BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF
SHOW CAUSE NOTICES NO. 70 TO 73 OF/2009 ISSUED TO

(1) M/S CHINA HARBOUR ENGINEERING COMPANY LIMITED (CHEC)
(2) M/S DREDGING INTERNATIONAL (DI)
(3) M/S JAN DE NUL N.V. (JDN)
(4) M/S CHINA INTERNATIONAL WATER & ELECTRIC CORPORATION (CWE)

(FILE NO. 3(17)/L.O/CCP/2009)

Dates of hearing:	January 14, 2010 & March 19, 2010
Present:	Mr. Khalid A. Mirza **Chairman**
	Ms. Rahat Kaunain Hassan **Member (Legal & OFT)**
On behalf of China Harbor Engineering Company Ltd:	Mr. Wang Xioping, and Mr. Mao Jiaming (Business Manager)
Dredging International:	Mr. Badrauddin Fateh Ali Vellani Advocate, Mr. Imran Ahmed, and Mr. Jan-Mark Van Mastwijk Area Manager
Jan De Null N.V.:	Mr. Mohammad Arshad Warsi Advocate
China International Water & Electric Corporation:	Barrister Khaliq-uz-Zaman Khan, and Mr. Yan Xinde (General Manger)
Port Qasim Authority:	Mr. Abdullah Leghari, Director (Technical) Mr. Munawer Ali Essani, Legal Advisor

ORDER

1. This Order shall dispose of the proceedings pursuant to a Show Cause Notice Nos. 70 to 73/2009 dated November 26, 2009 issued to M/s China Harbour Engineering Company Limited (hereinafter referred to as '**CHEC**'), M/s Dredging International (hereinafter referred to as '**DI**'), M/s Jan De Nul N.V (hereinafter referred to as '**JDN**') and M/s China International Water & Electric Corporation (hereinafter referred to as '**CWE**') for *prima facie* violation of Section 4 (2) (e) of the Competition Ordinance, 2010 (hereinafter referred to as the '**Ordinance**') read with Section 4 (1) of the Ordinance, which prohibits collusive tendering/bidding.

FACTUAL BACKGROUND

A. PARTIES TO THE PROCEEDINGS:

1. **CHEC** was established in December 2005 during the merger of China Harbour Engineering Company Group (founded in 1980) with China Road and Bridge Corporation into M/s China Communications Construction Company (the '**CCCC**'). CHEC is the major international operating division of CCCC group which was ranked 14th out of the 225 Top International Contractors on – Engineering News Recording (ENR). In the 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 was over two billion USD.[1] CHEC has total assets of US$ 645million, current assets of US$ 391 million and current liabilities of US$ 336, with having an approximate working capital of US$ 55 million.[2]

2. **CWE** has been involved in the fields of water resource- and hydropower engineering for 50 over years. CWE has a reputation for 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

[1] http://www.chec.bj.cn/ens/gsgk/zgjj/index.html

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

recognized as one of the major state-owned enterprises in China.[3] CWE has total assets of US$ 960 million, current assets of US$ 516 million and current liabilities of US$ 128 million approx and a working capital of US$ 388[4]. By the end of 2007, CWE had 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 Commerce of China. Meanwhile, CWE is one of a few firms that is listed in both the Top 60 Chinese Contractors and the Top 60 Chinese Design Firms rankings.[5]

3. **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] 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] JDN has total assets worth of US$ 1212/- million, current assets worth of US$ 1054/- million, and current liabilities of US$ 389/- million approximately and a working capital of US$ 665 million.[8]

4. **DI** is one of the primary operating companies of DEME Group, which is jointly owned by holding company *Ackermans* & *van Haaren* and *Vinci* -controlled contractor CFE. DEME Group has a fleet of 300 vessels, over 80 of which are dredging and hydraulic

[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.

[5] http://www.cwe.com.cn/en/BriefIntroduction/BriefIntroduction.html

[6] http://www.jandenul.com/

[7] http://www.jandenul.com/

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

engineering vessels. DI is responsible for more than two thirds of DEME Group's total turnover. The core activity of DI is dredging and land reclamation.[9] DI has a leading position in the global dredging market and has experienced rapid and sustained growth over the last decade. DI has total assets worth of US$ 1401 million, current assets worth of US$ 801 million, and current liabilities of US$ 690 million approx and a working capital of US$ 111 million.[10]

5. **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.[11] The KPT is administered by a Board of Trustees, comprising the Chairman and 10 Trustees. The Chairman is appointed by the Federal Government and serves as 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 is designed in a way so that the varying port user constituencies may be able to find representation in the Board of Trustees.[12]

6. **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, 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.

B. CAPITAL DREDGING PROJECT AT KPT AND ITS TENDERING:

7. KPT took the initiative of bracing itself to handle and cater for fifth and sixth generation ships in the year 2007-2008, by seeking to establish a new Pakistan Deep

[9] http://www.dredging.com/

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

[11] 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

[12] http://www.kpt.gov.pk/

Water Container Port (hereinafter referred to as the **KPT Project**). This would involve 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 meters' depth, with 3.75 km of quay wall.

8. In the bidding process for the KPT Project nine (9) Undertakings purchased the pre-qualification documents, namely (i) CHEC, (ii) JDN, (iii) DI, (iv) M/s Van Oord (hereinafter referred to as the '**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. However, only six (6) undertakings, namely (i) CHEC, (ii) JDN, (iii) DI, (iv) VOD,(v) CWE and (vi) M/s Boskalis International BV, filed applications for pre-qualification and all of them were considered pre-qualified after the evaluation carried out by the joint team of specialist consultants, UK-based M/s Royal Haskoning & Karachi-based M/s Techno Consults. Tenders were invited from the aforementioned six (6) Undertakings.

9. In response to the 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/-

10. KPT vide Board Resolution No. 30 dated 18-09-2008 approved the award of work to the lowest cost bidder i.e., CWE. The factum that the rates quoted by CHEC were almost double the rates of CWE was highlighted in the Enquiry Report and was alleged that, this appears to be a cover bid to the bid of CWE for the KPT Project.

C. <u>CAPITAL DREDGING PROJECT AT PQA AND ITS TENDERING</u>:

11. In the year 2007-2008 PQA 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**). PQA advertised its project in various news papers on 21 May 2007. M/s Boskalis International, CHEC, DI, JDN and VOD submitted their proposal for pre-qualifications. Following was 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	1st in order of merit
02.	JDN	88.0	2nd in order of merit
03.	CHEC	76.0	3rd in order of merit
04.	Boskalis International B.V	74.0	4th in order of merit
05.	DI	66.0	5th in order of merit

12. 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.

13. PQA Board vide its Resolution No. 139/2008 dated 21-10-08 approved the award of project to CHEC, since it was the lowest bidder for the project. As per the news reports, after award of the project to CHEC, the second lowest bidder for the project, DI, maneuvered to knock out CHEC from the tendering process. Subsequently, the Ministry of Ports and Shipping vide its letter dated 3-12-2008 scrapped the whole tendering process.

14. The project of deepening and widening of navigational channel was re-advertised in March 2009 and **(i)** Joint Venture of CWE and Trans Tech Pakistan, **(ii)** CHEC, DI and JDN submitted a joint technical proposal under the 'Pre-bid Consortium Agreement' dated 24-04-2009 (hereinafter referred to as the '**Consortium Agreement**'); and **(iii)** VOD submitted their technical proposals.

15. The consultants of the project ECIL submitted their Technical Evaluation Report in July 2009. 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 were some objectionable conditions & deviations from the tender documents which were mostly of contractual nature that had been made in the proposals of the Consortium and VOD. However, upon clarification from PQA, the Consortium withdrew their objectionable conditions. However, VOD refused to withdraw their conditions and therefore, VOD was also disqualified, leaving only Consortium in the race for award of project.

16. PQA through its letter of intent in March 2010 informed the Consortium that PQA intends to award the PQA project to the Consortium for a total cost of Rs. 16,058,348,104/- (Rupees sixteen billion, fifty eight million, three hundred forty eight thousand and one hundred four only), subject to clearance and authorization from the Competition Commission of Pakistan (hereinafter referred to as the '**Commission**') and availability of 80% foreign exchange loan to PQA at suitable financing terms and conditions approved by the Federal Government of Pakistan.

D. ENQUIRY, SHOW CAUSE NOTICES, REPLIES:

17. The Commission took notice of the news item appearing in the *daily* Business Recorder dated 04-05-2009, 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, which was the PQA Project.

18. The Commission deemed it appropriate to conduct enquiry into the matter and 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; Enquiry Officers were appointed and 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 Ordinance read with clause (e) of the sub-section (2) of Section 4 of the Ordinance.

19. The enquiry officer after collecting all the materials and analyzing them completed the enquiry by producing Enquiry Report dated 25-11-2009 (hereinafter referred to as the '**Enquiry Report**'). The Enquiry Report concluded as follows:

> ***(a)*** *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.*
>
> ***(b)*** *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.

(c) *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.*

(d) *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 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.*

20. On the above said findings and in light of public interest surrounding the case it was recommended by the Enquiry Committee to initiate proceedings under Section 30 of the Ordinance against CHEC, DI, JDN, VOD and CWE.

