



21 March 2011

Chairman,
Port Qasim Authority,
Port Qasim,
Karachi.

Sub: Complaint on Award of Second Oil Terminal to FOTCO

Dear Sir,

Transparency International Pakistan received reply of its letter dated 15 March 2011 from Secretary PQA dated 19th March 2011, regarding the complaint that PQA is awarding Second Oil Terminal to FOTCO without public tendering.

TI Pakistan on the letter of PQA dated 8 March 2011 requested for the following clarification

It is reported that the Implementation Agreement signed between PQA and FOTCO on 8 December 1992, does have a clause No 3.13.3 which gives the first right of refusal to FOTCO in case PQA intends to decides to expand oil handling facilities in the Port. However when the tenders were issued by PQA in October 1991, Guidelines for preparation of proposals did it contain the condition of Right of First Refusal of the BOT Operators, for the knowledge of all bidders.

PQA did not respond to this in its reply date 14 March 2011;

Again through its letter dated 15 March 2011, TIP requested PQA for following

TI Pakistan has requested PQA to examine the complaint issues, and confirm whether the complaint is correct or not, by checking that the provision in FOTCO Agreement are according with the terms and conditions of the PQA Guidelines in 1991 issued to all bidders. Post tender changes in the conditions of government assurances/guarantees, at the time of Agreement are not allowed.

And that the BOO period is 30 years, and this is 19th year of the BOT period. After 11 years PQA has to negotiate new financial terms of FOTCO Implementation Agreement Extension for another period. Was there any limit on PQA not to establish another Oil Terminal independently for next 30 years from 1992?

Secretary PQA has now in its reply dated 19 March 2011 has admitted that this condition which gives the first right of refusal to FOTCO in case PQA intends to decides to expand oil handling facilities in the Port was not announced in the terms and conditions of the PQA Guidelines in 1991 issued to all bidders at the time of tendering. The statement of PQA is quoted below.



Quote

The aspect of First Right to enter into negotiations with PQA for the said expansion was incorporated while negotiating with FOTCO to bring the first investment through private sector.

Unquote

According to the law of Pakistan, the terms & conditions offered at the time of inviting tenders can not be changed after the tenders have been opened for any reason thereto. In this regards, we quote the landmark Judgment of the Supreme Court of Pakistan in the Pakistan Steel Mills privatization case, dated 9 August 2006, as the Award of that Contract was declared illegal on this very ground also.

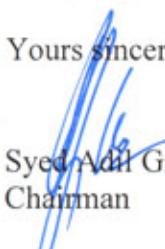
Para 61 (v) Whether the final terms/concession offered to the highest bidder/consortium on 31.03.2006 were in accord with the terms and conditions of initial public offering given to the potential bidders through advertisement dated 19.10.2005 and if not whether these can be justified on the touchstone of law and "reasonableness"?

*Para 4. While exercising the power of judicial review, it is not the function of this Court, ordinarily, to interfere in the policy making domain of the Executive which in the instant case is relatable to the privatization of State owned projects as it has its own merits reflected in the economic indicators. 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."

In view of the Supreme Court orders declaring post tender changes in the terms/condition as void and of no legal effect, and the fact that FOTCO has only 11 years are remaining out of 30 years BOO period, and that too may be an illegal act in view of SC Judgment. it is advisable for PQA not to proceed with negotiation with FOTCO, and invite public tenders in which FOTCO may also participate, so that PQA may be able to award 30 years BOO Contract, instead of a objectionable 11 year contract being negotiated with FOTCO for the Second Oil Terminal .

Yours sincerely,


Syed Adil Gilani
Chairman

Copy forwarded to the DG P&D, PQA for information please.