

Enquiry Report

(Under the provisions of Section 37 of the Competition Ordinance, 2007)

IN THE MATTER OF COLLUSIVE TENDERING BY FOREIGN COMPANIES IN THE DREDGING SECTOR OF PAKISTAN

1. INTRODUCTION

- 1.1 This Enquiry Report is prepared pursuant to the *suo-motto* notice taken by the Competition Commission of Pakistan (hereinafter referred to as the '**Commission**') of the news clipping of *Daily Business Recorder* dated May 04, 2009; wherein it was reported that some international dredging companies have formed a cartel in order to qualify for the bids of dredging 45 kilometers long navigational channel of Port Qasim to the extent that it gets an all-weather 14-metre draught by 2010.
- 1.2 Pursuant to the powers contained in clause (c) of sub-regulations (1) of Regulation 4 of the Competition Commission of Pakistan (Conduct of Business) Regulations, 2007 of the Chairman; Mr. Abdul Hafeez, Director (Investigations) and Noman Amin Farooqi, Deputy Director (Legal) were authorized/appointed to conduct enquiry into the allegation of collusive bidding, which is an offence under the provisions of sub-section (1) of Section 4 of the Competition Ordinance, 2007 (hereinafter referred to as the '**Ordinance**') read with clause (e) of the sub-section (2) of Section 4 of the Ordinance.

2. BRIEF FACTS

- 2.1 Karachi Port Trust took the initiative of bracing itself to handle and cater for fifth and sixth generation ships in the year 2007-2008 (hereinafter referred to as the **KPT Project**). This involves the development of deep draught berths and due to its strategic location Keamari Groyne was the natural choice. The berths were to be built at 18 m depth, with 3.75 km of quay wall. Provisions of 10 berths have been made in the Karachi Port Trust's long term plan. The project was to be carried out in phases and on public

- private partnership. Cost of project was US\$ 1087 million. Karachi Port Trust was supposed to share US\$ 345 million.
- 2.2 Only M/s China Water & Electric International Corp. & M/s China Harbour Engineering Company participated in the bidding process. The KPT Project was awarded to M/s China Water & Electric International Corp. the proposed rates (average) that stand at Rs. 310/- per cubic meter for dredging and Rs. 187.50/- and Rs. 447/- per cubic meter for the disposal of 24 million and reclamation of 8 million cubic meter dredged material, respectively. The rates offered by M/s China Harbour Engineering Company, the only competitor of M/s China Water & Electric International Corp. in bidding process, stand, however, far greater at Rs. 660/-, Rs. 281.50/- and Rs. 444.70/- for the same three jobs. (Copies of the News reports & KPT letter dated 31-07-09 are '**Annex-A**' to '**Annex-C**')
- 2.3 In the year 2007-2008 Port Qasim Authority also planned to undertake deepening and widening of the channel to achieve an all-weather 14-metre draught in the 45-km long navigational channel by 2010 (Hereinafter referred to as the **PQA Project**). The PQA Project was awarded to M/s China Harbor Engineering Company, who offered the lowest bid. It was Rs 10.2 billion self-financed dredging contract. Later the bid was scrapped allegedly at the behest of Dredging International, who was the second lowest bidder for the project. (Copy of the News report is '**Annex-D**')
- 2.4 Subsequently Port Qasim Authority in December, 2008 cleared M/s Dredging International for maintenance dredging at Port Qasim by 4.5 million cubic meters (cms) at Rs 314 per cm against Rs 211/- of the last year. Other bidders M/s Jan De Nul, M/s Van Oord and M/s China Harbour Engineering Company also came with the higher rates of Rs 1.52 billion, Rs 1.51 billion and Rs 2.02 billion respectively. (Copy of the News report is '**Annex-E**')
- 2.5 Subsequent to the scrapping of the earlier tender for the Deepening and Widening of Navigational Channel of PQA, the project was re-advertised in March 2009 and tenders were invited from the companies.

- 2.6 The scraping of capital dredging bid and the awarding of maintenance dredging tender to DI was also highlighted by the media in various news items of which the Commission took cognizance and appointed the Enquiry Officers for the matter.

3. PARTIES TO THE PROCEEDINGS

- 3.1 The term Undertaking has been defined under clause (p) of sub-section (1) of Section 2 of the Ordinance, in the following terms:

“undertaking” means any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association or undertakings;

- 3.2 For the purposes of this Enquiry Report, following are the relevant undertakings:

3.2.1 **M/s China Harbour Engineering Company Ltd.** (hereinafter referred to as the **CHEC**) was established in December 2005 during the merger of China Harbour Engineering Company Group (founded 1980) with China Road and Bridge Corporation into CCCC.