21. The Commission taking into account the conclusions and the recommendations of the Enquiry Report, deemed is appropriate to initiate proceedings under Section 30 of the Ordinance against CHEC, DI, JDN and CWE, by issuing show cause notices; however, the Commission did not agree with the findings relating to VOD, therefore, proceedings were not initiated against it. All the remaining undertakings, i.e. CHEC, DI, JDN and CWE, were required to file written replies to the show cause notices by 17-12-2009 and to appear before the Commission on 21-12-2009 and avail the opportunity of being heard. Relevant paragraphs of the show cause notices are reproduced herein below:

Show Cause Notice Issued to CHEC:

*4. **WHEREAS**, Karachi Port Trust (hereinafter referred to as the **KPT**) advertised the project of construction of Pakistan Deep Water Container Port (hereinafter referred to as the **KPT Project**), and only two companies submitted the bid for the project, M/s China International Water & Electric Corp. (hereinafter referred to as the **CWE**) the lowest bidder with the (average) rate quoted of Rs. 585/- per cubic meter was awarded the project, as compared to the (average) rate quoted by the Undertaking of Rs. 1006/- per cubic meter who was the only competitor of CWE;*

*5. **WHEREAS**, in terms of Enquiry Report, and in particular Paragraphs 7.7 to 7.7.3 of Part 7 of the Enquiry Report, prima facie, the Undertaking (in this case, CHEC) filed a 'cover bid' (i.e. token, symbolic or complementary bid as explained in the Enquiry Report) for CWE in the KPT Project thereby supporting*

CWE to win the KPT Project, as the Undertaking's financial bid was almost double the financial bid of CWE; the successful bidder;

*6. **WHEREAS**, Port Qasim Authority (hereinafter referred to as the **PQA**) advertised its project for deepening and widening of navigational channel (hereinafter referred to as the **PQA Project**), the project was awarded to the Undertaking being the lowest bidder for the project i.e., Rs. 10.2/- billion against the financial bid of Rs. 10.8/- billion (second lowest bid) by M/s Dredging International's (hereinafter referred to as the **DI**);*

*7. **WHEREAS**, in terms of Enquiry Report, and in particular Para 7.7.4 of Part 7 of the Enquiry Report, CWE appears consciously not to have participated in the bidding process of PQA Project, so that the Undertaking could be awarded the PQA Project in the bidding that took place in 2007-2008;*

*8. **WHEREAS**, subsequently the tenders for the PQA Project was scrapped by the Ministry of Ports and Shipping on violations of Pakistan Procurement Regulatory Authority Rules, 2004 and was re-advertised in the year 2009 and the tenders were invited for the PQA Project; however, in the second round of bidding CWE submitted a weak technical proposal for the PQA Project, which disqualified CWE at the technical evaluation stage, this appears to be indicative of a deliberate collusive attempt with the Undertaking to enable it to win the bid;*

*9. **WHEREAS**, in terms of Enquiry Report, and in particular Paragraph 7.7.6 of Part 7 of the Enquiry Report, it appears that, there exists an arrangement inter se the Undertaking and CWE for collusive bidding and allocation of territories for bidding, as both the Undertakings seem filing 'cover bids' with the object of avoiding competition with each other in their respective territories, by diving or sharing of markets for services which, prima facie, is in violation of sub-section (1) of Section 4 of the Ordinance and in particular clauses (b) and (e) of sub-section (2) of Section 4 of the Ordinance;*

*10. **WHEREAS**, in terms of Enquiry Report and in particular Paragraphs 7.8.5 to 7.8.7 of Part 7, the Undertaking entered into a Consortium Agreement dated 24-04-2009 with M/s Jan De Nul and DI (hereinafter referred to as the '**Consortium**'), for filing a joint bid for the PQA Project, when the project was re-advertised in 2009;*

*11. **WHEREAS,** it is relevant to point out that the scrapping of the earlier PQA Project after its award to the Undertaking was primarily on account of irregularities pointed out by DI which acted as a bitter rival against the undertaking in the first round and joined hands subsequently under the Consortium Agreement prima facie to avoid and eliminate any competition;*

*12. **WHEREAS**, in terms of the Enquiry Report and in particular 7.8.8 of Part 7, the reasons for formation of Consortium in the agreement are (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. However, the reasons afforded by the Consortium do not seem plausible for the following reasons:*

(i) All the Undertakings forming the Consortium had 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 establish that the Undertakings were/are independently capable, of performing the project of PQA;

(iii) The Undertakings comprising the Consortium are not only technically but also financially more strong Undertakings than VOD, who 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.

Accordingly, prima facie, the forming of the Consortium and entering into the Consortium agreement appears to have the object and effect of preventing, restricting and reducing competition in the relevant market;

*13. **WHEREAS**, in terms of the Enquiry Report, and in particular Paragraph 7.8.9 of Part 7, clause (2) of the Consortium agreement provides that:*

> *"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;

*14. **WHEREAS**, in terms of Enquiry Report and in particular Paragraph 7.8.8 to 7.8.10 of Part 7, 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;*

*16. **WHEREAS**, in view of the foregoing, it appears to the Commission that the undertaking along with CWE, DI, JDN and VOD may have engaged in practices prohibited under the Ordinance which has the object or effect of preventing, restricting or reducing competition within the relevant market and it prima facie constitutes violations of sub-section (1) of Section 4 of the Ordinance read with clauses (b) & (e) of sub-section (2) of Section 4 of the Ordinance;*

Show Cause Notice Issued to DI

*6. **WHEREAS**, in terms of Enquiry Report and in particular Paragraphs 7.8.5 to 7.8.7 of Part 7, the Undertaking entered into a Consortium Agreement dated 24-04-2009 with M/s Jan De Nul and CHEC (hereinafter referred to as the '**Consortium**'), for filing a joint bid for the PQA Project, when the project was re-advertised in 2009;*

*7. **WHEREAS,** it is relevant to point out that the scrapping of the earlier PQA Project after its award to the Undertaking was primarily on account of irregularities pointed out by the Undertaking which acted as a bitter rival against the undertaking in the first round and joined hands subsequently under the Consortium Agreement prima facie to avoid and eliminate any competition;*

*8. **WHEREAS**, in terms of the Enquiry Report and in particular 7.8.8 of Part 7, the reasons for formation of Consortium in the agreement are (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. However, the reasons afforded by the Consortium do not seem plausible for the following reasons:*

(i) All the Undertakings forming the Consortium had 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 establish that the Undertakings were/are independently capable, of performing the project of PQA;

*(iii) The undertakings comprising the Consortium are not only technically but also more financially strong Undertakings than M/s Van Oord (hereinafter referred to as the **VOD**), who 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.

Accordingly, prima facie, the forming of the Consortium and entering into the Consortium agreement appears to have the object and effect of preventing, restricting and reducing competition in the relevant market;

*9. **WHEREAS**, in terms of the Enquiry Report, and in particular Paragraph 7.8.9 of Part 7, clause (2) of the Consortium agreement provides that:*

> *"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;

*10. **WHEREAS**, in terms of Enquiry Report and in particular Paragraph 7.8.8 to 7.8.10 of Part 7, 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 CHEC and the Undertaking, respectively; as compared to a much higher current financial bid of Rs. 16.058/- billion of the Consortium;*

Show Cause Notice Issued to JDN:

*6. **WHEREAS**, in terms of Enquiry Report and in particular Paragraphs 7.8.5 to 7.8.7 of Part 7, the Undertaking entered into a Consortium Agreement dated 24-04-2009 with CHEC & DI (hereinafter referred to as the '**Consortium**'), for filing a joint bid for the PQA Project, when the project was re-advertised in 2009;*

*7. **WHEREAS,** it is relevant to point out that the scrapping of the earlier PQA Project after its award to CHEC was primarily on account of irregularities pointed out by DI which acted as a bitter rival against CHEC in the first round and joined hands subsequently under the Consortium Agreement prima facie to avoid and eliminate any competition;*

*8. **WHEREAS**, in terms of the Enquiry Report and in particular 7.8.8 of Part 7, the reasons for formation of Consortium in the agreement are (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. However, the reasons afforded by the Consortium do not seem plausible for the following reasons:*

(i) All the Undertakings forming the Consortium had 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 establish that the Undertakings were/are independently capable, of performing the project of PQA;

*(iii) The undertakings comprising the Consortium are not only technically but also financially strong Undertakings than M/s Van Oord (hereinafter referred to as the **VOD**), who 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.

Accordingly, prima facie, the forming of the Consortium and entering into the Consortium agreement appears to have the object and effect of preventing, restricting and reducing competition in the relevant market;

9. ***WHEREAS****, in terms of the Enquiry Report, and in particular Paragraph 7.8.9 of Part 7, clause (2) of the Consortium agreement provides that:*

> *"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;

10. ***WHEREAS****, in terms of Enquiry Report and in particular Paragraph 7.8.8 to 7.8.10 of Part 7, 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 CHEC and DI, respectively; as compared to a much higher current financial bid of Rs. 16.058/- billion of the Consortium;*

12. ***WHEREAS****, in view of the foregoing, it appears to the Commission that the undertaking along with CHEC, DI and VOD may have engaged in practices prohibited under the Ordinance which has the object or effect of preventing, restricting or reducing competition within the relevant market and it prima facie constitutes violations of sub-section (1) of Section 4 of the Ordinance read with clauses (e) of sub-section (2) of Section 4 of the Ordinance;*

Show Cause Notice Issued to CWE:

4. ***WHEREAS****, Karachi Port Trust (hereinafter referred to as the* ***KPT****) advertised the project of construction of Pakistan Deep Water Container Port (hereinafter referred to as the* ***KPT Project****), and only two companies submitted the bid for the project i.e. the Undertaking and M/s China Harbour Engineering*

*Company Limited (hereinafter referred to as the **CHEC**), the undertaking being the lowest bidder with the (average) rate quoted of Rs. 585/- per cubic meter was awarded the project, against the (average) rate quoted by CHEC of Rs. 1006/- per cubic meter who was the only competitor of the undertaking;*

*5. **WHEREAS**, in terms of Enquiry Report, and in particular Paragraphs 7.7 to 7.7.3 of Part 7 of the Enquiry Report, prima facie, CHEC filed a 'cover bid' (i.e. token, symbolic or complementary bid as explained in the Enquiry Report) for the Undertaking in the KPT Project thereby supporting the Undertaking to win the KPT Project through collusion, as CHEC's financial bid was almost double than the financial bid of the Undertaking; the successful bidder;*

