



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

IN THE MATTER OF

COMPLAINT FILED BY

M/S CATKIN ENGINEERING SALE & SERVICES (PVT.) LIMITED

Against

KPK DIRECTORATE OF AGRICULTURE ENGINEERING

(FILE NO: 248/Catkin/C&TA/CCP/2019)

Date of Hearing: 04-12-2019

Commission:

Dr. Muhammad Saleem
Member

Dr. Shahzad Ansar
Member

M. Jaleel

[Signature]

Present

Noman A. Farooqi

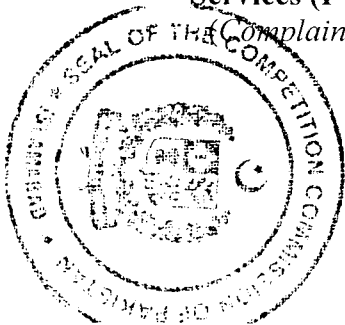
Assisted by:

Mr. Amir Zaman
Deputy Director (Legal)

**M/s. Catkin Engineering Sale &
Services (Pvt) Limited**

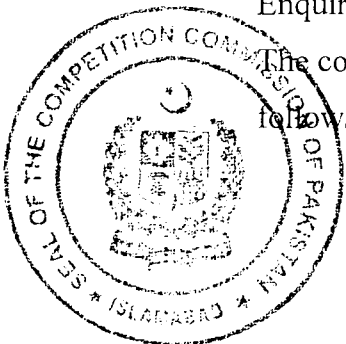
(Complainant)

Mr. Fawad Ashraf Ghumman,
Manager (S&M)

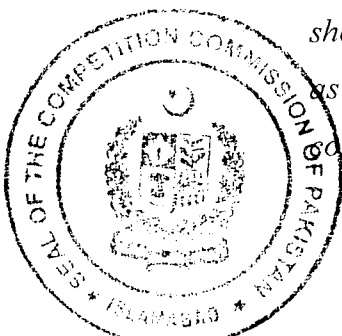


ORDER

1. This Order shall dispose of the Complaint filed by M/s Catkin (the ‘**Complainant**’) under Section 37(2) of the Competition Act, 2010 (the ‘**Act**’) against Khyber Pakhtunkhwa 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 ‘**Tender**’).
2. A Complaint was filed by the Complainant with the Competition Commission of Pakistan (the ‘**Commission**’) on March 4, 2019, against the Respondent to delete the following unfair conditions from the Tender as they were restrictive in terms of Section 4 of the Act:
 - a. *The company/firm must have registration with Khyber Pakhtunkhwa Revenue Authority (‘KPRI’);*
 - 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; and*
 - d. *The company/firm should have 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)*
3. Upon receipt of Complaint, the Commission constituted an enquiry under Section 37(2) of the Act. The concerns raised in the Complaint were examined in the enquiry and it was concluded that the clauses in the Tender were not in *prima facie* violation of Section 4 of the Act. The enquiry was concluded vide Enquiry Report dated 18 September 2019 (hereinafter the ‘**Enquiry Report**’). The conclusions of the Enquiry Report *vis-à-vis* each clause of the tender are as follows:



- 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 KRPA 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 years 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 year:** 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 projects 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.

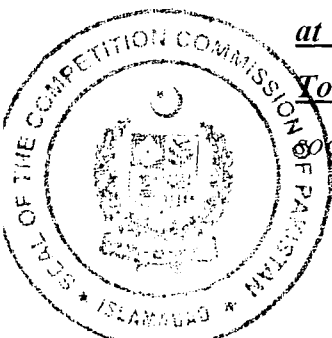


d. *The company/firm should have test bed for verification/testing of solar pumps along with all accessories as per ISO 9906 in company premises (Firm must have third party certification regarding test bed arrangements): Based on the findings of paragraph 28 it is noted that the condition of having the 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.*

4. Based on the above conclusions, the Enquiry Report recommended that no *prima facie* violation of Sections 3 & 4 is made out therefore, the matter may be closed.
5. Based on the findings of the Enquiry Report, a Hearing Notice was issued to the Complainant for 04 December 2019; providing for an opportunity of hearing, before rejecting the complaint. We deem it appropriate to reproduce the relevant part of the hearing notice in its relevant parts, which is as follows:

“3. In terms of the Enquiry Report in general and paragraphs 29 to 33 in particular it was concluded that the allegations against the M/s Khyber Pakhtunkhwa Directorate of Agriculture Engineering, for prima facie, violation of Sections 3 or 4 of the Act were not be made out.