3.2.2 CHEC is the major international operating division of CCCC group which was ranked the 14th on 225 Top International Contractors on ENR – Engineering News Recording (USA) , equivalent first among all Chinese international contractors with a total asset of 110 billion RMB and 42 full capital or share holdings branch companies, 17 participating stock companies and was listed on the Main Board of The Stock Exchange of Hong Kong Exchange and Clearing Limited. Meantime it is one of the largest Chinese

state-owned enterprises engaged in foreign trade as well. In 2007, the total value of international contracts won by CHEC is over two billion USD.¹

3.2.3 CHEC have total assets of US\$ 645/- million, current assets of US\$ 391/- million and current liabilities of US\$ 336/- million approx. having a working capital of US\$ 55/- million.²

3.2.2 **M/s China International Water & Electric Corp.** (hereinafter referred to as the **CWE**) has been practicing water resources and hydropower engineering for 50 over years. Having a reputation of being one of the first few state-owned corporations approved by China State Council to undertake international contracting projects. Over the years, CWE has been active in the international contracting, foreign economic aid, and international trading and manpower export sectors. Today CWE is recognized as one of the major state-owned enterprises in China.³

3.2.3 CWE has total assets of US\$ 960/- million, current assets US\$ 516/- million and current liabilities US\$ 128/- million approx and a working capital of US\$388/-⁴.

3.2.4 By the end of 2007, CWE has completed over 600 international contracts in more than 60 countries and regions, with a total contract value of approximately USD 4.7 billion. It is this reputation for construction excellence that makes CWE one of the Top 225 International Contractors continuously for 18 years (97th in year 2007) and one of the Top 200 International Design Firms continuously for 7 years (105th in year 2007) ranked by McGraw-Hill Construction Engineering News-Record magazine. CWE has always been within the Top 30 Chinese Global Contractors (18th in year 2007) ranked by Ministry of

¹ <http://www.chec.bj.cn/ens/gsgk/zqjj/index.html>

² Para 1.7.11 (d) at Pg. 10 of the Technical Evaluation Report by ECIL of July 2009.

³ <http://www.cwe.com.cn/en/BriefIntroduction/BriefIntroduction.html>

⁴ Para 1.7.11 (a) at Pg. 10 of the Technical Evaluation Report by ECIL of July 2009.

Commerce of China. Meanwhile, CWE is one of the few who are listed in both the Top 60 Chinese Contractors and the Top 60 Chinese Design Firms.⁵

3.2.5 **M/s Jan De Nul** (hereinafter referred to as the **JDN**) was established in 1938, by its founder Jan De Nul, as a Civil Engineering Construction Company. In 1951, expansion towards dredging started and evolved into its main activity in which JDN has become a world leader.⁶

3.2.6 A combination of more than 4500 staff and employees together with the world's most modern and technologically advanced dredging fleet, ranks **JDN** Group at the top of the international dredging industry. The JDN Group's massive expansion policy with respect to its new dredging fleet capacity is unequalled in the dredging sector.⁷

3.2.7 JDN has total assets worth of US\$ 1212/- million, current assets worth of US\$ 1054/- million, and current liabilities of US\$ 389/- million approx and a working capital of US\$ 665/- million.⁸

3.2.8 **M/s Van Oord** (hereinafter referred to as the **VOD**) is an independent private company with deeply committed shareholders.⁹ VOD tackles projects of every size and complexity, all around the world.¹⁰ VOD is a long-established company with almost 140 years of dredging and marine construction experience.¹¹

⁵ <http://www.cwe.com.cn/en/BriefIntroduction/BriefIntroduction.html>

⁶ <http://www.jandenu.com/>

⁷ <http://www.jandenu.com/>

⁸ Para 1.7.11 (c) at Pg. 10 of the Technical Evaluation Report by ECIL of July 2009.

⁹ http://www.vanoord.com/gb-en/our_company/profile/index.php

¹⁰ http://www.vanoord.com/gb-en/our_company/profile/index.php

¹¹ http://www.geoconnexion.com/uploads/worldfromsand_intv5i9.pdf

3.2.9 VOD has total assets worth of US\$ 1033/- million, current assets worth of US\$ 721/- million, current liabilities of US\$ 639/- approx and a working capital of US\$ 82/- million.¹²

3.2.10 **Dredging International** (hereinafter referred to as the **DI**) Dredging International is one of the primary operating companies of DEME Group, responsible for more than two thirds of total turnover. DI has a leading position on the global dredging market and has experienced rapid and sustained growth over the last decade. The core activity of DI is dredging and land reclamation.¹³

3.2.11 DI has total assets worth of US\$ 1401/- million, current assets worth of US\$ 801 million, current liabilities of US\$ 690/- million approx and a working capital of US\$ 111/- million.¹⁴

3.2.12 **Karachi Port Trust** (hereinafter referred to as the **KPT**) is a federal government agency that oversees the operations of Karachi Port at Karachi, Sindh, Pakistan. KPT was established by the Act IV of 1886, effective from 1 April 1887.¹⁵ The Karachi Port is administered by a Board of Trustees, comprising Chairman and 10 Trustees. The Chairman is appointed by the Federal Government and is also the Chief Executive of KPT. The remaining 10 Trustees are equally distributed between the public and the private sector. The five public sector Trustees are nominated by the Federal Government. The seats for private sector Trustees are filled by elected representatives of various private sector organizations. This way all port users find a representation in the Board of Trustees.¹⁶

3.2.13 **Port Qasim Authority** (hereinafter referred to as the **PQA**) is a federal government agency that oversees the operations of Port Qasim at Karachi, Sindh, Pakistan. It is Pakistan's second busiest port,

¹² Para 1.7.11 (e) at Pg. 10 of the Technical Evaluation Report by ECIL of July 2009.

