BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF

Amin Brothers Engineering et al.

(File No. 13/PESCO/CMTA/CCP/2010)

Dates of hearing:	3 November 2010, 25 January 2011, 24 February 2011 and 9 March 2011
Present:	Mr. Abdul Ghaffar Member
	Dr. Joseph Wilson Member
Present for Amin Brother Engineering et al.	Mr. Waqqas Ahmed Mir, Advocate Raja Mohammad Akram & Company

ORDER

1. This order disposes of the show cause notices numbered 27 to 31 dated 2 August 2010, issued to M/S Nam International (Pvt.) Limited (**Nam**), M/S Amin Brothers Engineering (Pvt.) Limited (**Amin**), Creative Engineering (Pvt.) Limited (**Creative**), M/S M.R. Electric Concern (Pvt.) Limited (**Electric**) and M/S Redco Pakistan Limited (**Redco**) (collectively the 'Respondents') for alleged involvement in a collusive bidding scheme with respect of the tender numbered ADB-PESCO-06-2009 (the '**Tender**') floated by Peshawar Electric Supply Company Limited (**PESCO**) for the procurement of, *inter alia*, 4759 High Tension Pre-stressed Concrete (**HT PC**) and 3678 Low Tension Pre-stressed Concrete (**LT PC**) poles. The Tender was opened on 3 August 2009. The issue in this case is whether the manner in which the Respondents bid for the Tender amounts to collusive bidding in violation of Section 4 of the Competition Act, 2010 (the 'Act'). We conclude that the Respondents colluded in the bidding in question.

A. Background

2. The Competition Commission of Pakistan (the 'Commission'), as part of its bid rigging detection program, routinely monitors information related to public sector tenders. In one such review conducted on the tenders related to the PESCO, the department found indicators of potential bid rigging in the Tender. The Commission, taking notice of this information, authorized an enquiry into the matter under Section 37 (1) of the Act and appointed Mr. Tariq Bakhtawar, Director General and Mr. Syed Umair Javed, Assistant Director as enquiry officers (the 'Inquiry Officers').

3. The Inquiry Officers completed the enquiry and produced an inquiry report dated 21 July 2010 (the 'Inquiry Report') which concluded that the Respondents had, *prima facie*, collusive bid for the Tender in violation of Section 4 of the Act, and recommended that proceedings under Section 30 of the Act maybe initiated.

4. The Commission issued show cause notices dated 2 August 2010 to the Respondents for their alleged conduct, *prima facie,* violative of Section 4 of the Act seeking their replies in the matter and affording them an opportunity to be heard.

5. All the parties were heard at length over four hearings conducted on 3 November 2010, 25 January 2011, 24 February 2011 and 9 March 2011. The Respondents were given numerous opportunities to present their case and submit any material in support of their contentions. All the Respondents were represented by a single counsel namely, Barrister Waqqas Ahmad Mir of Raja Mohammad Akram & Company.

6. In addition, officials of PESCO were invited to present their point of view in the matter.

B. Preliminary Objections

7. The counsel for the Respondents raised two preliminary objections which we feel should be addressed before taking up the main issues:

    a. That the Commission is applying the Act retrospectively? And

    b. That the show cause notices were issued legally?

8. Regarding the first preliminary objection, the counsel for the Respondents has contended that conduct of the Respondents in question took place before the promulgation of the then, and now lapsed, Competition Ordinance (CO) 2010. The counsel argues that the CO 2010 was promulgated on 18 April 2010 and was given effect only from 26 March 2010. Therefore, the counsel insisted, that the conduct in question i.e. the submission of the bid for the Tender which took place on 3 August 2009 could not attract the applicability of the CO 2010.

9. The Commission has previously dealt with a similar issue in the *Pakistan Poultry Association*[1] case. The question in that case was whether the CO 2010 was being applied retrospectively. In order to avoid repetition, the relevant part of the judgment is reproduced below.