4. You are, therefore, advised to appear before the Commission, and to avail the opportunity of being heard through a duly authorized representative on December 4, 2019 at the Office of the Commission i.e. 8th Floor South, ISE Towers, 55-B, Jinnah Avenue, Islamabad at 11:30 a.m. or as soon thereafter convenient to the Commission.”



6. On 04 December 2019, Mr. Fawad Ashraf Ghumman, Manager (S&M) of the Complainant was present. The Director General (Legal) was also in attendance and while assisting the bench, he made the following submissions:

(a). In terms of Section 37 of the Act, the legislature has clearly provided that the, where upon conclusion of the enquiry, the Commission is of the view that **it is necessary in the public interest so to do** (emphasis added), initiate proceedings under Section 30 of the Act i.e. issuance of show cause notice. In the instant matter neither any violation is made-out nor any public interest is highlighted which may require issuance of show cause notice under Section 30 of the Act.

(b). The Appellate Bench of the Commission in its **Order dated 16 March 2010, in the matter of Appeal Filed by Fecto Belarus Tractors (Pvt.) Limited**, the Appellate Bench of the Commission held that *“where a complaint has been filed and the findings of an enquiry do not indicate any prima facie violation and/or give any adverse findings against the complainant, it would be only fair and in accordance with the principles of natural justice that prior to the disposal of the complainant an opportunity of hearing be given to the complainant.”* Hence, before passing the Order for closure of the complaint, an opportunity of hearing must be provided to the Complainant.

(c). The Enquiry Report has taken into consideration all the facts and materials provided by the Complainant and also gathered material from the Respondent reached a conclusion that no *prima facie* violation of Sections 3 & 4 of the Act is made out, hence, the complaint in the matter may be rejected and the matter be closed.

The authorized representative of the Complainant i.e. Mr. Fawad Ashraf Ghumman, Manager (S&M) was asked, particularly, whether he has any



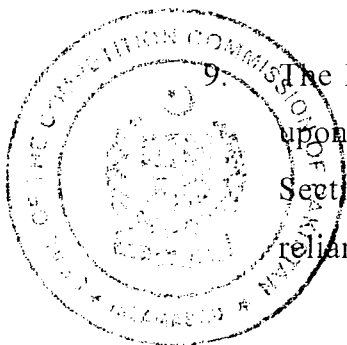
objection on the findings of the Enquiry Report and conclusions thereof? He replied that they are no more interested in pursuing the Complaint, therefore, during the enquiry they did not follow up or pursue the enquiry. He also added that the Tender has already been awarded and payments have been released for the project by the Respondent. He was asked *vis-à-vis* the clauses alleged in the Complaint and his reservation, however, he was unable to provide any response. On the contrary he submitted that he on behalf of the Complainant would like to withdraw the complaint.

8. The Director General (Legal) in attendance was asked to assist the Bench with reference to the withdrawal of complaint. He submitted that the Commission in one of its earlier orders, **Order dated 14 September 2018, in the matter Show Cause Notice issued to Pakistan Telecommunication Company Ltd.**, reported as **2018 CLD 984**, the Commission continued with the proceedings despite the withdrawal of Complaint and held as under:

“24. The Commission is entrusted with the responsibility of looking after the interest of general public vis-à-vis anti-competitive conduct and to create a level playing field in order to enhance economic efficiency in all spheres of commercial and economic activity and that too in the public interest, such like the one alleged against PTCL in the instant matter. Hence, the unilateral withdrawal of the complaint by the Complainants does not prejudice the proceedings against PTCL pending before the Commission.”