*6. **WHEREAS**, Port Qasim Authority (hereinafter referred to as the **PQA**) advertised its project for deepening and widening of navigational channel (hereinafter referred to as the **PQA Project**), the project was awarded to the CHEC being the lowest bidder for the project i.e., Rs. 10.2/- billion against the financial bid of Rs. 10.8/- billion (second lowest bid) by M/s Dredging International's (hereinafter referred to as the **DI**);*

*7. **WHEREAS**, in terms of Enquiry Report, and in particular Para 7.7.4 of Part 7 of the Enquiry Report, the Undertaking appears consciously not to have participated in the bidding process of PQA Project, so that the Undertaking could be awarded the PQA Project in the bidding that took place in 2007-2008;*

*8. **WHEREAS**, subsequently the tenders for the PQA Project was scrapped by the Ministry of Ports and Shipping on violations of Pakistan Procurement Regulatory Authority Rules, 2004 and was re-advertised in the year 2009 and the tenders were invited for the PQA Project; however, in the second round of bidding the undertaking submitted a weak technical proposal for the PQA Project, which disqualified it at the technical evaluation stage, this appears to be indicative of a deliberate collusive attempt with CHEC to enable it to win the bid; accordingly there appears to be a collusive behaviour on part of the Undertaking in either providing a 'cover bid' through a weak technical proposal or abstaining from filing a bid in the PQA Project;*

*9. **WHEREAS**, in terms of Enquiry Report, and in particular Paragraph 7.7.6 of Part 7 of the Enquiry Report, it appears that, there exists an arrangement inter se the Undertaking and CHEC for collusive bidding and allocation of territories for bidding, as both the Undertakings seem filing 'cover bids' with the object of avoiding competition with each other in their respective territories, by diving or sharing of markets for services which, prima facie, is in violation of sub-section (1) of Section 4 of the Ordinance and in particular clauses (b) and (e) of sub-section (2) of Section 4 of the Ordinance;*

*10. **WHEREAS**, in view of the foregoing, it appears to the Commission that the undertaking may have engaged in practices prohibited under the Ordinance which has the object or effect of preventing, restricting or reducing competition within the relevant market and it prima facie constitutes violations of sub-section (1) of Section 4 of the Ordinance read with clauses (b) & (e) of sub-section (2) of Section 4 of the Ordinance;*

22. **CHEC** filed its reply to the show cause notice vide letter dated 18-12-2009, salient points of the reply are as under:

Submission regarding the KPT Project:

(a) An appropriate competitive bid against the dredging work of KPT deep water port project. Its competitor i.e. M/s CWE hardly had any experience of dredging sea port in the past. CWE was not even pre-qualified for the project; however, for the reasons unknown to CHEC the project was awarded to CWE;

(b) The dredging work at KPT was first tendered in 2006 and six companies were pre-qualified, CWE not being one of them. However, only CHEC submitted the bid which was not accepted on the pretext of a single bid;

(c) The work was again tendered in October 2008 without the process of pre-qualification. Instead, post-qualifications were required as the tender conditions. Only two bids were filed one by CWE and the other by CHEC. CWE's technical bid was insufficient in many ways as CWE did not possess the dredgers required for the project and despite strong objections by CHEC the financial bids were opened and CWE being the lowest bidder was awarded the project. CHEC complained of this faulty tendering process at various levels, however, the objections of CHEC were never heard;

(d) The large difference between the prices of CHEC and CWE for the KPT project is clear proof that there is no collusion. In fact CHEC does not consider CWE its competitor because the latter has no experience and expertise in dredging work and it is not a dredging contractor at all;

(e) The contract of KPT is a bigger one and CHEC being a large company in this field will certainly not trade such a big contract for the smaller work of PQA and that too being one of three partners, if it was to collude with CWE as alleged by the Commission.

Submissions regarding PQA Project:

(a) **CHEC** submitted a bid with lowest price against maintenance dredging of PQA in 2005/06 but same was rejected on a petty issue and the work was awarded to DI at a higher cost;

(b) In early 2008, CHEC was the lowest bidder for the capital dredging of PQA but the tender was scrapped because of an internal feud within the Ministry and PQA;

(c) The inability of NESPAK or PQA to have the final assessment of the tendering process for the capital dredging work is no fault of CHEC or any other contractor;

(d) The reason for NESPAK's refusal to undertake final assessment appears to be their unwillingness to contradict the consultant i.e., ECIL;

(e) CWE submitted a technically weak proposal for the capital dredging work of PQA only for reason of not having the experience and expertise of dredging. There is no reason for CHEC to cooperate with such an inexperienced company who is not even a competitor in the dredging sector;

(f) It is denied that the proposal of CHEC was deficient in any respect. CHEC proposal was fully compliant with all requisite requirements of the matter;

(g) When the project was re-tendered in 2009 CHEC formed a consortium with DI and JDN for the following reasons:

(i) In 2009, some of the dredgers of CHEC were committed to other works and the company was not in a position to complete the entire work with its own equipment;

(ii) It was not possible for the company to arrange the finances of PQA project entirely on its own. The financial strength of a company does not mean that it can also arrange large finances through financial institutions during an era of global economic contraction as was the case in 2008-2009;

(h) Formation of a consortium to bid for a work is absolutely lawful and CHEC has done nothing wrong to form a consortium for a work which it considers beyond

its independent capacity under prevailing circumstances. It is natural that the parties to a consortium cannot allow any of its members who is privy to their financial proposal to become a partner with another company who would be a competitor of the consortium for the same work.

(i) Formation of consortium by DI, JDN and CHEC was not a cartel at all because there are other competitors such as VOD and CWE bidding for the same project. For different reasons the bids of VOD and CWE were not open. How can it be concluded that their prices should be higher than the Consortium? If the price is not controlled by the Consortium, it is absolutely wrong to accuse the parties of making a cartel in the tendering of the project;

(j) The re-tendering has not increased the price of the capital dredging work in real terms. The difference has occurred due to change in exchange rate; rising from Rs. 63 to Rs. 81 a dollar, and prices of commodities, especially the price of diesel which rose from Rs. 37 to Rs. 63 per litre during this period; and

(k) CHEC is only an observer in the International Association of Dredging Companies (the '**IADC**') and CWE is not in this organization at all. The allegation that collusive bidding occurred under the umbrella of IADC is therefore, groundless.

23. **DI** filed their reply to the show cause notice vide letter dated 17-12-2009, salient points of the reply are as under:

(a) The Enquiry Report has started from wrong premises and its resultant outcome is based on an incorrect understanding of various aspects of the dredging activities and of working of the dredging market;

(b) The Enquiry Report has mistakenly assumed that certain conditions are present in the dredging sector that promote collusion among the dredging companies;

(c) Dredging activity pursues numerous purposes although for the purposes of this investigation, the relevant activities are those linked to shipping;

(d) Dredging services involve highly complex services performed through highly complex equipment of various classes and categories, therefore, the dredging

activities under no circumstances be characterized as homogenous services or activities. These are extremely complex activities which involve various nuances with respect to the possible methods, technology and the kinds of equipment used for their performance, including their present location and planning;

(e) The bid documents may prescribe a certain type of dredger for the performance of the project, yet it is very difficult to consider one type of dredger substitutable with another type of dredger;

(f) The dredging market is characterized by transparency and the features of the dredging market would allow companies to monitor the behavior of their competitors. It is, however, impossible for the companies to foresee the behavior of their competitors in relation to specific projects, i.e. whether they will take part in the tender or not;

(g) There is no way of knowing for instance whether a competitor will opt for dredger A or B for a certain project, which could both be a suitable fit for its performance, but with great difference of performance and cost impacting the price;

(h) Besides the aspects already mentioned, there are certain questions concerning the means of estimating the price of dredging services that must be clarified in order to understand the issue better. Estimating the price of dredging project varies significantly from one case to another, and it is practically impossible to calculate one sole price that can be considerable generally as suitable for a particular service;

(i) In addition to the costing of the dredging projects another aspect which is to be considered is the technical information concerning the characteristics of the site where the dredging will be performed, and also on the quality and quantity of material to be removed;

(j) Besides the above, in taking part in dredging projects, the companies must plan, allocate or reallocate equipment to a specific territory, potentially refraining from taking part in projects that may occur in other markets that are more attractive, due to contractual and/or commercial commitments already undertaken, and provide greater financial return and smaller commercial risks;

(k) The allegations in the news report appearing in the *Business Recorder* are vehemently denied and further denied that it ever participated in the or was involved in collusive tendering insofar as the bids for the PQA Project were concerned or otherwise. With respect to increase in tender price from 2007 to 2009, it was due to:

- Political turmoil in the country resulting into higher insurance and financing cost;
- Unusual increase in fuel cost being a major part of the bidders total cost;
- Devaluation of about 30% of the Pakistan Rupee against the US Dollar;
- Reduction in the required completion period, forcing bidders to schedule large dredgers for the PQA Project, which are not readily available in the world; and
- Additional requirements and equipment for the revised tender.

(l) It is denied that DI is a part of cartel organized for the purpose of rigging bids for the PQA Project or for any other dredging contract, or of any other cartel;

(m) It is denied that formation of Consortium was an attempt to eliminate competition or place the Respondents' competitors at a disadvantage. Contrary to Petitioner's claim, competition increased after the formation of the Consortium because in 2009 more bids were submitted (3) than in 2007 (2);

(n) DI entered into Consortium with JDN and CHEC as permitted in the tender documents and this fact was disclosed to all relevant parties;

(o) The Consortium was formed to supplement the operations of the Consortium Members taking into consideration the following:

- Ensuring availability of adequate equipment required for the PQA Project in accordance with specifications. CHEC possessed the equipment which was suitable for the inner channel of PQA Projects and the equipment was available in the region however the equipment of DI and JDN was deployed other regions on other projects;
- Due to the economic and political condition in Pakistan, it was commercially prudent that the risk related to the PQA project be shared with other Consortium members;

- JDN is a Belgium company and the companies could jointly better secure the Belgium export Credit Agency (ONDD), the necessary funds and credit insurance required for the PQA Project;
- Due to worsening credit rating of Pakistan since the previous tenders, it had become increasingly difficult to procure finances required for the PQA Project in Pakistan.

