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COMPETITION COMMISSION OF PAKISTAN

ENQUIRY REPORT

(Under Section 37(2) of the Competition Act, 2010)

**IN THE MATTER OF ALLEGED RESTRICTIVE TRADING CONDITIONS
IMPOSED BY KPK DIRECTORATE OF AGRICULTURE ENGINEERING**

Maliha Quddus | Aqsa Suleman

Dated: 18th September 2019

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BACKGROUND & FACTS

1. On 04.03. 2019, the Competition Commission of Pakistan (the 'Commission') received a complaint filed by M/s Catkin Engineering Sales & Services (Pvt.) Limited ('Catkin' or 'the Complainant') under Section 37(2) of the Competition Act, 2010 ('the Act'). The complaint was filed against Khyber Pakhtoonkhwa Directorate of Agriculture Engineering ('the Respondent') for alleged restrictive trading conditions in its tender for 'Procurement and Installation of Deep Solar Pumping Systems on Agriculture Tube-wells/Open-wells' ('the impugned tender'). (Copy of Complaint Annex 'A')
2. The following unfair terms and conditions are alleged vis-à-vis the impugned tender:
 - a. The company/firm must have registration with Khyber Pakhtoonkhwa Revenue Authority ('KPRA').
 - b. The company/firm must have PKR 200 million average turnover for the last 03 years in solar pumping systems.
 - c. The firm should have experience of projects of similar and complex nature worth PKR 10 million completed in last five years.
 - d. The company/firm should have test bed for verification/testing of solar pumps alongwith all accessories as per ISO 9906 in company premises (Firm must have third party certification regarding test bed arrangements).

According to the Complainant these conditions are restrictive in terms of Section 4 (2)(a) of the Act.

3. The Complaint was sent to the Respondent to provide its para wise comments on the allegations made with regards to the unfair terms and conditions. In its response to the Enquiry Committee the Respondent notes that:

"... the Government of Khyber Pakhtunkhwa has legislated the Khyber Pakhtunkhwa Public Procurement Grievance Redressal Rules, 2017 to further make it convenient for the timely and efficient handling of grievances of the aggrieved bidder (both the Act and Rules are self explanatory).

In the instant case, the aggrieved bidder (M/s Catkin Engineering Sale and Services Pvt. Ltd.) is well aware from the detail of Grievance Redressal Mechanism and has already exhausted tier-1(a) of Section 35 of Khyber Pakhtunkhwa Public Procurement Regulatory Authority Act 2012 as provided therein, filed complaint dated 04/03/2019

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and was issued Summon for hearing vide Chairman Grievance Redressal Committee letter... dated 08/03/2019 and Decision of Grievance Redressal Committee communicated to the Complainant vide letter ... dated 13/03/2019.

Now after exhausting tier-1(a), the aggrieved bidder has the right to approach the Khyber Pakhtunkhwa Public Procurement Regulatory Authority for filing appeal in accordance with tier 1-(b) of Section 35 of Khyber Pakhtunkhwa Public Procurement Regulatory Authority Act, 2012, if it is still aggrieved". ('Copy of response by Respondent Annex 'B').

4. It is placed on the record that the response of the Respondent was sent to the Complainant for their para-wise comments vide CCP letter dated 12th April 2019. Since no response was received in the stipulated time period a reminder was sent on 24th April 2019. In response the counsel of the Complainant vide letter dated 2nd May, 2019 submitted a request in extension of filing of information for a further ten days. The Complainant's request was granted vide letter dated 3rd May 2019 and time was granted till 13th May 2019. No response was submitted on the stipulated time and a further letter was sent to the Complainant on 14th May 2019. A final letter was written to the Complainant on 20th May 2019 and telephonic conversations were held with the counsel of the Complainant and the Complainant itself asking them to submit their rebuttal however, despite assurances that the response will be submitted to date no response has been submitted. Calls to both the counsel and Complainant are not being attended despite the Enquiry Committee leaving multiple messages (Copy of all correspondence with Complainant Annex 'C').
5. Furthermore the response submitted by the Respondent annexes the decision of the Grievance Redressal Committee on the concerns raised by the Complainant. Paragraph C—Decision of the Grievance Redressal Committee reads as:
"After thread bar/thorough deliberation held between the Grievance Redressal Committee and the representative of the complainant Mr. Fawad Ashraf Ghumman, Manager Projects (S&M), M/s Catkin Engineering Sale and Services (Private) Limited.... Showed complete satisfaction as regards replies/clarifications of the Committee. Hence, the complaint is disposed off accordingly".
6. Even though the matter appears to be resolved, the Enquiry Committee deems it appropriate to undertake an analysis of the matter to see if there is any *prima facie* violation of any provision of the Act.