He further submitted that in the instant matter no violation of the Act is made out, hence, continuing with the proceedings will not serve any purpose.

The Director General (Legal) was also asked whether initiation of enquiry upon filing of a formal complaint is mandatory under the provisions of Section 37(2) of the Act? While addressing this particular aspect, he placed reliance on **National Feeds vs. Competition Commission of Pakistan**,



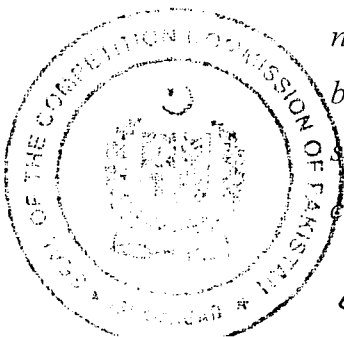
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reported as **2016 CLD 1688**, the Honorable Islamabad High Court while interpreting the provisions of Section 37(2) of the Act held that for initiation of the enquiry the Complainant in any formal complaint filed with the Commission must satisfy the criteria laid down in the express provision of law, i.e. it must be filed by an ‘undertaking’ or ‘a registered association of consumers’ and must be substantiated with *prima facie* evidence, failing which no enquiry thereon can be conducted. The Director General (Legal) further submitted that, there is an exception in the cases of Deceptive Marketing Practices cases where by specific claim is made and the onus to prove the legitimacy thereof lies on the seller/manufacturer of the product. He relied on the **Order dated 29 September 2009 in the matter of Show Cause Notice issued to China Mobile Pakistan Ltd (Zong) and Pakistan Telecom Mobile Ltd (Ufone)** reported as **2010 CLD 1478**, wherein the Commission has held that

“28.....[w]e should not “favour a return to unregulated laissez-faire marketing that would transfer the burden of evidence from the seller, who has the advantage of intimate knowledge of the product, to the buyer, who of necessity must make many, often instantaneous choices in the course of a day.”

...

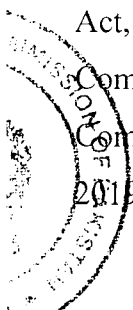
“32. Taking the above into account, I am of the considered view, that if in Pakistan, we want to encourage a compliance oriented approach viz a viz Section 10 of the Ordinance we must place a higher onus on the Undertakings in relation to the marketing practices. Therefore, from OFT’s perspective, the consumer to whom such information is disseminated has to be the ‘ordinary consumer’ who is the usual, common or foreseeable user or buyer of the product. Such a consumer need not necessarily be restricted to the end user. Here it may be relevant to point out that the ‘ordinary consumer’ is not the same as the ‘ordinary prudent man’ concept evolved under contract law. Unlike the ‘ordinary prudent man’ the thrust on



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ordinary diligence, caution/duty of care and ability to mitigate (possible inquiries) on the part of the consumer would not be considered relevant factors. It must be borne in mind that one of the objectives of the Ordinance is to protect consumers from anti-competitive practices; hence, the beneficiary of the law is the consumer. Therefore, in order to implement the law in its true letter and spirit, the scope of the term 'consumer' must be construed most liberally and in its widest amplitude. In my considered view, restricting its interpretation with the use of the words 'average', 'reasonable' or 'prudent' will not only narrow down and put constraints in the effective implementation of the provision it would, rather be contrary to the intent of law. It would result in shifting the onus from the Undertaking to the consumer and is likely to result in providing an easy exit for Undertakings from the application of Section 10 of the Ordinance. Accordingly, the term 'consumer' under Section 10 of the Ordinance is to be construed as an 'ordinary consumer' but need not necessarily be restricted to the end consumer of the goods or services."