¹³ <http://www.dredging.com/>

¹⁴ Para 1.7.11 (b) at Pg. 10 of the Technical Evaluation Report by ECIL of July 2009.

¹⁵ Behram Sohrab H.J. Rustomji, *Karachi 1839-1947 A Short History of the Foundation and Growth of Karachi* in Karachi During the British Era Two Histories of A Modern City, Oxford University Press, Karachi, 2007 Pg 52

¹⁶ <http://www.kpt.gov.pk/>

handling about 35% of the nation's cargo (17 million tons per annum). It is located in an old channel of the Indus river at a distance of 35 kilometers east of Karachi city centre. The total area of the port comprises 1,000 acres (4 km²) with an adjacent 11,000 acre (45 km²) industrial estate.

4. THE PRODUCT/SERVICES

- 4.1 The relevant services for the purposes of this enquiry report are that of dredging. Technically speaking, dredging is the relocation of underwater sediments and soils for the construction and maintenance of waterways, dikes and transportation infrastructures and for reclamation and soil improvements.¹⁷
- 4.2 A dredge is a device for scraping or sucking the seabed, used for dredging. A dredger is a ship or boat equipped with a dredge (though in American usage, there is no added letter)¹⁸
- 4.3 Dredging is of many types; however, for the purposes of the subject enquiry, following two types of dredging services are relevant, they are:
- 4.3.1 Capital dredging: dredging carried out to create a new harbour, berth or waterway, or to deepen existing facilities in order to allow larger ships access. Because capital works usually involve hard material or high-volume works, the work is usually done using a cutter suction dredge or large trailing suction hopper dredge, but for rock works drilling and blasting along with mechanical excavation may be used.
- 4.3.2 Maintenance: dredging to deepen or maintain navigable waterways or channels which are threatened to become silted with the passage of time, due to sedimented sand and mud, possibly making them too shallow for navigation. This is often carried out with a trailing suction hopper dredge. Most dredging is for this purpose, and it may also be done to maintain the holding capacity of reservoirs or lakes.

¹⁷ http://www.iadc-dredging.com/index.php?option=com_content&task=view&id=101&Itemid=206

¹⁸ <http://en.wikipedia.org/wiki/Dredging>

5. RELEVANT MARKET

5.1 Relevant market is defined under clause (k) sub-section (1) of Section 2 of the Ordinance in the following words:

“relevant market” means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products’ characteristic, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of the Competition are appreciably different in those areas;

5.2 From the above definition it is clear that the market has to be defined in two dimensions (i) Product/service market and (ii) geographic market. In the preceding paragraphs the product as well as the geographic market has been defined:

5.2.1 The service being considered in this case is that of dredging on the ports. No distinction can be drawn between capital dredging and maintenance dredging as the services are considered to be substitutable with one another. It is also not useful to distinguish it on the basis of soil characteristics, equipment or the type of customers and operators. The market is irregular and lumpy and procurement is organized through public tendering or bidding procedures. Therefore, the relevant product/service market for the purpose of the subject enquiry is of dredging services conducted at the ports of Pakistan.

5.2.2 As far as the geographic market is concerned, it consists of the area of Port Qasim as well as that of Karachi Port as the conditions of competition are homogeneous and the dredging contracts have also been awarded only by these two ports of Pakistan in recent years.

6. ISSUE

Whether CHEC, CWE, JDN, VOD, DI have entered into an arrangement of collusive tendering (bid rigging) in the relevant market of dredging within Pakistan in violation of the provision of sub-section (1) of Section 4 of the Ordinance read with clause (e) of sub-section (2) of Section 4 of the Ordinance?

7. DOCUMENTS/INFORMATION RECEIVED FROM PQA & KPT AND ITS ANALYSIS

7.1 Collusive tendering (Bid rigging) occurs when businesses, that would otherwise be expected to compete, secretly conspire to raise prices or lower the quality of goods or services for purchasers, who wish to acquire products or services through a bidding process. Public and private organizations often rely upon a competitive bidding process to achieve better value for money. Low prices and/or better products are desirable because they result in resources either being saved or freed up for use on other goods and services. Since, bids/tenders for the dredging projects in Pakistan are called by the Public bodies i.e., PQA and KPT it is they who are most often the target of collusive tendering or bidding (bid rigging) therefore, it was deemed appropriate to request for the Documents/information from these bodies, regarding the dredging activities and awarding of dredging projects through bidding processes.

7.2 The Commission vide its letters dated July 15, 2009 requested the following information from KPT and PQA:

- (i) Details of the procedures adopted for bidding of the dredging contracts;
- (ii) Copies of advertisements for the Capital/maintenance Dredging projects;
- (ii) Names and addresses of the companies along with the details of bids/tenders submitted by them for the Projects;

- (iii) List of the short listed companies for the Projects and the rates quoted by them in their bids/tenders;
- (iv) Copy of the minutes of meeting of Board wherein the Projects were awarded, along with all the ancillary documents, if any;
- (v) Provision of the minutes of meeting wherein the decision of scrapping the tender/bid for the Project was taken along with the relevant documents;
- (vi) Copy of the advertisement subsequent to the scrapping of the earlier tender, whereby the PQA has called bids/tenders for the Project again;
- (vii) Copies of the second tenders/bids submitted by the Companies for the Project and the list of short listed companies for the Project along with the rates quoted by them;
- (viii) Please intimate current status of the bidding process and if finalized, the name of the company to whom the contract for the Project has been awarded along with the relevant documents;
- (ix) In addition to the above, details of the dredging contracts awarded in last five years, including but not limited to the advertisements to call tenders/bids, the rates quoted by the companies, bids submitted along with the details of the short listed companies, the minutes of the meeting in which decision for award of contract was made, may also be provided;
- (x) Any or all ancillary documents/information available that may serve the purpose of the enquiry.

