



25th April 2011

Chairman,
Port Qasim Authority,
Port Qasim,
Karachi.

Sub: Complaint on Award of Second Oil Terminal to FOTCO
TIP Letter dated 8 -3-2011,15-3-2011 & 21-3-2011, and PQA replies dated 14-3-2011, 18-3-2011
& 21-4-2011

Dear Sir,

Transparency International Pakistan has received PQA reply dated 21 April 2011 along with legal opinion of PQA Legal advisor dated 8-4-2011, which has been examined.

TIP would like to highlight ambiguity in the legal opinion with relation to the lame reasons quoted by him.

S. No. 84. Whether the complaint is anonymous or by name, an illegal act if committed remains illegal.

S. No. 87. TIP has quoted Supreme Court decision on a Pakistan Steel Mill case for the portion of change between tendered terms and awarded terms, and one reason of nullifying the contract agreement given in the Supreme Court Order was that the **“final terms offered to the successful consortium which were not in accord with the initial public offering given through advertisement.”**

The advise of PQA legal Advisor to PQA is that “The portion of Supreme Court Order & Judgment quoted by TIP are not decision on question of Law nor they enunciate principle of law”.

After having gone through this particular opinion, I feel that there is hardly any doubt that this amounts to contempt of court.

S. No. 90. TIP in its letter of 15-3-2011 has advised PQA that Post tender changes in the conditions of government assurances/guarantees, at the time of Agreement are not allowed.

PQA legal advisor has on his own assumed that this advise of TIP is on the basis of Rule No 40 of PPR-2004, which was not existence at the time of execution of FOTCO IA.. TIP in its letter had not made this statement.

The advise of TIP is based on the principle of public tendering for BOO, BOT or any other tender. Had this condition been a part of the terms and conditions of the PQA Guidelines in 1991 issued to all bidders, there might be other bidders who would have participated in the two Oil Terminals being awarded by PQA in one Tender. This act of PQA is a non-transparent act of awarding Two Oil Terminals to FOTCO, whereas in the original tender it solicited bids for only one Oil Terminal.

S. No. 93 The Legal adviser has stated “article 18.1 of IA makes the FOTCO’s exclusive right limitless in terms of time.”



The legal advisor has suppressed from his note the Article 8.3(a) of the IA, which is very clear that the IA will be terminated if PQA do not renew the Lease on dispute of agreeable terms after 30 years. Refer to Article 8.3 (a) which states that the Land Lease shall initially be for a period of thirty years effective from the date of signing with a right for further renewals from periods of 30 years on mutually agreeable terms.

S. No. 95. Legal adviser has stated “ TIP’s findings that FOTCO’s IA is on BOT basis for 30 years period is a misreading of IA. FOTCOs IA is on build, operate and own basis in perpetuity i.e. unlimited in time”.

The legal advisor has not quoted last paragraph of TIP letter dated 21 March which has correctly named it as BOO Contract.

TIP reading the IA is on BOO basis for 30 years is not a misreading, but a correct statement. PQA Legal Advisor opinion given to PQA that FOTCOs IA is on build, operate and own basis in perpetuity i.e. unlimited in time. is an illegal statement, as the IA is for a BOO Project on 30 years lease.

PQA is advised to examine the contents of the Legal Opinion which are biased and not protecting PQA interest under the terms of IA.

TIP again recommends that in view of the Supreme Court orders declaring post tender changes in the terms/condition as void and of no legal effect, it is advisable for PQA not to proceed with negotiation with FOTCO, and instead of an objectionable 11 year contract PQA is negotiating with FOTCO for the Second Oil Terminal, it may invite public tenders in which FOTCO may also participate, so that PQA may be able to award 30 years BOO or BOT Contract of Oil Terminal II in accordance with the laws of the land.

TIP would like to point out that without inviting public tenders PQA has no means to determine the current market rates for the lease rent per year and royalty without inviting public offers. The only yardstick available with PQA is the latest lease and royalty rates under the latest IA signed in Nov 2010 for coal, clinker & cement terminal.

Yours sincerely,


Syed Adil Gilani
Chairman

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