> In order to address this issue, we deem it appropriate to give a brief history of the Ordinance. The Competition Ordinance, 2007 was promulgated on 2 October 2007 and subsequently after imposition of emergency was protected under the Constitutional (Amendment) Order 2007, which was subsequently upheld by the Honourable Supreme Court vide its judgment in 'Tika Iqbal Muhammad Khan and others vs. General Pervez Musharaf' cited as PLD 2008 SC 178 (the 'Tika Iqbal Case'). Subsequently, the Constitutional (Amendment) Order, 2007 was declared illegal and the judgment of the Honourable Supreme Court in Tika Iqbal Case supra was overruled by the full court of the Honourable Supreme Court on 31 July 2009 in 'Sindh High Court Bar Association and another vs. Federation of 5 Pakistan and others' PLD 2009 SC 879 (the 'SC Judgment'). The Honourable Supreme Court in SC Judgment held that '…the period of four months and three months mentioned respectively in Articles 89 and 128 of the Constitution would be deemed to commence from the date of short order passed in this case on 31 st July, 2009…'. Therefore, the Ordinance 2007 was to remain in force till 28 November 2009. Thereafter, Competition Ordinance, 2009 (the 'Ordinance 2009') was promulgated on 26 November 2009 and was given effect on and from the 2 October 2007.[1] Competition Ordinance, 2009 lapsed after four months and was re-promulgated by the President on 18 April 2010. The legislature through insertion of Section 60 of the Ordinance validated all the actions taken, orders passed and proceedings initiated by the Commission on or after 2 October 2007.[2]

10. In the abovementioned case, the inquiry had been started under the CO 2009, which had been given effect from 2 October 2007. In the instant case, the proceedings were at the earliest started on 7 June 2010 under the CO 2010. So the

[1] The complete judgment can be read at http://www.cc.gov.pk/images/Downloads/ppa_order_16_august_2010.pdf

question before us today is whether in these circumstances, the CO 2010 is being applied retrospectively.

11. The answer lies in Section 60 of the CO 2010. The section is reproduced below.

> *Validation of actions, etc. – Anything done, actions taken, orders passed, instruments made, notifications issued, agreements made, proceedings initiated, processes or communication issued, powers conferred, assumed or exercised, by the Commission or its officers on or after the 2nd October, 2007 and before the commencement of this Ordinance shall be deemed to have been validly done, made, issued, taken, initiated, conferred, assumed, and exercised and provisions of this Ordinance shall have, and shall be deemed always to have had, effect accordingly.*

12. The reading of Section 60, especially the underlined phrases, clearly indicates that the drafters of the CO 2010 intended that its provisions have retrospective effect from 2 October 2007 regardless of the day of commencement of CO 2007. Section 60 of the CO 2020 provides continuation of the competition regime started by CO 2007 on 2 October 2007, thereby filling the vacuum created by the lapse of successive ordinances. If the counsel's argument is accepted, then the purpose and ethos of introducing a reformed competition law in Pakistan would be negated.

13. Coming to the second preliminary objection, the counsel for the Respondents presents a two pronged challenge to the issuance of the show cause notices. First, it is argued that the show cause notices were issued by the Registrar of the Commission who does not have the power to do so. Second, even if the Registrar of the Commission had the authority to issue show cause notices, the same were issued illegally since the Registrar of the Commission does not have the power to determine whether or not it was in the 'public interest' to do so as mandated by Section 37 (4) of the Act.

14. These arguments are untenable. Section 28(2) of the Competition Act, 2010 empowers the Commission to delegate its functions and powers to any Member of

Officer of the Commission. In the present case, the Registrar of the Commission was delegated the power to issue the show cause notices in question. Moreover, as per Section 37(4), it is the Commission which determined that proceeding under Section 30 was in the public interest.

C. Issues And Discussion

15. Moving to the reply on merits, the counsel for the Respondents has raised some legal arguments on the application and interpretation of the Act:

    a. Whether it is mandatory to define the relevant market under Section 4 of the Act for cases involving allegation of bid rigging?

    b. Whether the *per se* rule for condemning hard core cartels is envisioned by the Act.

    c. Whether in cases of alleged bid rigging the effect on the relevant market needs to be determined?

16. On the first issue, the counsel for the Respondents has argued that the Inquiry Report erred insofar it states that the definition of a relevant market is not required given that the allegation of bid rigging. According to the counsel, the Act imposes a mandatory requirement on the Commission to define the relevant market when dealing with cases of collusion and cartelization. The counsel places reliance on the wording of Sections 2(1) (k) and 4(1) which are reproduced below for ease of reference.