7.3 PQA vide their letter bearing No. PQA/CD/09/09 dated 25-07-09 supplied the following documents to the Enquiry Officers:

- (i) Pre-qualification documents explaining the bidding of dredging contracts;
- (ii) Advertisement published in Daily Lloyd UK, Daily Financial Times World Wide, Daily Shanghai China, Daily Khaleej Times – Dubai UAE, Daily Dawn combined in Pakistan and Daily Jang;
- (iii) Names and addresses of the companies short listed for the dredging contracts;
- (iv) Copy of Board Resolution No. 139/2008 dated 21-10-08 for approval of PQA Board to award the work to CHEC;
- (v) Letter of Ministry of Ports and Shipping dated 3-12-08 scrapping the tender;
- (vi) Copies of re-advertisements published in local & international press, letters to Pakistan and Foreign Embassies and letter to dredging companies;

- (vii) Information regarding the latest tender and pre-qualified parties;
- (viii) The details of the dredging activities carried out during five years.

7.4 KPT vide its letter bearing no. S/1896 dated 31-07-09 supplied the requisite information. KPT submitted that in last five years only one dredging contract has been advertised for infrastructure work of construction of Pakistan Deep Water Container Port. Nine (9) firms purchased the pre-qualification documents and six (6) firms turned with request for their pre-qualification and six firms were considered for pre-qualified after conducting evaluation. Tenders were invited from all the firms; however, only CHEC and CWE submitted the bid. KPT vide Board Resolution No. 30 dated 18-09-2008 approved the award of work to the lowest cost bidder i.e., CWE.

7.5 PQA was also requested to provide a copy of the board resolutions approving the award of dredging projects to the bidders and the latest Technical Evaluation Report of the recent tender advertised by them of the navigational channel. The requisite information was provided.

7.6 **Analysis of dredging Sector in Pakistan;** In order to analyze the alleged collusive arrangement *inter se* the dredging companies, it is pertinent to look into the dredging sector and its activities in order to reach a conclusion. Although bid rigging can occur in any economic sector, there are some sectors in which it is more likely to occur due to particular features¹⁹ of the industry or of the product/services involved. Such characteristics tend to support the efforts of Undertakings to rig bids. Following are discussed the characteristics that have been found to help collusion, they need not all be present in order for companies to successfully rig bids:

- (i) **Small number of Undertakings:** OECD Guidelines for fighting Bid rigging in Public Procurement (hereinafter referred to as the '**OECD Guidelines**') provides that, collusive tendering or bidding (bid rigging) is more likely to occur when a small number of Undertakings supply the good or service. The fewer the number of sellers, the easier it is for them to reach an

¹⁹ OECD Guidelines for fighting Bid rigging in Public Procurement

agreement on how to rig bids. On Pakistani Ports it has been observed by reviewing the documents made available by PQA and KPT that in every dredging project, there are some regular bidders and apart from the regular bidders only 5 or 6 undertakings in total submit their bids. Therefore, there is no doubt in reaching the conclusion that the number of Undertakings involved in the dredging sector of Pakistan is very few.

- (ii) Little or no entry: OECD Guidelines provides that, when very few Undertakings have recently entered or are likely to enter a market because it is costly, hard or slow to enter; Undertakings in that market are protected from the competitive pressure of potential new entrants. The protective barrier helps support collusive tendering or bid rigging efforts. In the recent times, whole world is facing worst economic recession and since the dredging services not only requires heavy investment but it also requires technical know how and support, therefore, it can be said that there is little or no entry of any Undertaking providing dredging services in the dredging sector of Pakistan.
- (iii) Market conditions: OECD Guidelines provides that significant changes in demand or supply conditions tend to destabilize ongoing collusive tendering or bid-rigging agreements. A constant, predictable flow of demand from the public sector tends to increase the risk of collusion. At the same time, during periods of economic upheaval or uncertainty, incentives for competitors to rig bids increase as they seek to replace lost business with collusive gains.

Ongoing technological developments and the need to improve cost effectiveness have resulted in larger, more efficient ships. This, in turn, has resulted in the need to enlarge or deepen many of our rivers and canals, our "aquatic highways", in order to provide adequate access to ports and harbors and currently Pakistan is in the process of doing the same, therefore, it can be said that market conditions are such, which may increase risk of collusion.

- (iv) Industry associations: OECD Guidelines provides that Industry associations can be used as legitimate, pro-competitive mechanisms for members of a business or service sector to promote standards, innovation and competition. Conversely, when subverted to illegal, anticompetitive purposes, these associations have been used by company officials to meet and conceal their discussions about ways and means to reach and implement a bid rigging agreement.