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ANALYSIS OF BACKGROUND & FACTS

7. At the outset it must be noted that the Commission has sanctioned cases pertaining to restrictive conditions in public procurement tenders as follows:
 - a. Abuse of Dominant Position –Section 3 in the Matter of Utility Stores Corporation (‘USC’) Tender for procurement of Enterprise Resource Planning Software (‘ERP’). In that particular instance USC was held to be dominant in the relevant market of procurement of ERP software for retail stores in Pakistan.
 - b. Policy Note under Section 29(b) of the Act in the case of FBR’s tender for procurement of Tobacco Track and Trace System. Since in issuing the tender FBR was performing its statutory functions of tax collection it was deemed that FBR was not an undertaking in terms of Section 2(1)(q) of the Act and therefore, provisions of Section 3 and 4 of the Act were not attracted. The Commission however, issued a Policy Note to FBR advising suitable amendments to certain unfair/anti-competitive clauses of the tender.
 - c. It is also observed that the Complainant has erroneously cited the Commission’s Order in the matter of Complaint against Pakistan Engineering Council (‘PEC’) as relevant to the instant matter. In the PEC Order the Commission had found that PEC was an association of undertakings and had taken a decision which was found to be a violation of Section 4 of the Act and in this instance there appears to be no indication of the involvement of an association.
8. Since the instant matter does not attract the provisions of Section 4 of the Act an assessment has to be made with regards to whether the matter may be examined under Section 3 of the Act. Before any assessment as to whether Section 3 of the Act (or for that matter Section 4) is applicable it has to be established whether the Respondent is an undertaking in terms of Section 2(1)(q) of the Act. Section 2(1)(q) of the Act defines an undertaking as follows:

“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

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and shall include an association or undertaking.”

9. To qualify as an undertaking under Section 2(1)(q) of the Act form is not important rather it is engagement in an economic activity that has to be ascertained. We then answer the question that, in the issuance of the tender, the Respondent is: (a) exercising its public powers; or (b) carrying on an economic activity of a commercial nature¹. If this activity falls in the former category the Respondent is not an undertaking and will not attract the provisions of Section 3 of the Act. It is also possible that a government entity may be exercising its public powers for one activity and be carrying on an economic activity for another. In order to assess if the instant matter can be categorized as an economic activity we concurrently apply two tests: the comparative criterion and market participation tests².
10. Under the comparative criterion test we shall analyze if this activity could be carried out by a public body only and cannot be performed by a private entity. Under the market criterion test we will determine whether in actual practice this activity is carried out by a private entity (in a jurisdiction with similar market conditions). In the instant matter we believe that solarization on tube wells is an activity that can be and has been performed by the private sector including in other areas of Pakistan where farmers have installed such equipment privately. Therefore, the Respondent is an undertaking in terms of Section 2(1)(q) of the Act.
11. For further examination under Section 3 a relevant market has to be defined as per Section 2(1)(k) of the Act. Section 2(1)(k) of the Act defines "relevant market" as:

“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’ characteristics, 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

¹ The judgment in *Commission v Italy* [Case 118/85], European Court of Justice.

