TRANSPARENCY
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Advisory Committee

02nd July 2011

Chairman,
Port Qasim Authority,
Bin Qasim, Karachi.

Sub: Violation of Competition Act 2010, Agreement between Port Qasim Authority and Engro Vopak Terminal Limited- Business Recorder News Story dated 02nd July 2011.

Dear Sir,

Transparency International Pakistan is waiting for a response from Port Qasim Authority to its letter dated 15th May 2011, about the efforts to illegally award Second Oil Terminal to FOTCO without tendering. Since last 45 days, PQA has been unable to respond to TIP about this matter.

This is strange that PQA was already facing similar issue in case of contract awarded to Engro Vopak Terminal Limited, and inspite of the issue, PQA is trying to justify the illegal award Second Oil Terminal to FOTCO without tendering (Annex-A). PQA needs to re-examine its Legal Advisor.

We would like to refer to the Competition Commission of Pakistan's action of imposing penalty of Rs 1 caror against PQA awarded contract to Engro Vopak Terminal about similar violations. CCP has declared that PQA entered into an agreement with EVTL to handle and store all liquid chemicals at Port Qasim and it appears to have an object to prevent, restrict and reduce competition within the relevant market unless exemption is sought under Section 5 of the Competition Act 2010. According to the news report published in "Business Recorder", "PQA has failed to carry out due diligence to determine the competition indicators and short comings of the market".

TI-P refers to the Competition Commission of Pakistan's S.R.O 51(1)/2008 dated 15th January 2008, requiring all undertakings to seek exemption within 90 days from the date of issuance of General Order.

PQA is suggested to refrain from proceeding further on negotiations to award the Second Oil Terminal to FOTCO, and immediately invite public tenders.

You are also requested to ensure that all relevant laws, including the Public Procurement Rules 2004 and the Competition Act 2010, are followed in the procurements of your organization.

TI Pakistan is striving to have Rule of Law in Pakistan.

With Regards,

Syed Adil Gilani
Chairman
Advisory Committee

Copies forwarded for the information of:
1. Chairman, Public Accounts Committee, Islamabad.
2. Secretary, Ministry of Ports and Shipping, Islamabad.
3. DG , NAB, Sindh, Karachi.
4. Registrar, Supreme Court.
5. Auditor General, Islamabad.
6. Managing Director, PPRA, Islamabad.
7. All Board Members of PQA.

BUSINESS RECORDER

02nd July, 2011

Failure to seek exemption: CCP slaps Rs 10 million penalty on EVTL

July 02, 2011
The Competition Commission of Pakistan (CCP) has imposed penalty of Rs 10 million on Engro Vopak Terminal Limited (EVTL) for the company's failure to seek exemption under Section 5 of the Competition Act, 2010. According to an order issued by the CCP here on Friday.

The CCP bench comprising Chairperson Ms Rahat Kaunain Hassan, Member, Ms Vadiyya Khalil and Member, Dr Joseph Wilson, passed an order on June 29, 2011 in respect of the proceedings initiated against Engro Vopak Terminal Limited (EVTL) and Port Qasim Authority (PQA) for entering into a prohibited agreement in violation of Section 4 of the Act, whereby a penalty of Rs 10 million has been imposed on Engro Vopak Terminal Limited (EVTL) for its failure to seek exemption under Section 5 of the Competition Act, 2010.

The 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 will 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.

The CCP took notice on its own of exclusive rights granted to EVTL through a concessionary agreement entered into by and between PQA and EVTL to handle and store all liquid chemicals at Port Qasim (the "Concession Agreement") for 30 years which appeared to have an object or effect to prevent, restrict and reduce competition within the relevant market unless exemption is sought under Section 5. Show Cause Notices were issued to PQA and EVTL for, prima facie, contravention of Section 4(1) and 4 (2) (a) & (d) of the Act.

Despite General Order issued by CCP and published in the Official Gazette vide SRO 51(I)/2008 dated 15-01-2008 (which required all undertakings to seek exemption within 90 days from the date of issuance of General Order), EVTL raised the objection and remained persistent throughout the proceedings that the Act is not applicable on the Concession Agreement as it was executed prior to promulgation of the Act.

However, PQA filed an application under Section 5 to seek exemption in respect of the Concession Agreement during the course of hearing. The Bench in this order has held that all agreements entered into prior to promulgation of the Act but are continuing and have object or effect to restrict competition within the relevant market, fall within the purview of Section 4 of the Act and are required to seek exemption under Section 5. Therefore, EVTL has been penalised in sum of Rs 10 Million for its failure to seek exemption under Section 5 of the Act.

The bench in its findings has acknowledged that public private partnerships fill the infrastructure gap while effectively addressing technical and financial needs of large projects and also the efficiency gains resulting in terms of economies of scope and scale and acquired synergies that are passed on to the consumers.

However, concerns have been raised that exclusivity under a concession agreement sanctions an extreme market power to the concessionaire that is often prone to be abused and can have an adverse effect on economic growth if competition concerns are not taken into account.

The bench is of the view that competition issues need to be taken into account at the various stages of a concession, including its design, the award process and its execution, as well as in the regulatory framework for the markets concerned. In the given facts and circumstances, it appears that PQA has failed to carry out due diligence to determine the competition indicators and short comings of the market and also to entrust EVTL with certain obligations or impose constraints to prevent any potential abuse of dominance and to achieve the desired general economic interest.

After taking all the facts and circumstances into account, the Bench has granted only conditional exemption with respect to the Concession Agreement and has directed PQA to take immediate action to review the Concession Agreement and incorporate therein effective provisions to address competition concerns stipulated in the Order.

Failure to comply with the aforementioned direction within the given time period shall constitute breach of condition having the effect of cancellation of the exemption and in addition PQA and EVTL shall be liable to pay a penalty of Rs 1 million for each day default.

The bench observed that it is not inclined to interfere with time length of an agreement allowed to a concessionaire which varies between 5 to 30 years, in particular, where agreements have been entered into prior to the competition law coming in force. The bench quoted the words of Lord Goff "we are there to oil the wheels of commerce and not to put a spanner in the works".

However, the Bench held that intervention by CCP is imperative where adverse effects of lessening of competition outweigh any benefits resulting from the grant of concessionary rights and/or there would be a clear violation established under the law in the past impacting competition in the relevant market.

The Bench also took notice of the fact that in the year 2009, there was 21 percent increase in volume of EVTL as compared to the preceding year 2008, however, the profit increased by over

78 percent in sum of PKR 917 million. Having the glimpse of this case, the Bench emphasised the need for regulating concessionary agreements/rights. This is to ensure that while technical or economic progress is made and must be encouraged it shall also allow consumers fair share of the resulting benefit and protect consumers from any anti-competitive behaviour.

Keeping in view the implications/scenario under the Concession Agreement, the bench also observed this apprehension that PQA has awarded all its major terminal on the basis of 30 years BOT which may set a tendency for exploitative and exclusionary practices by concessionaires. Therefore, PQA has been directed apply exemption in respect of all other concession agreements, which will be reviewed by the CCP on case to case basis, CCP added.