> *"relevant market" means the market which <u>shall</u> be determined by the Commission with reference to a product market and a geographic market and a product market comprises all those products or services which are regarded as interchangeable or substitutable by the consumer 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 homogeneous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are*

appreciably different in those areas;

4 (1) *- No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition <u>within the relevant market</u> unless exempted under section 5 of this Ordinance.*

17. The counsel's reliance on the sections reproduced above is misplaced. By emphasizing the underlined words in the sections above, especially Section 2 (1) (k), the counsel for the respondents has tried to imply a mandatory command in the law when none exists. Section 2(1) (k) lays down broad guidelines for the Commission on how to define a relevant market when needed. In addition, it clarifies that the authority to define the relevant market rests with the Commission, and none other.

18. Similarly, the counsel of the Respondents has failed to take into account the rationale of competition law, as well as the jurisprudence developed around the world, in relying on the wording in Section 4(1). Before coming to the hasty conclusion that the Commission is mandated by Section 4(1) to determine a relevant market in all cases, the rationale behind having a relevant market when dealing with competition issues must be kept in mind. In competition law, distinction must be made between unilateral anti-competitive conduct (abuse of dominance in Section 3 cases) and multilateral anti-competitive conduct (collusion in Section 4 cases). In the first instance, the issue is to determine whether a dominant undertaking has abused its market power in a particular market. Before an abuse of dominance can be established, dominance in a particular market has to be established which, in turn, warrants a definition of a relevant market. Therefore in cases regarding abuse of dominance, it is an essential requirement that a relevant market is identified in order to establish dominance, and thus its abuse, if any.

19. The same is not true in cases of collusive behavior prohibited under Section 4. It is an underlying presumption that all the undertakings involved are operating in the same market, whether horizontal or vertical. Clearly, if they were not, then the need or question of collusion would not have arisen in the first place. Moreover, in cases of collusion, market power is irrelevant. What is relevant is the agreement to collude. Therefore, the identification of a relevant market in cases of collusion is merely for the purposes of reference, and is not a requirement for establishing an anti-competitive action.

20. This principle must be kept in mind while reading Section 4(1). Thus it is not mandatory on the Commission to define a relevant market in cases of collusion, nor does the wording of Section 4 mandates it.

21. This interpretation finds support in jurisprudence developed in the E.U. In *SPO v Commission*,[2] a case used by the counsel of the Respondents, the court held in paragraph 74:

> The approach to defining the relevant market differs according to whether Article 85 or Article 86 of the Treaty is to be applied. For the purposes of Article 86, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behavior (judgment of the Court of First Instance in Joined Cases T-68/69, T-77/89 and T-78/89 SIV and Others v Commission, cited above, paragraph 159), since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined. For the purposes of applying Article 85, the reason for defining the relevant market is to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the Common Market.

[2] SPO v Commission, Case T-29/92 [1995] ECR II-289

22. Notwithstanding the discussion above, the Commission has time and again held in its own decisions that in cases of restriction by object, the Commission is not under compulsion to define a relevant market. In the *Pakistan Banks' Association* case,[3] the appellate bench of the Commission held in paragraph 24 that:

> *…. we, independent of EU and U.S. jurisprudence are of the view, that if the agreement has the object of preventing, restricting or reducing competition, there is no need to assess its anticompetitive effects, for which ordinarily relevant market is defined. Accordingly, in the given facts not defining the relevant market is not material. We therefore hold that the Single Member Bench rightly chose not to address the question of the relevant market, as this was not necessary based on the facts of the case before him.*

23. In the case before us the facts make out an allegation of bid rigging. In the simplest terms, the object of bid rigging is to, *inter alia*, raise prices above the competitive levels i.e. collusion to fix prices. Given the restriction by object nature of bid rigging, there is no need to determine the effects in the relevant market. Consequently, in light of the facts, there is no need to determine the relevant market.

24. With regard to the second issue, the counsel for the Respondents contends that the Inquiry Report erred in concluding that bid rigging is a *per se* violation of competition law. The counsel claimed that the said rule is peculiar to the U.S jurisdiction. In contrast, the EU competition law, structured along the lines of 'object' and 'effect' of restrictive agreements, therefore rejected the concept of *per se* violation. The counsel placed reliance on *Matra Hachette*[4] to show that there is no concept of the *per se* rule in the EU law. The counsel contends that since the Act is structured after EU law, the per se rule cannot be applied.