(p) A joint venture ensures the best and most efficient technical and financial services and also such joint ventures are justified due to the changing political and economic environment in the target country and are ultimately beneficial to the projects itself;

(q) The Enquiry Report has heavily relied on OECD guidelines which only provides situations, therefore, it is erroneous to conclude on the basis of the OECD Guidelines that bid rigging exist in the dredging sector of Pakistan;

(r) It is denied that IADC or its members undertake illegal or anti-competitive purposes or that the IADC has been used to implement bid rigging. It is further denied that CHEC, DI, JDN or VOD has used the IADC platform for collusion or any illegal activity;

(s) DI never participated in the collusive tendering and owing to the magnitude of work and various technical, economic and financial reasoning explained above and DI was not in a position in 2009 to execute the project at its own, therefore, Consortium for the PQA Project was entered into. Further these Consortium members have been submitting bids regularly in the past. However, in 2009, the Consortium was made for the first time in Pakistan;

(t) The Consortium is only limited to and for the purposes of the PQA Project;

(u) DI denies any allegation with reference to knocking out of CHEC from the first round of PQA Project or placing of anything before PQA or Ministry of Ports and Shipping for scrapping of PQA Projects' tender;

(v) The Form A5, A6 ad A9 of the Tender documents in no way establish that the Consortium Members are independently capable of performing or executing the

project independently, it only provides the list of work done by the Consortium members to show the experience thereof;

(w) The exclusivity clause is an internationally accepted term in similar agreements and allows for consortiums to undertake large projects bringing together their respective resources, and further the Consortium's bid would not have been accepted or rejected if any bidder participated in more than one bid for the same projects;

(x) DI and JDN has evaluated the currency exchange risk in Euros and US dollars against the hedging cost and given the importance and dedication of the Consortium to execute the works, the DI and JDN agreed to absorb the Euro – US dollar risk and hedge the same on award;

(y) Inclusion of JDN facilitated procurement of finances from ONDD and also supported the in-the-trailer-suction Hooper technology to meet the timeline;

(z) The refusal on Part of VOD to accept the payment in US dollars cannot be termed as an act of collusion between the Consortium and VOD and it is further denied that bid of VOD was a cover bid;

(aa) Whatever happened in India on the dredging project is of no relevance to the tendering for the PQA Project;

(bb) It is denied that the Consortium Agreement is in violation of Section 4(1) or clause (a) or (e) of Section 4(2) of the Ordinance;

(cc) Enquiry Report does not establish violations of any of the provisions of the Ordinance and no basis exists for initiating proceedings under Section 30 of the Ordinance

(dd) DI reserves the right to urge further grounds, including legal and constitutional grounds, and to make further submissions and to adduce further evidence in support of any of its submissions made in this reply.

24. **JDN** filed their reply to the show cause notice vide letter dated 21-12-2009. Salient points of the reply are as under:

(a) The Show Cause Notice has been wrongly addressed to Jan De Nul Group (Sofidara S.A) as it is not involved in the call for tenders for capital dredging works issued by PQA. As a matter of consequences it is hereby, voluntarily and in good faith, responding without prejudice to the Show Cause Notice without being formally served;

(b) The Show Cause Notice is not sustainable in law insofar as JDN has in no way breached Section 4(1) read with Section 4(2)(e) of the Ordinance by entering into a consortium agreement. A consortium agreement between principal dredging companies is a fairly common practice worldwide in order to accomplish mega maritime projects by sharing specialized equipment, know-how and financial resources. JDN did not have sufficient equipment required to complete the PQA project independently, therefore, JDN entered into Consortium agreement for PQA project;

(c) In forming a consortium, the parties had no ulterior motives. In fact there were and are cogent ground realities which prompted the parties to enter into Consortium agreement. When comparing the current bid with that quoted by other bidders in previous rounds, it must be borne in mind that there has been a substantial depreciation of the Pak rupees *vis-à-vis* US dollar and by some count the devaluation of Pak rupee devaluation has been close to 18%. Furthermore, considering that the project needs to be completed in one year, additional devaluation had to be structured into the price. Moreover, in one year's time between 2008 to 2009, a 10% to 15% price increase is universally practiced;

(d) The recent economic downturn which has engulfed the world at large has made it increasingly difficult to secure credit lines from financial institutions to undertake mega projects in certain emerging countries where sovereign guarantees may be hard to come by. Therefore, the parties have joined hands to share the burden and the lenders also feel more secured and amenable to offering better credit limit;

(e) Dredging requires different type of dredgers such as suction dredger, cutting dredger etc., along with other supporting specialized equipment. On account of the fact that there are many ongoing international dredging projects there is a shortage of equipment with the result that parties need to pool their resources in

terms of equipment sharing, this is also one of the reason that international dredging companies take projects collectively;

(f) Considering the preceding valid reasons for parties to cooperate, neither the object nor the effect of the Consortium agreement was to impair or reduce competition but to bring good value and state of the art technology to implement PQA project. Moreover, there were other bidders, too, namely VOD and Boskalis. There was complete transparency and due process was followed in terms of PQA inviting tenders;

(g) It may also be appreciated that PQA which is a Pakistan Government entity accepted the Consortium agreement with full knowledge that the three parties had come together on the basis of the Consortium agreement.

(h) The Show Cause Notice has also questioned Clause (2) of Consortium agreement as *prima facie* being in restraint of competition in terms of Section 4(1) of the Ordinance. In fact this clause aims at ensuring that each member of the consortium commits itself to performing its task in a responsible and diligent manner to the optimum benefit of the client. Such clauses are quite common in international joint venture agreements;

(i) JDN has not at any previous time independently participated in and/or submitted a bid in connection with PQA project;

(j) There is no truth in the statement that JDN has ever been disqualified at Cochin port dredging project. In fact JDN has never participated in Cochin port dredging project; and

(k) The Show Cause Notice has also alluded to the fact while VOD did not agree to payment in US dollars, the Consortium agreed to do so. While the payment in Euros may have been preferred by European contractors, however, with full realization that in terms of foreign currency Pakistan is linked to US Dollar, the Consortium may have accordingly deemed fit to accept payment in US Dollar. VOD is a separate independent entity and is not part of the Consortium; therefore, the Consortium cannot be held accountable for VOD's actions.

25. **CWE** filed their reply to the Show Cause Notice vide letter dated 22-12-2009, salient points of the reply are as under:

(a) CWE welcomes and support the efforts of the Commission in taking suo moto notice of and seeking to eradicate the scourge of collusive bidding from the business. CWE is an internationally respected entity owned and controlled by the Government of China with over fifty years of experience for providing quality and cost effective services to business around the world and in Pakistan;

(b) the show cause notice distorts the statement of Mr. Ismail Dilawar and thereby seeking to raise the wholly incorrect and unjustified implication and insinuation that CWE was or may have been part of the alleged cartel, which CWE denies as alleged and at all;

(c) In 2008 KPT awarded the contract to CWE following a competitive and transparent bidding process tender notice for which had been published on December 4, 2007. KPT engaged Royal Haskoning & Techno Consults as independent consultants in connection with the tendering process.

(d) Out of the nine contractors, six applied for and were pre-qualified by KPT. For collusion to effectively occur in these circumstances, all possible bidders had to be party to the collusion either by submitting a cover bid or abstaining from biding or suppressing their bid altogether. The notice does not anywhere allege, qualified bidders; nor is there any evidence of such collusion.

(e) CWE has had a presence in Pakistan since 1983, but this was the first KPT harbor project in Pakistan for which CWE had either shown interest or for which it had submitted a bid.

(f) PQA first published its notice inviting expressions of interest from contractors on 21-05-2007. This is more than six months before the KPT project. This project was cancelled by PQA on the advice of the Ministry of Ports and Shipping dated 03-12-2008.

(g) The allegation of collusion between CHEC and CWE in bidding process for the KPT project on the grounds because CHEC's bid was almost twice the amount of CWE's which raised the suspicion that it was a cover bid, is denied.

(h) Without prejudice to aforementioned denial, the following are submitted in rebuttal of Notice and Enquiry Report:

(i). The mere fact that, out of two bidders for a project, ones price is lower than the other cannot by itself a ground for any collusion. Others factors also exists. The large disparity between prices may raise prima facie suspicions of not only possible collusion bet also possible misunderstanding of inability of the lowest bidder to effectively implement the project. The price disparity may be reflection of the fact that party quoting the lower price has a reduced profit margin;

(ii) No allegations of prior knowledge have been made in notice or enquiry report. No allegations of impropriety have ever been made against the tendering process itself;

(iii). Allegation of winning a bidding process only because the bid submitted by CWE was too high is not only unreasonable and capricious and but exercise in license;

(iv). Where there are six bidders the collusion of two bidders is highly unproductive and improbable. The only possible benefit would be that the competitors would be reduced from 6 to 5. This could never justify the heavy financial and administrative cost of participating in the biding process

(i) CWE did not participated in the PQA Project for the first tender for two reasons, (i) it was wholly unaware that PQA had invited expression of interest; and (ii) head office instructions were to maintain focus on inland projects;

(j) After award of KPT Project, CWE decided to participate in future harbour projects of Pakistan;

(k) It is denied that CWE's technical or financial bid was weak as alleged or at all that they were designed to further a collusive design with CHEC to enable the later to win the bid.

(l) CWE's bid for the PQA Project Second Tender was unfairly and capriciously evaluated by PQA and its consultants. The evaluation did not properly assess

CWE technical bid or the clarifications provided subsequently, and as a result CWE was disqualified.

(m) If CWE's financial bid had been opened it believes that it would have been declared the lowest bidder and therefore, awarded the contract.

(n) No arrangement exists between CWE and CHEC or any other entity for collusive bidding and allocation of territories for bidding as alleged and at all.