² *FENIN v Commission* [Case C-205/03 P]



which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas;"

12. In the instant matter the relevant product market appears to be the market for procurement and installation of deep solar pumping systems since the tender document specifies the same. Since companies from all over Pakistan can participate in the tender, the relevant geographic market appears to be the whole of Pakistan. The relevant market therefore, appears to be the market for procurement and installation of deep solar pumping systems in Pakistan.
13. The next question pertains to the establishment of dominant position. Section 2(1)(e) of the Act defines dominance as follows:

'Dominant Position' of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent';

It is noted that solar pumping equipment is used primarily for two purposes: to power agriculture tube wells and for powering pumps for drinking water. Secondly, such equipment is used in all the provinces in Pakistan. For example, the Public Health Engineering Department, Government of KPK had in the same year undertaken procurement for purchase of solar pumps for drinking water. Therefore, from the foregoing it is noted that the Respondent is not *prima facie* dominant in the relevant market.

14. As stated in paragraph 11 above, the Complainant does not appear to be in a dominant position in the relevant market however, without prejudice to the foregoing, the Enquiry Committee finds it prudent to still examine the alleged anti-competitive clauses in the impugned tender. Based on the submissions of the Respondent, the tender and Standard Bidding Document ('SBD') have been prepared in conformity with the following laws:
 - a. Khyber Pakhtunkhwa Public Procurement Authority Act, 2012 ('KPPRA Act');

- b. Khyber Pakhtunkhwa Public Procurement of Goods, Works & Services Rules, 2014 ('KPPRA Rules');
- c. SBD notified by Pakistan Engineering Council ('PEC') relevant to Electrical and Mechanical Works harmonized with PPRA.

We know proceed to examine the impugned clauses one by one:

(I)The Company/firm must have registration with Khyber Pakhtunkhwa Revenue Authority (KPRA):

15. Clause 6 of the Evaluation Criteria (Annex A of the SBD) reads:

"Firm/Company must have registration with Khyber Pakhtunkhwa Revenue Authority: If "yes" the applicant will be eligible for further evaluation for qualification (copy of valid certificate shall be attached)."

The Complainant states:

"KPK Public Procurement of Goods, Works and Services Rules, 2014 require only the proof of being a taxpayer and does not require the registration of undertaking with KPRA. The KPK Sales Tax on Services Act, 2013 does not require supplier of goods to be registered with it. Secondly, if the contract is awarded to an unregistered bidder, the said contractor may get itself registered with KPRA later. Therefore, the purpose of inserting this condition is to oust all suppliers of other provinces and give opportunity of competition only to those who are registered with KPRA".

16. In its response to the allegations the Respondent notes that the SBD was prepared in compliance with Rule 37 of the Khyber Pakhtunkhwa Public Procurement of Goods, Works and Service Rules 2014 which reads as follows:

"37.A Registration with Khyber Pakhtunkhwa Revenue Authority.

All bidders are required to be registered with the Khyber Pakhtunkhwa Revenue Authority, established under the Khyber Pakhtunkhwa Finance Act, 2013 (Khyber Pakhtunkhwa Act No. XXI of 2013), for works, consulting and non-consulting services as listed in Schedule-II of the Act ibid".

17. The Enquiry Committee finds this statement of the Respondent to be accurate furthermore, it is noted that, as erroneously assumed by the Complainant, registration with KPRA does not entail proof of paying provincial taxes it merely requires the entity desirous of participating in the tender to be registered with KPRA. The Enquiry Committee notes that registration with KPRA is the same as obtaining a National Tax Number ('NTN') from the Federal Board of Revenue ('FBR') i.e. a person/entity does not have to be actually paying any taxes to obtain an NTN. It is also observed that



registration with KPRA can be done online through their website. Based on the foregoing, it appears that this clause does not adversely impact competition.

(II) The company/firm must have PKR 200 million average turnover for the last 03 years in solar pumping systems.

18. Clause 7(iv) of the evaluation criteria reads as follows:

“Firm must have 200 Million average turnover for the last 3 years in Solar Pumping System. Must attached Sales Tax Returns, Income Tax Returns & Financial Audited Balance Sheets, which should correspond to the claim”.