[3] Read the Commission's judgment available at http://cc.gov.pk/images/Downloads/Final%20PBA%20Order%2010.06.09.pdf
[4] Matra Hachette v Commission, Case T-17/93 [1994] ECR II-595

25. The counsel's argument is based on differences of semantics, international politics, and legal culture between the U.S and E.U, and lacks understanding of the development of competition law jurisprudence around the world. The origins of *per se* can be traced to the enactment of the Sherman Act in 1890. Section 1 prohibited 'any contract in restraint of trade'.[5] Thus the statute condemned all contracts in restraint of trade as *per se* illegal. In essence every contract puts some type of restraint on the parties to the contract. Literal interpretation of Section 1 of the Sherman Act would make most commercial contracts falling afoud of Section 1. It was not till 1911 that the U.S Supreme Court, in Standard Oil v the United States,[6] held that not all contracts in restraint of trade can be said to be illegal and only unreasonable restraints were caught in the prohibition of the Sherman Act. This laid the foundation for the rule of reason doctrine in competition law which envisioned a careful analysis of the pro and anti-competitive effects of an agreement before coming to a conclusion about its competitive nature. The doctrine advocated a case-to-case basis approach. Subsequently, however, the U.S courts found that that there were certain categories of horizontal agreements which did not have any pro-competitive benefits and were liable to be held illegal without an enquiry into its effects.[7] This category included price-fixing,[8] market division,[9] output restraints,[10] and boycott[11] contracts between competitors. Such agreements were said to be *per se* illegal. It needs to be appreciated that the development of the 'rule of reason' and 'per se' doctrine was necessitated by the fact that the statue condemned all contracts in restraint of trade without providing any tools to conduct any meaningful analysis. After the U.S, the E.U was the next significant jurisdiction to enact a competition law in 1962.[12] By this time, the E.U had the opportunity to encompass the principles developed in the U.S jurisdiction

[5] Section 1 - Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. See 15 U.S.C. § 1.
[6] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911)
[7] See Northern Pacific R. Co. v United States, 365 U.S 1, 5 (1958)
[8] See supra note 7
[9] See supra note 7
[10] NCAA, 468 U.S. 99-101
[11] FTC v Superior Court Trial Lawyers Association, 493 U.S. 411 (1990)
[12] EEC Council Regulation No 17 adopted on 06/02/1962 and put in effect on 3/03/1962

within its statue. One cannot expect the E.U, an entity trying to carve out a political and jurisprudential niche for itself, to simply import the terms from the latter. Nevertheless, the E.U. classification of 'object' and 'effect' clearly echoes the broad principles developed by the U.S courts in the 'per se' and 'rule of reason' doctrines. As the E.U jurisprudence developed in light of its unique goal of establishing a common market among the E.U states, distinctions and diversions with the U.S jurisprudence emerged.

> More broadly, the U.S system pursues different goals to the E.U…and these can never be reconciled, nor can the differences in "history, legal culture, mentality and conceptual emphasis.[13]

26. This difference has already been discussed by the Commission in the *KSE price fixing*[14] case. In paragraph 42, the Commission stated that:

> The word 'object' as in Section 4 does not refer to "the subjective intention of the parties when entering into the agreements, but the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied." Agreements that 'by their very nature' restrict competition are treated as having that object. Under the E.C jurisprudence, for example, "an agreement which has as its object the restriction of competition, it is unnecessary to prove that the agreement would have an anticompetitive effect in order to find an infringement of Article 81(1)." Similarly, in the U.S., agreements which 'by their very nature' restrict competition are referred to as "naked" restraints i.e., naked in the sense that the restraint "does not accompany any significant integration of research and development, production or distribution," and they are condemned under per se rule, i.e, without inquiring into their effects. [Footnotes Omitted]

27. The various terms developed in the U.S and the E.U, therefore, have the same underlying principles. Those principles are broadly as follows. In situations where the purpose of the agreement is to restrain competition, it is classified as a *per se* violation or a restriction by object and no further analysis into its effect is

[13] C. Callery, "Should the European Union embrace of exorcise Leegin's "rule of reason"? (2011) European Competition Law Review. 11,32(1), 42-49
[14] See the judgment

required. However, in circumstances where the purpose of the agreement is not to restrain competition, but in fact may affect competition are further analyzed under the 'rule or reason' or by 'effect' i.e. which takes into account factors like facts peculiar to the business, the history of the restraint, why it was imposed, among others.

28. Pakistan had the opportunity to benefit from both the U.S and the E.U at the time when the Act was created. The choice of object/effect over the *per se*/rule of reason, however, cannot be attributed to a preference of one term over the other. This similarity with the E.U law does not mean that Pakistan must only look at E.U case law and principles when looking for persuasive case law. We have over time developed our own jurisprudence and are not bound by any particular international jurisprudence.