(o) CWE welcomes and support the efforts of the Commission in taking suo motto notice of and seeking to eradicate the scourge of collusive bidding from business in order to foster transparency and competition for the ultimate benefit of business and consumer.

(p) CWE believes that it is the victim of the scourge of collusive bidding in the manner in which the PQA Project Second Tender was evaluated and scored resulting in its exclusion from having its financial bid opened. CWE urges the Commission to fully and fairly investigate so that business and consumers benefit from the competition and transparency.

E. HEARINGS BEFORE THE COMMISSION:

26. The first hearing in the matter was held on 14-01-2010. Mr. Wang Xioping, representing CHEC appeared before the Commission and argued the matter. Mr. Badaruddin Fateh Ali Vellani, advocate and & Mr. Imran Ahmad, representing DI appeared before the Commission and argued the matter at length and elaborated by refereeing to their written reply the justifications for entering into the consortium. They also submitted before the Commission that they are willing to address the concerns of the Commission and would like to resolve the issue. Mr. Mohammad Arshad Warsi, advocate, representing JDN appeared before the Commission and adopted the arguments made on behalf of DI. Barrister Khaliq-uz-Zaman Khan, representing CWE appeared before the Commission and argued the matter at length and elaborated upon the written reply filed by them. Hearing was adjourned with the direction to all the parties to file their comments to the replies and any

additional submission before the next date of hearing and the parties were also directed to forward a copy of their replies to other parties to the proceedings.

27. On 19-03-2010 Mr. Mao Jiaming representing CHEC appeared before the Commission and argued the matter at length by elaborating their written reply. Mr. Badaruddin Fateh Ali Vellani, advocate, Mr. Jan-Mark Van Mastwijk and & Mr. Imran Ahmad, representing DI appeared before the Commission and argued the matter at length and elaborated the justifications for entering into the Consortium. They also submitted before the Commission that they are willing to address the concerns of the Commission and would like to resolve the issue. Mr. Mohammad Arshad Warsi, advocate, representing JDN appeared before the Commission and adopted the arguments made on behalf of DI. Barrister Khaliq-uz-Zaman Khan, representing CWE appeared before the Commission and argued the matter at length and elaborated upon the written reply filed by them.

28. The arguments made during the hearing are discussed and deliberated upon herein below.

F. ISSUES:

29. The material issues that emerge from the submissions made by the parties are as follows:

(i) Whether CHEC & CWE have divided territories, i.e. KPT and PQA among themselves, and have colluded with each other and filed cover bids to realize such division, in violation of Section 4 (2) (b) & (e) read with Section 4 (1) of the Ordinance?

(ii) Whether CHEC, DI and JDN through the 'Consortium Agreement' have entered into a prohibited agreement which has its object or effect of preventing, , restricting, reducing or distorting competition within the relevant market, in violation of Section 4 (1) read with Section 4 (2)(e) of the Ordinance?

G. DELIBERATIONS & ANALYSIS OF ISSUES

Issue No. (i) ***Whether CHEC & CWE have divided territories, i.e. KPT and PQA among themselves, and have colluded with each other and filed cover bids to realize such division, in violation of Section 4 (2) (b) & (e) read with Section 4 (1) of the Ordinance?***

30. In this regard, it is imperative for us to understand the meaning of '*cover bidding*'. Since this term is not defined under the Ordinance, we revert to the definition of cover bidding provided in the OCED Guide Lines[13], which is as follows:

> *"Cover bidding. Cover (also called complementary, courtesy, token, or symbolic) bidding is the most frequent way in which bid-rigging schemes are implemented. Cover bidding is designed to give the appearance of genuine competition. 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."*

31. UK-Office of Fair Trading in its ***Decision No. CA98/04/2005 dated 08-07-05, in the matter of Collusive tendering for felt and single ply roofing contracts in Western-Central Scotland***, while discussing various types of anti-competitive arrangements that can result in a pre-selected supplier winning a contract, defines 'cover bidding' in the following words[14]:

> *"Cover bidding (or cover pricing) occurs when a supplier submits a tender price for a contract that is not intended to win the contract but has been arrived at by arrangement with another supplier who wishes to win the contract. Cover bidding gives the impression of competitive bidding, but in reality, suppliers agree to submit token bids that are usually too high"*

[13] Guidelines for Fighting Bid Rigging In Public Procurement, helping Government for obtaining best value for money.
[14] Para 34, Pg. No. 14-15 of the Decision No. CA 98/04/2005

32. From the above, we are of the view that a 'cover bid' is a bid which is usually filed by the competitors to facilitate the designated winner of the project, and to show rather in an artificial manner, that the process of bidding was competitive and was contested by the competitors.

33. Contrary to the findings in the Enquiry Report, CHEC in its written reply and arguments made during the hearing has strongly opposed these allegations. It has submitted that, the KPT Project was first tendered in 2006 and CWE was not one of six companies that pre-qualified. CHEC was the only undertaking which submitted the bid and the same was not accepted on the pretext of it being a single bid. CHEC further submitted that, the KPT Project was again tendered in October 2008 and instead of the process of pre-qualification, post-qualifications were required as the tender conditions. This time, only two bids were filed one by CWE and the other by CHEC. The technical bid of CWE was insufficient in many ways as CWE did not possess the dredgers required for the project and despite strong objections by CHEC the financial bids were opened and CWE being the lowest bidder was awarded the project by the KPT board. As per CHEC's submissions, it complained of this faulty tendering process at various levels. However, the objections of CHEC were never redressed. Regarding the high price margin between the prices of CHEC and CWE for the KPT Project, it was asserted that, this difference in itself is a clear proof that there is no collusion. In fact, CHEC does not consider CWE as its competitor because the latter has no experience and expertise in dredging work and according to CHEC, CWE is not a dredging contractor.

34. With reference to KPT Project, CWE in its written reply and during the hearings has submitted that, there is no collusion of any kind *inter se* CWE and CHEC and the process of tendering for the KPT Project was duly competitive and transparent. It was submitted that, out of nine contractors purchasing the pre-qualification documents, six (6) undertakings turned with a request for their pre-qualification and were considered pre-qualified by KPT. It is argued that, in the usual course of events, there was no possible way for any of them to know who would or would not submit a bid and what the terms of any such bid(s) would be. It would have been reasonable to assume that not all pre-qualified contractors would participate in the pre-bid process. It is contested that for collusion to effectively occur in these circumstances, all possible bidders had to

be a party to collusion either by submitting a cover bid or abstaining from bidding or suppressing their bids altogether.

35. With reference to the PQA Project, CWE submitted that, the first tender for the PQA Project was advertised in May 2007, and CWE did not participate in the first round of bidding for two reasons, namely: (i) it was wholly unaware that PQA had invited expressions of interest; and (ii) because head office instructions were to maintain focus on inland projects. However, upon award of KPT Project, CWE decided that in future it should participate in Pakistani harbor projects; hence, it expressed its interest in the second tender of PQA Project. Since, CWE was pre-qualified for the PQA Project, therefore, it submitted technical and financial bids. CWE's technical bid was opened and evaluated. As a result of the technical evaluation it was awarded 73.5 marks whereas 75 marks were required for technical qualification.

36. CWE denied that their technical or financial bids were weak as alleged or that they were designed to further a collusive design to enable CHEC to win the bid for the PQA Project, in consideration of CWE getting the KPT Project. It was further contended that CWE's technical proposal was not properly evaluated as they were not given any scoring for the item 2(i)(b) relating to the employees employed for 5 years or more. According to CWE these marks were capriciously withheld and not awarded in view of the following, (a) in item 3(i) relating to trailing suction hopper dredgers, CWE has not been given any mark, whereas 10 marks should have been given as the details of two such dredgers had been provided in the bid documents, (b) CWE has not been given any mark for item no. 3(ii) relating to cutter suction hopper, whereas CWE should have been given 2.5 marks because CWE had provided details of one such dredger in its bid documents, (c) for item no. 3(iii) relating to grab/back hoe dredgers, CWE should have been given full 3 marks but was not given any marks despite the fact that details of two such dredgers, which are owned by CWE, were provided in the bid documents. It was pleaded that, if correct evaluation of technical proposal was made by PQA, CWE would have been qualified for the PQA Project.

37. To further substantiate its ground, CWE submitted that if its purported financial bid would have been opened; it would have been declared the lowest bidder and would have been entitled for the award of the project. However, upon disqualification of the technical proposal the financial proposal of CWE was returned.

38. During the course of hearing the counsel for CWE was categorically asked whether or not CWE has challenged the wrongful technical evaluation at any forum? At first it was replied that the technical report was not made available to them. However, when it was pointed out to them that PQA's letter dated 31-08-2010 expressly states that the report was enclosed. The counsel responded that, as per the information provided to him by his client no report was annexed to the said letter. He was again asked as to whether a copy of the report was requested by CWE upon receipt of the letter? The counsel for CWE responded that CWE had not, but the representative informed us that he informally took up the issue with PQA.

39. The representatives of PQA denied the assertions made by CWE. They informed that CWE was disqualified for reasons of not providing the requisite details. It was submitted that for the PQA Project the bidders were required to own or hire the following completely three different types of dredgers:

    (i) Two (2) Trailing Suction Hooper Dredgers of combine hopper capacity of minimum 20,000 cum with each dredger of minimum hopper capacity of 8,000 cum;
    (ii) One cutting dredger designed and capable to dredge 20 meter or above;
    (iii) One (i) Grab/Backhoe dredger designed and capable to dredge 20 meters or above

    It was further submitted by PQA that, CWE did not own or hire the dredgers required in (i) and (ii) above and did not provided the ownership/hire documents of the only dredger mentioned in their technical proposal. Further the information regarding the equipment, personnel and experience of M/s Transtech Pakistan (proposed partner of CWE for PQA Project) was not provided as required under the tender documents. It was for this reason the proposal of CWE was rejected. PQA denied the fact that CWE or its representative informally made any representation in this regard.