10. On careful review of the Enquiry Report, the Hearing Notice and the submissions made before us, it is evident that neither the Enquiry Report has concluded that there is any *prima facie* violation nor the Complainant is interested in contesting the conclusions thereof. We are also conscious of the fact the complaint was also forwarded to the Respondent vide letter dated 6 March 2019 and the Respondent filed their parawise comments. In their comments, the Respondent submitted that the Complainant being aggrieved party filed the complaint before Khyber Pakhtunkhwa Public Procurement Regulatory Authority (the '**KPPRA**') under tier – 1(a) of Section 35 of KPPRA Act, 2012 and summoned for hearing by the Chairman Grievance Redressal Committee on 08 March 2019. The decisions of the Grievance Redressal Committee was communicated to the Complainant vide letter dated 13 March 2019. The Para C of the Decision is reproduced as under:



“C. 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 Plot No. 14 & 15, Hospital Blvd, Sector A, DHA Phase – II, Islamabad – 44000 showed complete satisfaction as regards replies/clarifications of the Committee. Hence the complaint is disposed off accordingly.”

11. Even otherwise, as discussed in Para 6-8 above and the decision of the Khyber Pakhtunkhwa Grievance Redressal Committee and the acceptance of the said decision by the Complainant, We are of the firm view that the complaint in the instant matter is meritless and is hereby rejected. However, before parting with the Order we deem it appropriate to lay down some guidelines for the application of Section 37 (2) of the Act, which are as under:

(i). In pursuance of the law laid down by the Appellate Bench of the Commission in its **Order dated 16 March 2010, in the matter of Appeal Filed by Fecto Belarus Tractors (Pvt.) Limited**, where a complaint has been filed and the findings of an enquiry do not indicate any *prima facie* violation and/or give any adverse findings against the complainant, it would be only fair and in accordance with the principles of natural justice that prior to the disposal of the complainant an opportunity of hearing be given only to the complainant.

(ii). In line with the principle laid down in **2016 CLD 1688**, in particular for alleged violation of Sections 3, 4 to 9 and 11 of the Act, mere filing of a formal complaint shall not trigger initiation of a formal enquiry in terms of Section 37(2) of the Act. For initiation of the enquiry the Complainant in any formal complaint filed with the Commission must satisfy the criteria laid down in the express provision of law, i.e. it must be filed by an ‘undertaking’ or ‘a



registered association of consumers' and must be substantiated with *prima facie* evidence, failing which no enquiry thereon can be conducted.

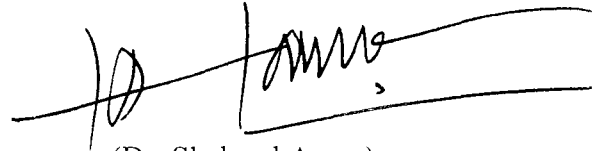
(iii). Notwithstanding the above, in the cases of deceptive marketing practices i.e. Section 10 of the Act, and keeping in view the concept elucidated in **2010 CLD 1478**; the burden of proof is on the undertaking concerned i.e. the manufacturer/seller of goods or provider of services that the claims made by them in the process of marketing about their product and/or services is appropriately substantiated, the Complainant in such like matters is considered an informer; this is in line with the mandate of the Commission under the provisions of the Act i.e. the Commission is entrusted with the responsibility of looking after the interest of general public *vis-à-vis* anti-competitive conduct and to create a level playing field in order to enhance economic efficiency in all spheres of commercial and economic activity and that too in the public interest.

12. The Registrar of this Commission is directed to circulate this Order to all the departments entrusted with the enforcement of Sections 3 to 11 of the Act, for compliance *vis-à-vis* Section 37 (2) of the Act as directed in Para 11 of this Order.

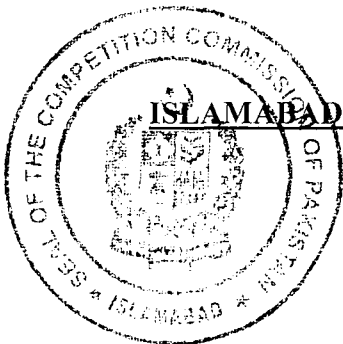
13. In terms of what has been stated above, the case is hereby disposed of.



(Dr. Muhammad Saleem)
Member



(Dr. Shahzad Ansar)
Member



ISLAMABAD THE 16TH DAY OF DECEMBER 2019