19. According to the Complainant the purpose of “inserting this clause is to oust all undertakings from competition” however, it has not provided any explanation as to how it would do so. The Respondent in its rebuttal has noted that during the pre-bid meeting the Complainant was the only company to seek clarification on this clause and the issue was deliberated upon in much detail during the proceedings (of the pre-bid meeting). “The Complainant was summoned on 12.03.2019 vide sub-rule 2 of rule 6 of the Khyber Pakhtoonkhwa Public Procurement Grievance Redressal Rules 2017 and during the course of hearing by the Grievance Redressal Committee constituted under sub rule 1 of rule 5 of the Khyber Pakhtoonkhwa Public Procurement Grievance Redressal Rules 2017, the Complainant has total misconception regarding the term “Average Annual Turnover” because it is evident from the letter of the Complainant dated 01.01.2019... by stating that “the firm that even have done the business of 1000 million in 1 or 2 years is not eligible”. Whereas a firm/company for example have a business of 1000 million will have average annual turnover of approximately 333 million in last 3 years and can easily qualify”.

20. The Complainant then goes on to cite Clause IB 15.4(a) of the PEC SBD relevant to Electrical and Mechanicals works harmonized with PPRA which was used to prepare the impugned SBD (reproduced below):

“The bidder should have an average annual turnover in last five years equal to or more than the Total Bid Price alternately the bidder should have successfully completed in the last five years any specific project having value equal to or high than the total bid price”.

21. It is noted that the PEC recommendation is for the firm to maintain an average turnover over a 5 year period however, the impugned SBD requires turnover to be maintained over a 3 year period which appears to be less stringent since it would be easier for a

firm to maintain a certain level of sales over 3 years rather than 5 years. Therefore, this clause does not appear to impede competition.

(III)The firm should have experience of projects of similar and complex nature worth PKR 10 million completed in last five years.

22. Clause (iii)(a) of the Evaluation Criteria is reproduced below:

“Projects of similar nature and complexity 10 Million (Supply & Installation of Solar Based Pumping Machinery) completed in last five years in any Public Works Department/NGOs (must attached completion certificates of the Projects). ---16 Marks

- *8 Marks are given if the applicant has completed at least 5 projects of similar nature in last five years;*
- *For less than 5 projects completed use the following weightage $8x(A/5)$*
- *For more than 5 projects but less than 10 projects completed use the following weightage $8+(A/5)x4$, A=No of projects of similar nature completed in last five years.*
- *Full Marks are given in case of 10 projects or more”.*

23. According to the Complainant 16 marks are assigned to this requirement and only two firms qualify. The Respondent in its reply has noted that:

“As per KPPRA Rules 2014, to assess the bidder eligibility for execution of the project, the procuring entity should evaluate the relevant and past performance of the bidder. The current procurement is amounting to Rs. 187.435 million against such complex project. The department only demanded 10 million per project against 187.435 million project requirement is not a discriminatory and difficult condition. Further the condition of provision of detail of 10 million projects (previous and in hand) is also very reasonable in the sense that allotment of marks is based on individual project and not collectively”.

24. It is noted that the burden of proof in the instant matter rests with the Complainant who has failed to substantiate as to how the impugned clause is restrictive of competition. The Respondent’s assertion that the value of the project is Rs. 187.435 million whereas the impugned clause requires only Rs. 10 million worth of projects shows that apparently the criteria required is not as stringent as is alleged. Therefore, the criteria does not appear to be anti-competitive.

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(IV)The company/firm should have test bed for verification/testing of solar pumps alongwith all accessories as per ISO 9906 in company premises (Firm must have third party certification regarding test bed arrangements).

25. Clause v(a)—Equipment Capabilities reads as follows:

“Test Bed for verification/ testing of Solar pumps along with all accessories as per ISO-9906 in company premises. (Firm must have Third Party Certification regarding Test Bed arrangements. Marks assigned 13. 13 Marks for complete setup are given.”