40. We have heard the undertakings concerned at length and have also gone through all the relevant documents available on the record. Prior to analysis of the arguments made and commercial justifications afforded by each of the parties, it would be helpful to refer to the principle that an 'agreement' may consist not only in an

isolated act but also in a series of acts or a course of conduct.[15] Conduct may amount to a concerted practice even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behavior[16].

41. Furthermore, most of the times, only a limited amount or no direct evidence is available explicitly proving unlawful contact between undertakings, such as the minutes of a meeting, which will normally be only fragmentary and sparse. For such like situations, we are in agreement with the view taken by the European Court of Justice in the matter of ***Aalborg Portland A/S and others v Commission*** ***in joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C- 213/00 P, C-217/00 P and C-219/00 P (EU Cement Cartel Case)*** wherein it was held that,

> *"In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules."*

42. We must state that the parties have not been very convincing, in rebutting the allegations of 'cover bid'. To the contrary the facts taken in defence further cast a shadow and seem to justify everything being done merely as a co-incidence. Facts such as:

(a) The significant cost difference quoted by CWE and CHEC is evident in the table below for which no satisfactory response has been given by either of the parties:

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/-

The sole ground taken by CHEC in this regard is that the significant difference is not a result of any collusion and is only due to CWE's in-experience and lack of expertise in the dredging field. It was asserted that CHEC does not even consider CWE its

[15] Case C-49/92P *Commission v Anic Partecipazioni SpA,* [1999] ECR I-4125, paragraph 81.

[16] Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 256.

competitor. CWE did not offer any explanation, however, it asserts that nine (9) contractors purchased the bid documents and out of which six (6) pre-qualified. Therefore, for collusion to effectively occur in these circumstances, all possible bidders had to be a party to the collusion either by submitting a cover bid or abstaining from bidding or suppressing their bid altogether.

(b) As for the assertions of CWE's in-experience and lack of expertise no supporting evidence has been placed on record. However, CWE has placed a certificate provided by G.M (Planning and Development Division) KPT, bearing no. GM(P&D)/PS/2009/MISC/199 dated 30-06-09, wherein it has been stated as follows:

> *"….The contract value of the dredging and reclamation works is around Rs. 19 billion and CWE is responsible for the dredging and reclamation of around 33 million cubic meters of materials. The performance of CWE is satisfactory."*

The fact that the KPT Project was awarded to CWE in 2008 and the certificate issued by KPT confirming satisfactory performance seem to contradict the allegations of in-experience or lack of expertise as being without merit. However, CWE has also not explained the cost difference, its argument that all bidders have to be a part of the collusion does not preclude the possibility of collusion between the two bidders who ultimately filed the bid for the KPT Project. Also, as to what eliminated others or why others abstained from even filing a bid for the KPT Project is not before us and we have to restrict ourselves to the given facts on the record. On the other hand, one cogent reason for having at least two parties to bid for the KPT Project is quite evident i.e. in the earlier round of bidding for the KPT Project in 2006; the bid by CHEC bid was not accepted on the pretext of being the single bid despite the fact that six (6) undertakings had earlier been pre-qualified.

(c) It is also worth mentioning, that while CHEC asserts that it informed KPT about lack of experience of CWE in the dredging work upon award of the project but no evidence in writing or otherwise has been provided.

(d) For CWE it appears too naïve on their part to submit that despite purporting to be one of the largest general contractors in China, completing more than 600 international contracts in more than 60 countries and being one of the top 225 International contractors ranked by Mc Graw-Hill Construction Engineering News

Records Magazine from 1997 to 2007, it was unaware about the advertisement of PQA Project in its first round of bidding in 2007. Thus its abstinence from bidding in the PQA Project in 2007, its subsequent bidding and winning in the KPT Project, followed by a technically defective bidding for the second round of PQA Project in favour of the Consortium, or upon disqualification making no efforts to challenge the same before any forum, in our considered view, is certainly more than a co-incidence.

43. Taking a holistic view of the matter, we are at a loss to appreciate the justifications for so many omissions and CWE & CHEC have done very little, for us to assume otherwise. The fact that CWE did not contest the alleged wrongful disqualification, particularly when it maintains that its quoted price was much lower. More striking is its omission to provide the basic documents in the bid before PQA. If either of the facts are taken as true, such omission is too glaring and smacks of sheer lack of diligence in presenting the bid documents. No serious, diligent and responsible bidder can make such a fatal omission. Considered in the complete perspective of the case before us, and keeping the ultimate effect of the conduct and behaviour of CWE & CHEC, we are not inclined to grant any benefit of doubt to both the parties as CWE & CHEC have failed to demonstrate any valid or prudent commercial basis for their conduct.

44. In view of the above, we are constrained to reach the conclusion that, there was a collusive arrangement *inter se* CHEC and CWE to divide territories i.e. KPT Project and PQA Project among themselves and to file cover bids in their respective territories, which has the object of restricting, reducing and distorting competition and is in violation of Section 4 (2) (b) & (e) read with Section 4 (1) of the Ordinance.

45. Therefore, Issue No. (i) is decided as against CWE and CHEC.

<u>Issue No. (ii)</u> Whether CHEC, DI and JDN through the 'Consortium Agreement' have entered into a prohibited agreement which has its object or effect of preventing, , restricting, reducing or distorting competition within the relevant market, in violation of Section 4 (1) read with Section 4 (2)(e) of the Ordinance?

(a) <u>Treatment of Consortium Agreements in other jurisdictions</u>:

46. Generally speaking, a bidding consortium between two or more significant competitors may violate the provisions of Section 4 of the Ordinance if parties to the consortium qualify as competitors i.e. they are independently capable of performing the project and would have submitted a bid absent the agreement to bid jointly.

47. Therefore, it needs to be analyzed as to whether the bidding consortia agreements (horizontal collaboration) are condemned *per se* and treated as the agreements having the anti-competitive objects, or to be treated under the rule of reason i.e analyzing the effects of the agreements. In order to address this, we deemed it appropriate to discuss the treatment of such like agreements in other mature jurisdictions in order to adopt an informed approach regarding the analysis and treatment of bidding consortia in Pakistan.

48. In this regard, we note that in Germany, an important aspect of the ban on cartels is the case law which specifies the conditions under which bidders are allowed to submit a joint bid in an auction. Such bidding consortia can be found in virtually all auction markets but are very frequent in the German construction industry. A bidding consortium between two or more significant competitors typically violates the ban on cartels if both companies would have submitted a bid absent the agreement to bid jointly. Setting up a bidding consortium is, therefore, a cartel agreement if bidding separately would have been a viable and rational business decision and if the agreement appreciably restricts competition. Bidding consortia can also fall under the scope of German merger control[17]. In the case of ***Rethmann and Tönsmeier*** regarding their joint participation in GfA Köthen, it was held as follows:

> *Rethmann, Tönsmeier and the public-owned GfA Köthen were active in various local disposal markets, especially in the market for the collection and transport of residual waste, waste paper and other types of waste. In a tender to privatise GfA Köthen, Rethmann and Tönsmeier submitted a joint bid. In November 2004, the Bundeskartellamt prohibited the joint participation of Rethmann and Tönsmeier in GfA Köthen. Both the formation of a bidding syndicate by Rethmann and Tönsmeier and the formation of a joint venture*

[17] Roundtable on Competition In Bidding Markets – Note by Germany (DAF/COMP/WD(2006)57) dated 12-10-2006

constituted illegal anti-competitive agreements within the meaning of the ban on cartels. As a result of the formation of the bidding syndicate only one joint bid was submitted in the tender to privatize GfA Köthen instead of two independent bids. Rethmann, the second-largest German waste disposal company, and Tönsmeier, a well-established medium-sized enterprise, would both have been able to submit an independent bid. According to the Bundeskartellamt.s evaluation Rethmann and Tönsmeier would also have coordinated their competitive behaviour in the relevant geographic market after the merger as a consequence of the formation of the cooperative joint venture. Furthermore, the merger would have strengthened a dominant oligopoly in the markets for the collection and transport of residual waste and waste paper in a geographic area of approx. 100 km surrounding the District of Köthen.[18]

49. In South Africa, collusive tendering is a *per se* prohibition under their Competition Act (1998). In recent past, there has been a significant increase in bid rigging cases in South Africa. This is partly due to the prioritization of enforcement in the construction sector, where the practice appear most prevalent. Further, there was also evidence of collusive tendering for contracts with two state owned entities, namely, ***Portnet***, which controls commercial ports, and ***Gautrain***, a government initiative to introduce a rapid rail link system in the Gauteng province of South Africa. In one instance, competitors sought to share the market by collectively bidding through ***"The Railway Sleepers' Joint Venture"*** in circumstances where they could have bid independently. The holding company of one of the parties, ***Aveng***, settled with the Commission with an administrative penalty of ZAR46.3m (€4.1m). It also undertook to put into place a compliance programme and agreed to co-operate with the Commission's investigation. The case against the remaining members of the cartel is currently pending before the Tribunal.