Existence of International Association of Dredging Companies (IADC), the umbrella organization for contractors in the private dredging sector with more than one hundred and twenty members with affiliated companies on five continents. The suspected collusion for tendering/bidding *in* se CHEC, CWE, JDN, VOD and DI cannot be ruled out.

- (v) Identical or simple products or services: OECD Guidelines provides that, when the products or services that individuals or Undertakings sell are identical or very similar, it is easier for Undertakings to reach an agreement on a common price structure. In the current case, the services offered by the Undertakings are the same therefore, it can be said that there is a collusive arrangement.

- (vi) Few if any substitutes: OECD Guidelines provides that, when there are few, if any, good alternative products or services that can be substituted for the product or service that is being purchased, individuals or Undertakings wishing to rig bids are more secure knowing that the purchaser has few, if any, good alternatives and thus their efforts to raise prices are more likely to be successful. Further more, it has been observed from the Technical Report submitted by the ECIL to the PQA in July, 2009 that CHEC, DI and JDN have been submitting the bids through consortium, which limits the choice of PQA for awarding of dredging projects.

After analyzing basic characteristics of the dredging sector of Pakistan, we hereby conclude that *prima facie* the conditions of the dredging sector of Pakistan are such that help and support the collusive tendering or bidding (bid-rigging).

7.7 **Analysis of bidding at KPT;** Although Undertakings may agree to implement collusive tendering or bidding (bid-rigging) schemes in a variety of ways, they typically implement one or more of several common strategies. These techniques²⁰ may include (i) *cover bidding*²¹, (ii) *Bid suppression*, (iii) *Bid rotation*, and (iv) *Market Allocation*.

7.7.1 KPT and PQA invited the tenders for the projects of construction of Pakistan Deep Water Container Port and Deepening and Widening of Navigational Channel, respectively almost at the same time. For the project of Pakistan Deep Water Container Port at KPT, Nine (9) Undertakings namely (i) CHEC, (ii) JDN, (iii) DI, (iv) VOD,(v) CWE, (vi) M/s Penta Ocean construction Japan, (vii) M/s Boskalis International BV, (viii) M/s Sinohydro Corporation and (ix) M/s Malaysian Maritime & Dredging Corporation purchased the pre-qualification documents, however, only six (6) undertakings namely (i) CHEC, (ii) JDN, (iii) DI, (iv) VOD,(v) CWE and (vi) M/s Boskalis International BV turned with the request for pre-qualification and all of them were considered pre-qualified after the evaluation carried out by the specialists consultants M/s Royal Haskoning UK & M/s Techno Consults – Karachi. Tenders were invited from the aforementioned six (6) Undertakings.

7.7.2 In response only to invitation to submit the bids only two Undertakings namely CWE and CHEC submitted their bids. CWE and CHEC quoted the following rates:

Name of Undertaking	Cost for overall work	Average rate of per cubic meter
CHEC	Rs. 33, 229, 281, 430.00/-	Rs. 1006/-
CWE	Rs. 19, 325, 888, 984.00/-	Rs. 585/-

²⁰ OECD Guidelines for fighting Bid rigging in Public Procurement

²¹ OECD Guidelines for fighting Bid rigging in Public Procurement at pg. 2 provides that *Cover bidding*. Cover (also called complementary, courtesy, token, or symbolic) bidding is the most frequent way in which bid-rigging schemes are implemented. It occurs when individuals or firms agree to submit bids that involve at least one of the following: (1) a competitor agrees to submit a bid that is higher than the bid of the designated winner, (2) a competitor submits a bid that is known to be too high to be accepted, or (3) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Cover bidding is designed to give the appearance of genuine competition.

- 7.7.3 KPT vide Board Resolution No. 30 dated 18-09-2008 approved the award of work to the lowest cost bidder i.e., CWE. It is pertinent to note here that CHEC quoted the rates almost double the rates of CWE. (Copy of KPT Letter dated 31-07-09 and KPT Board Resolution is '**Annex-F1**' & '**Annex-F2**')
- 7.7.4 Almost at the same time in 2007-08 PQA invited the tenders for Deepening and Widening of Navigational Channel (hereinafter referred to as **PQA Project**). CHEC, JDN, VOD, DI and M/s Boskalis International B.V filed the pre-qualification documents and were declared pre-qualified by the Technical Assessment Report. CHEC submitted a financial bid of Rs. 10.2/- billion and DI submitted a financial bid of Rs 10.8/- billion. PQA Board vide its resolution no. 139/2008 dated 21-10-2008 resolved that the contract be awarded to CHEC being the lowest bidder, however, it is pertinent to mention here that CWE did not participated in the bidding process.
- 7.7.5 Even when the PQA Project was re-advertised in 2009, CWE submitted a technical proposal which lacked the minimum technical requirement for the project and were disqualified in the technical report.²²
- 7.7.6 It appears that there exists a tacit collusion *inter se* the Chinese companies namely CHEC and CWE, which is in violation of the provisions of sub-section (1) of Section 4 read with clauses (b) & (e) of sub-section (2) of Section 4 of the Ordinance, on the following basis:
- (i) The tenders were called at almost the same time for both the projects and were awarded by the respective boards in September and October 2008, however, CHEC submitted very high (almost double) rates for the same services i.e. capital dredging for KPT Project and was the lowest bidder for same services (capital dredging) for PQA Project.
 - (ii) CWE did not submit their bid for the first PQA Project in 2008; however, it was the lowest bidder for KPT project.