29. Regarding the third issue, the counsel for the Respondents further contended that in cases of alleged collusive bidding, the Commission should not examine the latter by 'object' and should instead demonstrate that the alleged collusion has an effect on the relevant market. Reliance in this regard is placed by the counsel on *SPO v Commission.*[15]

30. The argument of the counsel cannot be accepted. As mentioned above, bid rigging schemes are designed to fix prices and divide markets. Both these actions constitute restriction by object as per the jurisdiction evolved in Pakistan. The anti-competitive effects of these actions have consistently been established over a hundred years of competition jurisprudence and no economic evidence has been established that shows pro-competitive benefits of these actions. Therefore, collusive bidding remains on the restriction by object category before the Commission.

31. In this regard reliance on the principles established by dicta in *SPO v Commission* is misguided. SPO v Commission centered on the rules, adopted by an association

[15] SPO v Commission, Case T-29/92 [1995] ECR II-289

of constructors, which established a procedure to be followed by its member when submitting a bid for a tender. The European Court of First Instance held that these rules infringed article the then article 85(1) (now article 101(1)). The rules covered many areas that potentially infringed the prohibition including exchange of information, indirect fixing of prices, market allocation, and limitation on freedom to negotiate. The case is distinguishable from the case before us; the SPO v Commission was concerned with a complicated set of rules established by an association while in the instant case we are concerned with one specific instance of alleged collusive bidding by few undertakings. In any event, the court in SPO v Commission held that the rules had the 'object and effect' of restricting competition with no clear indicating as to approach adopted. Even with regard to Article 85(3), the court found no grounds to grant an exemption to the rules.

32. A careful reading of the court's order will reveal that the court ruled that any pro-competitive effects of the collusive practice in the case could only be considered under the exemption criteria and could not be argued while determining whether the actions constituted a restriction on competition. The court observed:

> *96 The beneficial effects of the rules described by the applicants cannot be taken into consideration for the purposes of Article 85 (1) of the Treaty but are pertinent only to the application of the criteria laid down by Article 85(3) of the Treaty. It follows that those various arguments must be examined in the context of the second plea in law.*
>
> *97 Accordingly, as far as the present plea in law is concerned, it is appropriate only to examine the applicants' arguments concerning the correctness of the facts and the assessment of them under Article 85 (1) of the Treaty.*

33. In Pakistan, the exemption criteria are laid down in Section 9 of the Act which envisions rule of reason inquiry to analyze whether the benefits of the restraint clearly outweigh the adverse effects of absence or lessoning of competition. This analysis is not required in cases where the agreement has the 'object' of restraining competition.

Relevant Market

34. Before proceeding further we would like to take a look at the definition of the relevant market. The Inquiry Report defines the relevant market as the market for the supply of LT and HT poles in Pakistan, which is incorrect. Therefore it would be prudent, even if for purposes of reference, to present a more accurate picture of the relevant market. In the case before us we are dealing with supply for certain goods to public sector entities through tenders and biddings. Not all tenders are the same. The terms and conditions of tenders vary and therefore they cannot be placed in the same relevant product market. Hence, the relevant market in the case before us today is the market for supply for LT and HT poles in the PESCO tender ADB-PESCO-06-2009 LOT-III.

The Joint Venture

35. The Inquiry Reports alleges two things. First that Nam, Creative, Mrec, and Redco entered into a 'joint venture' agreement to collusively bid for the tender in question. Second, that Amin Brothers, a company in the same corporate group as Nam, submitted a cover bid. The Inquiry Report provided *prima facie* evidence of collusive bidding, concluding that the joint venture agreement was a mere quota agreement while the bid by Amin Brothers was a cover bid designed to give the impression of competitive bidding.

36. In light of the above, the Respondents have the onus of proof. First that there were valid, justifiable and provable reasons for the joint venture in the form in which it existed. Second, in relation to the cover bid, the counsel had to prove that Nam and Amin Brothers were separate entities for all legal and practical purposes and could not have known about each others bidding details.

37. Regarding the first issue, the Respondent's counsel contended that a legitimate joint venture was formed between the Respondents to collectively bid for a tender

which would otherwise not have been possible for any of the Respondents to fulfill. According to the counsel, the manufacturing capacity submitted to PESCO as part of the bidding documents was the total production capacity and not the utilization of manufacturing capacity which is determined by a number of factors including 'economies of scale, orders in hand, cost of inputs, debt\liabilities, availability of resources etc.' According to the counsel, none of the four joint venture partners had the conditions favoring utilization of full capacity.