50. In Singapore, Section 34 of the Competition Act (Chapter 50B) (the "Act") prohibits any agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or

[18] The full text of the Bundeskartellamt decision on 16 November 2004 is available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion04/B10-74-04.pdf

distortion of competition within Singapore. By their very nature, Competition Commission of Singapore (the '**CCS**') regards collusive tendering or bid-rigging arrangements as restrictive of competition to an appreciable extent. Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of the system is that parties that tender prepare and submit bids independently. Any tenders submitted as a result of collusion or co-operation between tenderers will, by their very nature, be regarded as restricting competition appreciably. However, the government does allow smaller firms to form a consortium and tender for bigger projects to allow more firms, including small and medium enterprises to participate in such tenders.[19]

51. The approach of Italian Competition Authority (the '**ICA**') has always been more restrictive towards joint bidding, as joint bidding is often considered inappropriate. In the course of its advocacy functions the ICA has recommended that contracting authorities limit to exceptional circumstances the possibility to enter bidding consortia for undertakings individually satisfying the bid participation requirements. The ICA's view was recently validated by the Supreme Administrative Court in a decision of June 2009 (Decision 4145). The ruling confirmed the legitimacy of a provision in the contracting authority's call for tender, restricting companies that individually fulfill the capacity requirements from bidding consortia. The court confirmed that such provision can play a pro-competitive part and fulfill legitimate public interests arising from the specific features of the relevant market. The ICA in its decision of ***October 30 2007 in Proceeding I-657, confirmed by the Lower Administrative Court's Judgment No 6215 of June 26 2008*** found that a number of companies (although one of them was later held not liable) had entered into arrangements for contract bidding by setting up three macro-groupings (strategic alliances and bidding consortia) in order to coordinate their participation in the bidding process for local public transport contracts on a national scale. The consortia were set up in the wake of the imminent market liberalization provided for by Legislative Decree 422/1997, which was intended to introduce competition through the contracting of local public transport services by way of public bids. According to the companies, the groupings were to be seen as strategic alliances aimed at achieving synergy, reducing operating costs and exchanging know-how in order to gain experience in the first tender processes. They were justified by the

[19] OECD Roundtable on Collusion and Corruption in Public Procurement (DAF/COMP/GF/WD(2010)8), dated 13-01-2010.

fragmentation of the Italian market, which had more than 1,000 firms which, in a liberalized context, would have to compete with much larger European operators. Therefore, the competitive effects of the alliance should be not considered with respect to the single tender, but rather with respect to the whole set of new tenders, which would result from the enactment of the new legislation. However, the ICA did not accept this approach and defined the relevant market from the point of view of the restraint on competition as the single tender, while the overall effect of the arrangements was evaluated with respect to the sum of the actual and potential tenders at national level. On this basis, it considered that the arrangements entered into by the parties restricted competition in a number of tenders: they aimed at ensuring that local public transport contracts went to the incumbent operator in each geographic area (defensive bidding) or at reducing competitive pressure between potential rivals when bidding for contracts outside their home territory (aggressive bidding). Subsequently, the Supreme Administrative Court of Italy in an appeal to ICA’s decision acknowledged that bidding consortia and strategic alliances must be assessed on a case-by-case basis, having regard to the actual objective they pursue and the market context. Nevertheless, it then upheld the ICA's definition of the relevant market and evaluated the anti-competitive object of the agreements with reference to the single tenders. Hence, this has led to the adoption of a very restrictive interpretation of bidding consortia and strategic alliances.

52. The Supreme Administrative Court of Italy, has taken the view that in order to assess whether such instruments constitute anti-competitive agreements, it had to investigate the actual and concrete rationale underlying the agreements with reference to the market concerned. The court then applied this criterion to each tender. In this context, several elements supported the ICA's assessment regarding the existence of prohibited agreements:

- The bidding consortia were clearly disproportionate in respect of the financial and technical requirements prescribed for any contract tendered; therefore, the objective pursued by the members of the consortia was to limit competition rather than to rely on other companies' capacity.

- Each bidding consortium was designed in such a way that in each of the tendered areas, the local incumbent had a predominant role, regardless of the economic

convenience of such an arrangement. The court shared the ICA's view that the instrumental use of the bidding consortium was proved by the fact that once the contract was awarded to the bidding consortium, only the local incumbent was effectively involved in the management of the service. Indeed, when new companies were incorporated and entrusted with the management of the service, the non-incumbent undertakings held only symbolic stakes in these companies.

- Moreover, in aggressive bidding, exclusive agreements restraining reciprocal competition without any objective justification were established ex ante - the parties made reciprocal commitments to abstain from bidding in tenders for the area of local incumbents.

- The court concurred with the ICA in evaluating that the instrumental use of joint bidding could also be inferred from the fact that the companies had planned to use joint bidding for an indefinite number of tenders and not - as would have been economically rational - according to any single tender's requirements. On the contrary, the agreements were entered into regardless of any economic assessment on:

  - the subjective and objective capacity requirements in each tender (i.e. the consortia were clearly disproportionate to the actual requirements);
  - the actual suitability of the incumbent to manage the service; or
  - the benefit of non-incumbent undertakings renouncing independent behaviour.

- The objective of the agreements was clearly to preserve market shares rather than to increase them. Moreover, where the agreements had been implemented, their effect was the award of the contract and the preservation of the incumbent's market share.

53. Therefore, the court concurred with the ICA that the bidding consortia constituted prohibited agreements between incumbent operators which were clearly intended to share markets by preserving their respective market shares and making void the process of liberalizing industry.

54. In EU, only the agreements which fulfils the following criteria do not fall under the prohibition of Article 81 (Now Article 101) of the EC Treaty:

- cooperation between non-competitors,
- cooperation between competing companies that cannot independently carry out the project or activity covered by the cooperation,
- cooperation concerning an activity which does not influence the relevant parameters of competition.

55. If cooperation in commercialization is objectively necessary to allow one party to enter a market it could not have entered individually. A specific application of this principle would be consortia arrangements that allow the companies involved to mount a credible tender for projects that they would not be able to fulfill, or would not have bid for, individually. As they are therefore not potential competitors for the tender, there is no restriction of competition.[20]

56. In USA, Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce....". The Courts apply the literal restriction, however, only to a narrow category of conduct that is *per se* unlawful. *Per se* liability applies to "agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." Courts presumptively do not apply the *per se* rule, instead applying a "rule of reason" analysis that requires an examination of the economic effect of the challenged conduct and the market in which it occurs. The U.S. Courts do not apply the *per se* rule where there is no past precedent of holding a practice to be illegal. The *per se* rule is not applicable, so long as there are plausible arguments that a practice enhances overall efficiency and makes markets more competitive.

57. In addition to the above jurisdictions, we have taken into consideration the OECD Policy Brief on Fighting Cartels in Public Procurement (hereinafter referred to as the '**Policy Brief of OECD**'). The Policy Brief of OECD provides that some jurisdictions allow joint bidding by firms in the same market only if bidding is costly or if a minimum size of business is necessary to carry out the contract. In these circumstances, joint bidding is a way to enable smaller firms to participate in larger tenders, from

[20] Commission notice of 6 January 2001: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements; Para 143

which they would otherwise be excluded. However, a bidding consortium should not be permitted if each firm in the consortium has the economic, financial and technical capabilities to fulfill the contract on its own.

58. The above background help us to infer that, bidding consortia or consortium agreements for bidding are permissible *inter se* the small and medium enterprises, i.e. which given magnitude of work or their economic, financial or technical in abilities are not independently capable of performing the whole project. It is generally formed amongst undertakings which complement the expertise of each other or in other words are not competitors and where formulating a bid itself is not costly, and where there is no risk of investment factors, (in such cases bidding consortia ought to be allowed).

59. Furthermore, after analysing some of the mature jurisdictions, we've also come to a conclusion that, the bidding consortia are to be treated on case to case basis applying the rule of reason and should not be treated as *per se* illegal i.e. agreements that always have anti-competitive objects and effects.

(b) Analysis of the effects of the Consortium Agreement:

60. In order to analyze the effects of the Consortium Agreement, we will briefly identify the relevant market.The relevant market under clause (k) of Subsection (1) of Section 2 of the Ordinance has been defined in the following terms:

> *""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;"*

61. The concept of 'relevant market' in the Ordinance is similar to what exists under the European law. It is used in order to identify the products and undertakings that are directly competing with each other in a business. Accordingly, the relevant market is the market where the competition takes place. As is clear from the above definition, the 'relevant market' consists of a product market and a geographical market. Whereas the former can be said to mean the market with respect to the different groups of goods available, the latter is the market in terms of its geographic area in which those products are either produced and/or traded and/or the services are provided.

62. The relevant product market consists of all those products that are considered to be substitutable by consumers in terms of their prices, characteristics and end-uses. In identifying the relevant product market, several different factors need to be considered for instance substitutability, competition, prices and product demand elasticity. It is not necessary for the products/services to be identical in their functional and physical aspects, price or quality; in fact, it is sufficient that the products merely present themselves as real economic alternatives to the other i.e. they have the ability to influence consumer buying.

63. In our view, the service being considered in this case is that of dredging on the ports and more specifically PQA. Except DI, no one else has made any objection to the definition of the Relevant Market in the Enquiry Report. DI has mainly submitted that the services of dredging are of complex nature and different dredgers are used due to the requirement of the procurement agency and the conditions of soil of that area. In this regard, it is useful to distinguish it on the basis of soil characteristics and equipments as various types of equipment might be used for performing the same activity, given the soil characteristics, however, in the instant matter, the dredging services under the PQA Project are to be performed at PQA Port, where the condition and characteristics of soil are same. Furthermore, the market is irregular and procurement is organized through public tendering or bidding procedures.

64. It is also worth mentioning that, although the PQA Project primarily is of 'capital dredging'[21], however, it also requires 'maintenance dredging'[22] and the whole project is

[21] 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.

divided in two parts i.e. maintenance and capital. Upon completion of maintenance dredging in the first year of the PQA Project, capital dredging will be carried out by the successful bidder. In our view the relevant product market is rightly determined as the market for supply of dredging services.

65. As regard the geographical market, it consist of PQA, as it is 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 to which the Consortium Agreement pertains. Further the CHEC, DI and JDN under the covenants of Consortium Agreement have proposed to provide the relevant services i.e. dredging services at PQA for the PQA Project. Hence, we have no doubt in concluding that relevant geographic market for the purposes of these proceedings.

(i) The Project:

66. As per the Technical Evaluation Report and the Tender documents, PQA 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**). Under the PQA Project the scope of capital dredging work mainly includes deepening & widening of Port Qasim navigational channel such that the designed depths and widths of the entire channel is suitable for vessels of parameter of LOA 310m, beam & draught 14m. The PQA Project entails dredging for deepening and widening of navigational channel with depth up to -17.5 m CD in the outer channel and -15CD in inner & reach channel including improvements in the configuration of the channel and provision of Navigational Aids facilities VTS & Tidal Stations. It also envisaged dredging for deepening and widening of turning basins, berthing basins, service jetty and its approaches to the depths specified in the Tender Documents.