26. The Complainant has alleged that the condition of having the Test Bed facility on its premises is restrictive since only two firms would be able to meet this criteria. The Respondent has provided the following reasons for inclusion of this condition:

27. *“The test bed facility is required in bidder premises to perform pre supply test of solar pumping systems after award of the contract. Before conducting the test on any equipment it must be calibrated. The pumping machinery asked for, in SBD by the procuring entity are to be supplied having standard ISO-9906 specification, therefore the third party validation of ISO-9906 specification of the test bed was required from the participating bidders in the said tender”.*

28. It is noted that the condition of having the test bed facility on the company premises appears to be unnecessary and the Respondent has failed to provide a satisfactory answer as to why 13 marks were assigned for this requirement.

CONCLUSION & RECOMMENDATIONS

29. The questions before the Enquiry Committee were whether the tender for procurement and installation of solar pumps for agriculture tubewells in KPK violated provisions of the Act. As per the decision of the Grievance Redressal Committee, submitted by the Respondent, the concerns raised by the Complainant were satisfactorily addressed however, the Enquiry Committee deemed it appropriate to examine the matter under the relevant provisions of the Act.

30. Based on the findings of paragraph 10 the Respondent appears to be an undertaking in terms of Section 2(1)(q) of the Act. Based on the findings of paragraph 12 the relevant market appears to be the market for procurement and installation of deep solar pumping systems in Pakistan.

31. Based on the findings of paragraph 13 solar pumping equipment is used primarily for two purposes: to power agriculture tube wells and for powering pumps for drinking water. Secondly, such equipment is used in all the provinces in Pakistan. For example,

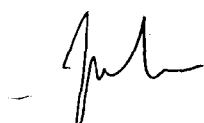
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the Public Health Engineering Department, Government of KPK had in the same year undertaken procurement for purchase of solar pumps for drinking water. Therefore, from the foregoing it is noted that the Respondent is not *prima facie* dominant in the relevant market.

32. The alleged anti-competitive clauses of the impugned tender were examined one by one to see whether they were anti-competitive:

- a. **The Company/firm must have registration with Khyber Pakhtunkhwa Revenue Authority (KPRA):** Based on the findings of paragraph 17, it appears that registration with KPRA is the same as obtaining a National Tax Number ('NTN') from the Federal Board of Revenue ('FBR') i.e. a person/entity does not have to be actually paying any taxes to obtain an NTN. It is also observed that registration with KPRA can be done online through their website. Therefore, it appears that this clause does not adversely impact competition.
- b. **The company/firm must have PKR 200 million average turnover for the last 03 years in solar pumping systems:** Based on the findings of paragraph 21 it is noted that the PEC recommendation is for the firm to maintain an average turnover over a 5 year period however, the impugned SBD requires turnover to be maintained over a 3 year period which appears to be less stringent since it would be easier for a firm to maintain a certain level of sales over 3 years rather than 5 years. Therefore, this clause does not appear to impede competition.
- c. **The firm should have experience of projects of similar and complex nature worth PKR 10 million completed in last five years:** Based on the findings of paragraph 24 it is noted that the burden of proof in the instant matter rests with the Complainant who has failed to substantiate as to how the impugned clause is restrictive of competition. The Respondent's assertion that the value of the project is Rs. 187.435 million whereas the impugned clause requires only Rs. 10 million worth of projects shows that apparently the criteria required is not as stringent as is alleged. Therefore, the criteria does not appear to be anti-competitive.
- d. **The company/firm should have test bed for verification/testing of solar pumps alongwith all accessories as per ISO 9906 in company premises (Firm must have third party certification regarding test bed arrangements):** Based on the findings of paragraph 28 it is noted that the



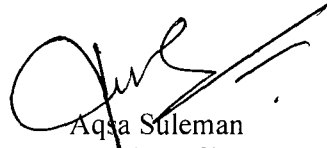
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condition of having the test bed facility on the company premises appears to be unnecessary and the Respondent has failed to provide a satisfactory answer as to why 13 marks were assigned for this requirement.

33. Based on the foregoing, no *prima facie* violation of Section 3 or 4 of the Act is made out by the Respondent in the instant matter.



Maliha Quddus
Enquiry Officer



Aqsa Suleman
Enquiry Officer