²² At pg. 35 of the Technical Evaluation Report of Engineering Consultants International (Pvt.) Limited of July 2009.

- (iii) CWE submitted a technical proposal for the PQA Project on its re-advertisement in 2009 which did not even fulfill the minimum technical requirements.

7.8 **Analysis of bidding at PQA;** PQA advertised its project of widening and deepening of Navigational Channel in various news papers on 21 May 2007. M/s Boskalis International, CHEC, DI, JDN and VOD submitted their proposal for pre-qualifications. Following is the standing of the Undertakings as per the Pre-qualification Report of ECIL dated 30-11-2007:

Sr. No.	Name of Undertaking	Points Allocated	Remarks
01.	VOD	91.0	1 st in order of merit
02.	JDN	88.0	2 nd in order of merit
03.	CHEC	76.0	3 rd in order of merit
04.	Boskalis International B.V	74.0	4 th in order of merit
05.	DI	66.0	5 th in order of merit

(Copy of the Pre-Qualification Report of ECIL dated 30-11-2007 is '**Annex-G**')

7.8.1 Only CHEC and DI submitted their technical as well as financial bids. CHEC submitted its financial proposal of Rs 10.2 billion for the PQA project and the second lowest bidder for the project was DI with the financial proposal of Rs. 10.8 billion.

7.8.2 PQA Board vide its Resolution No. 139/2008 dated 21-10-08 approved the award of project to CHEC being the lowest bidder for the project. As per the news reports, after award of the project to CHEC, second lowest bidder for the project DI started maneuvering to knock out the Chinese firm from the tendering process.²³ (Copy of the Board Resolution No. 139/2008 dated 21-10-08 is '**Annex-H**')

7.8.3 Subsequently the Ministry of Ports and Shipping vide its letter dated 3-12-2008 scrapped the whole tendering process (copy of letter is appended herewith as '**Annex-I**'). The relevant text of the said letter is reproduced herein below:

²³ Business Recorder, December 30, 2008; <http://www.brecorder.com/index.php?id=858679>
Business Recorder, October 27, 2008; <http://www.brecorder.com/index.php?id=830605>;

“... [I]t has been decided with the approval of the Minister of State for Ports and Shipping that in view of the divergent views on the bid evaluation process by Financial Advisor (P&S) and PQA inability of M/s NESPAK to undertake the task of final assessment, it may seem appropriate that the whole tendering process be scrapped and re-tendering approved...”

7.8.4 The Ministry of Ports and Shipping vide its letter dated September 04, 2009 submitted a report wherein the details for scrapping of tender along with the relevant documents were given (Copy of the Report is appended herewith as '**Annex-J**'). The major reasons for scrapping as explained by the Ministry of Ports and Shipping are as follows:

- (i) PQA appointed ECIL a consultancy firm in 2007 for preparation of tender documents, qualification of dredging companies and evaluation of bids, however, ECIL employed Cdr. ® Sher Muhammad Malik in March 2008 who has been retired after superannuation from the post of Chief Hydrographer on 01-05-09 from PQA. He could not undertake any business direct or indirect with his old employer before expiry of (2) years from the date of his retirement, this is in violation of conduct rules.
- (ii) CHEC applied on plain paper and not on company's letter head as per the requirement of documentation and did not supplied the E-mail/website addresses for communications;
- (iii) The experience shown by CHEC was of 'contracting and engineering' and not of dredging;
- (iv) Both the technical proposal and the financial proposal were opened at the same time in violation of Rule 36 of the Public Procurement Rules, 2004;

7.8.5 The project of deepening and widening of navigational channel was re-advertised in March 2009 and following companies submitted their proposals:

- (i) Joint Venture of CWE and Trans Tech Pakistan;
- (ii) Consortium of CHEC, DI and JDN (hereinafter referred to as the '**Consortium**'); and
- (iii) VOD.

7.8.6 The consultants of the project ECIL submitted their Technical Evaluation Report in July 2009 (copy whereof is appended herewith as '**Annex-K**'). Consortium and VOD's technical proposal was declared eligible for evaluation of the financial proposals and the technical proposal of Joint Venture of CWE and Trans Tech Pakistan failed to meet the criteria given in the tender documents and was declared technically weak. The technical report also pointed out that there are some conditions & deviations from the tender documents which are mostly of contractual nature. However, it was proposed that the conditions and deviations may be negotiated and dredging companies be asked to withdraw these conditions & deviations before they could be considered as a qualified group.

