3.13.3 In the event that PQA decides to expand the petroleum products and crude oil handling facilities at Port Qasim through Private Sector participation then company shall have the first right to enter into negotiations with PQA for said expansion. If the Company and PQA are unable to reach agreement on said expansion, then PQSA shall have the right to offer said expansion to third parties.

On a similar Article in the IA of PQA and Engro Vopak Terminal Limited CCP Order dated 29 June 2011 paragraph 37 adjudicates application of Article 3 Competition Act, 2010. The order is quoted below.

37. Exclusive rights granted to EVTL pursuant to the Implementation Agreement create entry barriers for any new entry and prevents competition in respect of handling and storage of chemicals at Port Qasim for 30 years.

Quoted below is a report from daily times 2 July 2011.

"PQA has been directed to take immediate action to address the competition concerns stipulated in the order regarding the agreement within a given time frame. Failure to comply with the aforesaid directions shall make PQA and EVTL further liable for a penalty of Rs 1 million for each day default. Exemption has been granted subject to the conditions imposed by CCP. Such failure will constitute a breach of conditions having the effect of cancellation of the exemption. Moreover, PQA has been directed to seek exemption in respect of all of its agreements granting concessionary rights to private undertakings."



It has been confirmed by PQA in its replies to TIP that the terms and conditions of the Tender had been amended by PQA after the Tender Opening, by adding following three major changes giving undue advantage to FOTCO Agreement, not offered to others in the tender documents.

1. Perpetual period allowed to FOTCO to operate the Oil Terminal forever.
2. No other party shall be allowed to built another Oil Terminal in PQA at all times to come, except with option of FOTCO to refuse first.
3. Guarantee for 4000,000 tons of oil annual throughput.

TIP would like to inform the Secretary that PQA Legal Advisor is misguiding PQA to take support of Board of Investment Gridlines for allowing above three post tender amendments/concessions allowed to FOTCO. The BOI guidelines for BOT/BOO Project were issued in 1998, vide MOF Ref No. A.F.1 (25) - EF (Inv.) /97 - 729 Islamabad, on August 12, 1998, whereas the Tender for Oil terminal was issued by PQA in 1991/1992.

The clarifications of PQA Legal Advisor also raises the issue that the renders awarded to FOTCO in 1992 as illegal.

TIP would also like to quote the Supreme Court decision on a Pakistan Steel Mill case in 2005 is not related with PPRA Rules, and declare that the change of tendered terms and awarded terms, is one reason of nullifying the contract agreement in following words in the Judgment of the Supreme Court in Pakistan Steel Mills privatisation case announced in August 2006

Whether the final terms/concession offered to the highest bidder/consortium on 31.03.2006 were in accord with the terms and conditions of initial public offering given to the potential bidders through advertisement dated 19.10.2005 and if not whether these can be justified on the touchstone of law and "reasonableness"?

However, the process of privatization of Pakistan Steel Mills Corporation stands vitiated by acts of omission and commission on the part of certain State functionaries reflecting violation of mandatory provisions of law and the rules framed thereunder which adversely affected the decisions qua prequalification of a member of the successful consortium (Mr. Arif Habib), valuation of the project and the final terms offered to the successful consortium which were not in accord with the initial public offering given through advertisement.

For the foregoing reasons, the Letter of Acceptance (LoA) dated 31st March, 2006 and Share Purchase Agreement dated 24th April, 2006 are declared as void and of no legal effect."

Transparency International Pakistan request the Secretary to examine and address following issues;

1. The issues of illegality in award of Oil Terminal to FOTCO in 1992 due to post tender changes in the terms and conditions in light of the Supreme Court Orders in 2005 in case of Pakistan Steel Mill.
2. Invite public tenders for Second Oil Terminal as required under CCP Act section 3.

Yours sincerely,

Syed Adil Qilani
Advisor & Procurement Specialist

Copy forwarded for the information of

1. Chairman, PQA, Islamabad
2. Registrar Supreme Court of Pakistan, Islamabad
3. Chairperson, Competition Commission, Islamabad
4. Chairman, PQA, Karachi
5. DG P&D, PQA, Karachi