38. Advocating on behalf of Redco, the counsel asserted that the company was out of operation for almost a year. Since its plant was not operational, Redco used 57 out of 120 days to fulfill the contract to do maintenance work, purchase raw material, gain permissions and conduct tests, and arrange workers. Then 29 days were taken to complete production while 28 days were required to cure the poles.

39. Regarding Creative, the counsel argued that the company had many orders in hand and it was not possible for it to singly fulfill the order. The counsel submitted a list of order placed with Creative.

40. Arguing on behalf of Electric, the counsel stated that the manufacturing capacity submitted to PESCO had to be seen in light of the fact that HT and LT poles cannot be manufactured at full capacity at the same time as both types share the same production facilities.

41. The counsel did not touch upon the manufacturing capacity details of Nam or Amin, choosing instead to argue their case in terms of the allegations of cover bidding.

42. It would be pertinent to summarize here the monthly capacity of each member of the joint venture as submitted to PESCO and the monthly utilizable capacity being claimed by the counsel. We have multiple figures made available to us, provided by the Respondents, relating to the capacity and its utilization. While multiple data sets raise questions about the veracity of the submissions, such issues will be dealt later on. For now we have tried to consolidate some data in tabular form

below. The first table related to HT PC poles while the second pertains to LT PC poles.

HT PC Poles

Company	Total Capacity/Month	Utilized Capacity	Quota in JV
Nam	1560	624	1128
Creative	1482	1200	1128
Redco	2080	800	1128
Electric	2002	500	1375
Total	7124	3124	4789

LT PC Poles

Company	Total Capacity/Month	Utilized Capacity	Quota in JV
Nam	1300	728	872
Creative	1482	1080	872
Redco	1560	800	872
Electric	2184	500	1062
Total	6526	3108	3678

43. The counsel for the Respondents has rejected the allegation in the Inquiry Report that the joint venture formed does not conform to the typical characteristics of a joint venture. The counsel contended that not all joint ventures are full function joint ventures which are long term in nature and envisage singular control of all parties concerned. He contended that the joint venture in question is an ordinary joint venture where responsibilities have been divided.

44. Attending to the question of manufacturing capacities and the peculiarity of time, we find that the explanation provided by the Respondents does not provide any valid, justifiable and provable reason for forming a joint venture. Our determination is based on the following observations.

45. First, the Respondents have provided multiple data sets to us and PESCO which makes the acceptance of any data set questionable. For example, while Redco has contended that it can only produce 800 HT and LT PC poles in a month in one document, it seems to have successfully produced 1128 HT PC in accordance with the joint venture agreement despite all the problems expounded upon by the

counsel. In case of Redco there is discrepancy in the total manufacturing capacity submitted to PESCO and that submitted to us. According to the figures submitted to PESCO, and going by the counsel's argument that companies can either , the latter's total manufacturing capacity is either 80 LT PC or 60 HT PC poles per month. However, according to one document submitted by Redco during the hearings, it could only produce 42 HT PC and 32 LT PC poles in a month while operating at full capacity. The figures seem to be running all over the place. As another example, while Nam has submitted to us that it can only produce 672 HT PC and 728 LT PC poles in a month, its previous work orders indicate that Nam in the period January to June, 2008 successfully manufactured over 1625 HT PC and 1654 LT PC poles per month, figures even higher than those submitted to PESCO as total manufacturing capacity. As another example, while Electric has submitted that its utilizable capacity is just 500 HT PC and LT PC poles, previous work orders show that Electric successfully produced around 786 HT and 687 LT PC Poles every month in the period January 2009 to April 2010. The figures provided by the Respondents in support of their arguments are clearly not reliable.

46. Second, even in theory, the rationale provided by the Respondents is not acceptable insofar as collusive behavior is concerned. The contention that without the joint venture, the tender could not have been fulfilled in time is not a benefit for which coordinated behavior can be condoned. From the point of view of a procuring agency, one unsuccessful tender is not a loss of efficiency. In fact, in a scenario where no successful bidder had emerged, the procuring agency would have had the opportunity to restructure the tender in a more realistic manner keeping in mind the market dynamics, thus ensuring a more efficient market. From the perspective of the suppliers, it is important that companies improve their individual efficiencies. The inability of an individual firm to participate in a particular tender is inconsequential. If a company is inefficient, market forces would force it out of the market and its place would be taken by a more efficient competitor.