7.8.7 CHEC, DI and JDN *Pre-Bid Agreement* dated 24-04-09 (hereinafter referred to as the '**Agreement**') (copy whereof is appended herewith as '**Annex-L**') to form a consortium and submit their bid accordingly through a consortium for the project of Deepening and Widening of Navigational Channel at Port Qasim. The whereas clause of the Agreement read as under:

"WHEREAS

1. *Port Qasim Authority (hereinafter referred to as the "Client") are calling for bids for deepening and Widening of Port Qasim Navigational Channel, Karachi, Pakistan (hereinafter referred to as the "Project");*
2. *The Client will invite contractors to submit a bid for the project;*
3. *Given magnitude of the Works and the equipment requirement associated with the execution of the Works, DI and JDN have agreed to join forces for their respective part of work;*
4. *Parties have decided to co-operate in execution of the Project. CHEC and DI-JDN will each arrange for financing of the project.*
5. *Parties will tender together (consortium of CHEC, JDN & DI hereinafter referred to as the 'JV') for the capital dredging contract. If awarded, DI-JDN will perform the works in the*

outer part (maintenance and capital) and CHEC will perform the works in the inner part of the channel (mainly capital).”

7.8.8 It is also pertinent to mention here that the reason afforded by CHEC, DI and JDN for formation of consortium is (i) the given magnitude of the works and equipment requirement, (ii) the current world wide economic turmoil, (iii) the decline in borrowing capacity with banks and (iv) the project requires a financial proposal. The reasons afforded by the CHEC, DI and JDN do not seem plausible for the following reasons:

- (i) All the Undertakings i.e. DI, JDN and CHEC have previously submitted an independent bid for the project which was scrapped due to violations of PPRA Rules, 2004,
- (ii) Forms A-5, A-6 and A-9 submitted by the Undertakings along with the technical proposal amply establishes that the Undertakings are independently capable, of performing the project of PQA (Copies of Forms A-5 are appended herewith as ‘Annex-M1’ to ‘Annex-M3’ & Forms A-6 are appended herewith as ‘Annex-N1’ to ‘Annex-N3’ and Forms A-9 are appended herewith as ‘Annex-O1’ to ‘Annex-O2’),
- (iii) DI, JDN and CHEC are not only technically but also financially strong Undertakings than VOD, who has submitted an independent bid and was the only competitor of the Consortium. The Technical Evaluation Report of July 2009 also provides the financial capabilities of the Undertakings, which are as follows:

Name of Company	Total Assets	Current Assets	Current Liabilities	Working Capital
DI	US \$ 1401 Million	US \$801 Million	US \$ 690 Million	US \$ 111 Million
JDN	US \$ 1212 Million	US \$ 1054 Million	US \$ 389 Million	US \$ 665 Million
CHEC	US \$ 645 Million	US \$ 391 Million	US \$ 336 Million	US \$ 55 Million
VOD	US \$ 1033 Million	US \$ 721 Million	US \$ 639 Million	US \$ 82 Million

- (v) the Undertakings offer the same services and are competitors of each other.

7.8.9 It is also pertinent to mention here that the Consortium Agreement is *prima facie* aimed at elimination of competition and artificially raising the price of the Project for PQA in respect of dredging services, thereby, forcing PQA to pay supra-competitive prices, which otherwise would not have sustained in a competitive market, which is further evident from the fact that in earlier scrapped bid the financial proposal was of Rs. 10.2/- billion and Rs. 10.8/- billion by the Undertaking and DI, respectively; as compared to a much higher current financial bid of Rs. 16.058/- billion of the Consortium.

7.8.10 Further more, clause (2) of the Agreement, which reads as under:

“None of the Parties shall, during the validity of this agreement, directly or indirectly with any other party, prepare or submit or take any part in the preparation or submission of a tender for the project without the other Parties consent”

The object and effect of having such a clause alone in the Agreement *prima facie* is prohibited in terms of Section 4 (1) of the Ordinance and such agreement unless exempted under Section 5 of the Ordinance is void.

7.8.11 Another important aspect of the bidding at PQA is that both parties i.e. Consortium and VOD have placed certain conditions and deviations in their documents. PQA sought clarifications from both regarding the conditions and deviations. The Consortium *vide* their letters dated 02-09-2009 and 29-09-2009, withdrew all conditions and accepted F.E. payment in US dollars in accordance with tender conditions (copies of the letters are appended herewith as '**Annex-P**' & '**Annex-Q**'). VOD informed that the clarifications being sought by PQA were integral part of their tender which needed to be finalized at the time of award of work. Regarding F.E. payment they have stated that payment be made in Euros and if PQA desires payment in US dollars then F.E. payment is first to be converted in Euros as on date 14 days prior to opening of tender and subsequently from Euros to dollars as on date of signing of Agreement. (Copies of letters of VOD are appended herewith as '**Annex-R**', '**Annex-S**' and '**Annex-T**').

- 7.8.12 PQA Board in its meeting held on 30-09-2009 was apprised of the response of the bidders, whereby the technical proposal of the Consortium was considered as compliant and proposal of VOD as non compliant. As approved by the Board, the financial proposal was opened by PQA's dredging committee on 01-10-2009 in presence of authorized representative of Consortium. (Copy of opening statement and financial proposal are appended herewith as '**Annex-U**' & '**Annex-V**')
- 7.8.13 From the above the picture emerges that, DI and CHEC who were bitter rivals for the PQA Project in 2007-08 have joined hands in order to avoid any confrontation and competition between each other for the project and have divided the project between them. Interestingly JDN has also joined them and jointly they formed a Consortium through Agreement. Another facts which needs highlighting is that all the three Undertakings are each other's competitors and are equally able to obtain the project independently and perform it, as well.
- 7.8.14 The role played by VOD is also very peculiar for the simple reason that, they submitted the technical proposal but with certain conditions and deviations which were not acceptable to PQA and when subsequently PQA required clarification from them, they refused to remove the conditions and deviations from their tenders. Subsequently, their bid was declared non-compliant.
- 7.8.15 It appears that there is collusion *inter se* Consortium and VOD, as the conditions and deviations in the Technical proposals are almost identical and when clarifications were sought, Consortium removed their conditions however, VOD refused.
- 7.8.16 Further more, in India the Cochin Port Trust had earlier cancelled tenders it called in November 2007 for capital dredging after the bids were found quoting extremely high rates. The cancellation came amid allegations that foreign dredging companies which participate in dredging bids by major ports in the

country acted as a cartel.²⁴ The main international companies involved in the Indian dredging sector are **M/s Royal Boskalis Westminster NV, M/s Van Oord dredging and Marine Contracting Co. NV, M/s Jan De Nul NV and M/s Dredging International NV.** (Copies of the online news reports are appended herewith as 'Annex-W', 'Annex-X' and 'Annex-Y')

- 7.8.17 It is pertinent to point out that all the aforementioned dredging companies are also involved in the dredging activities and bidding at the ports of Pakistan for the dredging contract and from the perusal of the record it appears that all the other undertakings are submitting tenders for the project, however, only DI has been allotted the projects in recent times.
- 7.8.18 Keeping in view the above, it is hereby concluded that *prima facie* CHEC, DI and JDN have entered into an agreement for jointly bidding for PQA Project, the object and effect of which is to prevent, restrict or reduce competition within the relevant market and thus is *prima facie* in violation of sub-section (1) of Section 4 read with clauses (a) & (e) of sub-section (2) of Section 4 of the Ordinance.
- 7.8.19 It also concluded that *prima facie* VOD has submitted a cover bid for the project, raising therein the conditions which were not acceptable to the PQA and subsequently when they were asked to remove such conditions they refused to do so, therefore, they also supported the consortium to procure the project which is *prima facie* violation of sub-section (1) of Section 4 and in particular clause (e) of sub-section (2) of Section 4 of the Ordinance.

²⁴ www.hindu.com/2008/05/16/stories/2008051655921700.htm

8. CONCLUSION

- 8.1 From analysis of the material available on the record, and the patterns of bidding by CHEC and CWE, it is concluded that *prima facie* CHEC and CWE are not competing with each other in their allocated territories i.e., CHEC is not competing with CWE in KPT and submitting cover bids, and CWE is not competing with CHEC in PQA, either by not submitting a bid or submitting a cover bid, which is in violation of the provisions of sub-section (1) of Section 4 and in particular clause (b) of sub-section (2) of Section 4 of the Ordinance.
- 8.2 From the analysis of the material available on the record, and the conduct of the CHEC and CWE, it is concluded that *prima facie* CHEC and CWE are submitting cover bids for each other in PQA and KPT, which is in violation of the provisions of sub-section (1) of Section 4 and in particular clause (e) of sub-section (2) of Section 4 of the Ordinance.
- 8.3 From perusal of the material available on the record, it is hereby concluded that CHEC, DI and JDN have entered into an agreement for submission of a single joint bid, the aim and object of which is to prevent, restrict or reduce competition within the relevant market and thus is *prima facie* in violation of sub-section (1) of Section 4 and in particular clauses (a) & (e) of sub-section (2) of Section 4 of the Ordinance.
- 8.4 Moreover, VOD has also submitted a cover bid for the project, raising therein the conditions which were not acceptable to the PQA and subsequently when they were asked to remove such conditions they refuse to do so, therefore, they also supported the consortium to procure the project which is *prima facie* violation of sub-section (1) of Section 4 and in particular clause (e) of sub-section (2) of Section 4 of the Ordinance.

9. RECOMMENDATIONS

- 9.1 Ports play an important role in the economics of the nation and provide a crucial link between land and sea transport. They also have an important social function, through the provision of jobs both directly and indirectly. Moreover, the dredging activities carried out at the ports are to enhance the capacity and the efficiency of the Ports, which ultimately contribute to the economy.
- 9.2 Collusive tendering by the foreign companies in the dredging sector of Pakistan for obtaining dredging contracts, and quoting exorbitant rates for the projects is not only harmful to the public procurement agencies such as PQA and KPT, and thereby forcing public procurement agencies such as PQA and KPT to pay supra-competitive prices, which is not only anti-competitive but also have a direct and immediate impact on public expenditures and therefore on taxpayers, directly and indirectly. Foreign companies by collusive tendering not only rule out the possibility of competitive bidding but also create barriers to entry for the local companies, which results in loss to the public procurement agencies and closure of any possible employment opportunities for the public at large.
- 9.3 In view of the foregoing, it is therefore, recommended that proceedings under Section 30 be initiated against CWE, CHEC, DI, JDN and VOD on account of the contraventions mentioned in the conclusions and in light of the public interest surrounding the case.

(ABDUL HAFEEZ)
DIRECTOR (INVESTIGATIONS)

(NOMAN A. FAROOQI)
DEPUTY DIRECTOR (LEGAL)

DATED: NOVEMBER 25, 2009