47. In any event, the Respondents have not convinced us that without the participation of all four companies, the required quantity could not have been provided. Even if we go by the figures tabulated above, two or three companies could have fulfilled the tender in the stipulated time. We cannot understand why all four undertakings, especially one which was stretched due to existing orders, had to get together to fulfill the tender other than to ensure that each undertaking gets a piece of the pie.

48. It is clear from the figures before us that the joint venture was formed to share quantities between the members of the joint venture at a non-competitive price. The counsel for the Respondents has contended that prices were voluntarily reduced which shows that the aim of the joint venture was not to raise prices. This argument is untenable. The volunteer reduction, if anything, shows that the prices quoted were higher than what would have been if there had been any significant competition for the tender. The voluntary nature of the reduction implies that a reasonable margin for all the companies would still exist. Given that all companies would not have the same cost structure, this means that the joint venture agreement and the collective bidding had the effect of creating a price floor, ensuring that the even the most inefficient member of the joint venture received a price above what if would otherwise be able to receive.

49. Regarding the argument of the Respondents about the nature of the joint venture agreement and its distinction from a full function joint venture, we feel that it is not material for making a determination of the principal issue in this case.

Cover Bid

50. Now we come to the second issue of the cover bid by Amin. The counsel for the Respondents has denied that Amin's bid had anything to do with the joint venture's bid. According to the counsel, Amin is a legal entity of its own and is not related to Nam as alleged in the Inquiry Report. In this regard the counsel submits that while one director, Mr. Mohammad Munir, used to be common

between the two companies but resigned from the directorship of Nam on 12 July 2009 by virtue of an agreement signed on that day between him and Malik Nazir Ahmad. Furthermore, the counsel contends that the same person did not sign the bidding documents for Nam and Amin; that Mr. Naeem Yaqub, whose signatures appear on the bidding documents of Amin resigned from Amin and joined Nam, and thereafter issued a letter to NTDC for final inspection of manufactured poles. The counsel also has argued that the similar difference in the quoted amounts of HT PC and LT PC poles between Amin and Nam is purely coincidental and that the fact that both companies operate from the same location does not prove collusion.

51. The counsel's arguments are not supported by the facts proved by the evidence on record. Regarding the nexus between Amin and Nam, the agreement of 12 July 2009 appears to be an agreement without any consideration which makes it hard for us to accept it as a valid agreement signifying change of ownership. In any event, as submitted by the counsel himself, the purported transfer of ownership actually transpired many months after the bids were submitted which shows that at the time relevant to this case, Amin and Nam were linked through common directorship and ownership. In any event, record obtained from SECP also shows that both Amin and Nam are from the same corporate group namely Wire Manufacturing Industries, where directors from both Amin and Nam serve. These directors are Ahmad Jamal and Malik Nazir Ahmed from Nam and Mohammad Munir from Amin. This fact has not been challenged by the Respondents during the hearing at any stage. We have no doubt that both the companies are part of the same corporate structure and had common directorship and ownership at the time of the bidding.

52. Regarding the circumstantial evidence, it is very important to keep in mind that both Amin and Nam, which had common directorship and ownership at the time, operated from the same business address and use the same facilities such as the phone and facsimile. While these two factors alone raises concern regarding collusion, the fact that there is a common difference of PKR 110 in the unit prices

of the HT PC and LT PC poles submitted by the two companies forces us to believe that, at the very least, exchange of information about pricing took place between Amin and Nam. This pricing difference could not have been a mere coincidence, keeping in mind all the factors above. In fact, on a balance of probabilities, we are convinced that this pricing strategy was a result of a coordinated move between the two companies to ensure that the joint venture would win while giving the impression of a competitive bidding process.

D. Penalty

53. In light of the discussion above, we hold that the Respondents violated Section 4 of the Act by engaging in collusive bidding which is a serious infringement of competition law. Therefore, we are inclined to impose a penalty of PKR 2 million on each of the Respondents. The penalty should be deposited within thirty days of this order.

54. Ordered accordingly.

(ABDUL GHAFFAR)
Member

(DR. JOSEPH WILSON)
Member

ISLAMABAD, THE 13TH OF MAY, 2011.