(ii) Status of the parties concerned:

67. With reference to the parties to the Consortium Agreement, it is worth mentioning that, all the parties i.e. CHEC, DI and JDN and undoubtedly appear to be experts in the performing dredging activities and in fact can clearly be termed as each other's

[22] 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.

competitors. This is supported by the following: (i) CHEC was founded in 1980; it merged with China Road and Bridge to create China Communications Construction Company in 2005 (the 'CCCC'). CHEC is China's largest international contractor and is the second-largest dredging company in the world. CHEC focuses on basic infrastructure, such as marine engineering, dredging and reclamation. CHEC has been involved in most of the major dredging and reclamation works along China's coastline, while most of its projects have been in Asia, Middle East and Africa, (ii) JDN is a Belgian family-owned company. It started off in 1938 as a civil works contractor before expanding into dredging in 1951. About two-thirds of the JDN's revenue comes from the Middle East and dredging accounts for 90 percent of the JDN's turnover. The company also specializes in the oil and gas services industry, with purpose-built vessels, (iii) Whereas, DI is one of the primary operating companies of DEME Group, responsible for more than two thirds of total turnover of the Group. DI has a leading position on the global dredging market and has experienced rapid and sustained growth over the last decade. The DEME Group is ranked fourth in the world in dredging. Furthermore, DEME has developed many proprietary technologies and methods, including DRACULA, an acronym for "Dredging, And Cutting Using Liquid Action", which the company says has resulted in improved efficiencies on trailing suction hopper and cutter section dredgers of up to 20 percent. This information has been taken from *http://uk.reuters.com/article/idUKLDE62Q09K20100329* - *(March 2010).* Also the description of the parties taken mainly from the websites of each of the undertakings concerned, given in 'Factual Background' Part-A above, more or less confirm the fact that they are not small or medium sized undertakings and possess expertise in dredging services which qualifies them to act as competitor against each other.

68. It is pertinent to refer to the relevant players in the relevant market. It has been observed from the documents available on the record that, in May 2007 when the PQA project was first advertised, although M/s Boskalis International, CHEC, DI, JDN and VOD, all submitted their proposal for pre-qualifications, however, financial proposal of Rs. 10.2 Billion and Rs. 10.8 Billion was only submitted by CHEC and DI, respectively. The PQA Project was even awarded to the CHEC. Subsequently upon procedural lapses it was scrapped by the Ministry of Ports and Shipping. Interestingly it was DI (one of the parties to the Consortium Agreement) who complained about certain anomalies and lapses in the tendering documents of CHEC vide its letter dated

12.11.08. Upon the said letter Ministry of Ports and Shipping conducted an enquiry into the matter and subsequently the PQA Projects' first round of bidding was scrapped. The contents of the said letter further reveals that the representative of DI also had a meeting with the Minister for Ports and Shipping on 11.11.08.

69. The PQA Project was re-advertised in March 2009, only three entities namely (i) Joint Venture of CWE and Trans Tech Pakistan, (ii) Consortium of CHEC, DI and JDN; and (iii) VOD submitted the proposal.

70. Keeping in view the pattern of PQA Project tendering, it has been noticed that, CHEC, DI, VOD and JDN are the regular participants in the tendering process for the PQA Project. It would also be relevant to point out that the worldwide standings of CHEC, DI and JDN are all ranked amongst the top five (5) dredging undertakings in the world as briefly mentioned in para 69 *ibid.* What is worth mentioning is that VOD is also ranked amongst the top five international dredging companies. As per the Enquiry Report the technical proposal of VOD was declared as non-complaint as VOD demanded foreign exchange payment be made in Euros whereas PQA desired the payment in US dollars. There appears to be no doubt in our mind that, the parties forming a consortium clearly become dominant. It important to highlight that CHEC and DI have not only independently carried out maintenance dredging projects but have been rivals in the first round of bidding for PQA Project and as stated above, it was DI which got the PQA Project awarded to CHEC scrapped.

(iii) Justifications afforded by the Consortium Members:

71. The reasons afforded by CHEC, DI and JDN for formation of the Consortium are mainly,

(i) the 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.

We are of the considered view that it is important to analyze the aforementioned conditions at seriatim to reach to a definite conclusion coupled with the technical as well as economic and financial capabilities of the Consortium members.

(a) Magnitude of the works associated with PQA Project and equipment requirement (technical capabilities of the Parties):

72. During the hearing the counsel for DI, Mr. Vellani argued at length that the consortium agreement for PQA Project is in line with the international practices of dredging companies and was formed owing to the non-availability of the equipment required for the PQA Project, current global economic crisis and the changed political and climatic conditions of Pakistan and elaborated the written reply filed by them. The representatives of JDN and CHEC instead of making any additional submissions adopted the submissions of the counsel for DI.

73. Further what needs to be appreciated is that, all the consortium members are involved in the provision of similar/same services i.e. dredging be it maintenance or capital. All the consortium members have previously completed many dredging projects independently. Reference can be made to the Forms A-5, A-6 and A-9 submitted by the consortium members as supporting documents to the bid.

74. We are of the view that, in case the consortium members possesses different qualities/expertise, they complement each other and their respective expertise are useful in achieving the efficiencies in production and distribution of services, however in the instant case, it is beyond our understanding that, what possible efficiencies could be achieved by the competitors, who are in themselves efficient enough to provide the services required efficiently. Here, the only motive which appears is to avoid any sort of confrontation *inter se* the Consortium members and to create a win-win situation.

75. Regarding the non-availability of the equipment aspect, we note that, all the members of the consortium have annexed the documents with their bid of the required dredgers for the project.

(a) DI has proposed TSHD Dredgers Nile River 16989 cum, Uilenspiegel 13700 cum, Lange Wapper 13695 cum, Breydel 9000 cum, and cutter dredgers D'Artagnan & AlMahaar and Back Hoe Dredger Bigg Boss and Survey Boat Parakeet for the PQA Project.

(b) JDN has proposed TSHD Dredgers Gerardus Mercator 18000 cum, Juan Sebestian de Elcano 16500 cum, Vasco Da Gama 33000 cum, Francis Beaufort 11300 cum, Filippo Brunelleschi 11300 cum, James Cook 11750 cum, and cutter dredgers JFJ De Nul, Leonardo Da Vincci and Marco Polo and Back Hoe dredgers Vitruvius, Mimar Sinan and Postnik Yakovlev for the PQA Project.

(c) CHEC has proposed TSHD Dredgers Xin Hai Lon 12888 cum, and cutter dredgers Xin Hale and Clamshell Grab dredger eaglet for the project.

76. The key equipments required by PQA under its tender documents are (i) One (1) Trailing Suction Hooper Capacity min of 8000 cum with year of construction 1990 onwards, (ii) two (2) cutter suction dredger designed and capable to dredge up to depth pf 20 meters or above with year of construction 1980 onwards, and (iii) survey boat & allied equipment. To us it is astonishing to note that in the annexures to the tender submitted by each of the Consortium member, it has been represented that the required key equipments are available for the PQA Project. Even the photographs of such equipment have been attached. This unambiguously belies the claim of non-availability of the equipment by the parties to the Consortium Agreement.

77. Also, DI & CHEC were asked during the course of the hearing that, given the duration between scraping of previous PQA Tender and recent tender for the PQA Project re-tendering was almost of 6 months then how come the equipment which was available to them mere six (6) months earlier was not available to them upon re-tendering of the project. They were also asked as to whether there was any other tender advertised and procured by the either of consortium members during this period of six (6) months, where the equipment has been deployed. Although the representative sought time for making submission on this very aspect, yet they have failed to provide any details, despite repeated requests.

78. Keeping in view the above, in our considered view, there remains no doubt in reaching to the conclusion that, the justifications afforded on the pretext of non-availability of equipment for entering into the ‘Pre-bid Agreement’ is unjustified not sustainable and is hereby rejected.

(b) Current world-wide economic turmoil, and (iii) the decline in borrowing capacity with banks and (iv) to submit a financial proposal (financial capabilities).

79. In this regard, we deemed it appropriate to refer to the financial abilities of the Consortium members, provide in the Technical Evaluation Report, which are:

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

80. It is also worth mentioning that VOD submitted an independent bid for the PQA Project its financial ability as outlined in its tender documents and Technical Evaluation Report for the PQA Project is as follows:

Name of Company	Total Assets	Current Assets	Current Liabilities	Working Capital
VOD	US $ 1033 Million	US $ 721 Million	US $ 639 Million	US $ 82 Million

81. The individual financial ability of DI and JDN are much better than the financial ability of VOD, yet VOD filed an independent bid but DI and JDN filed a joint bid in collaboration with CHEC for the PQA Project. It is beyond comprehension that VOD was not affected by the economic turmoil or reduced borrowing capacity of the banks despite its lesser financial ability, and submitted a bid independently and was even willing to perform the PQA Project on its own available resources.

82. The only plausible reasoning for CHEC, DI and JDN to file a joint bid appears to be reducing their own cost and risks involved rather than improving the provision of efficient services to PQA for the PQA Project[23].

83. Further, the representatives of CHEC were also asked specifically that, had the earlier PQA tender was not scrapped whether then, they had the option not to complete the project. The response was that, they would have been left with no other choice but to complete the PQA Project.

84. Keeping in view the above facts, we are not convinced that CHEC, DI and JDN did not have the independent financial capability for the procurement of PQA Project.

[23] Para 32 of the Commission notice of 6 January 2001: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements

85. It is also worth mentioning that the present financial proposal of Rs. 16.058 billion of the Consortium is much higher almost 60% as compared to the previous proposal of Rs. 10.2 billion filed by CHEC. Although it has been claimed by the Consortium members that the same is due to (i) political turmoil in the country resulting into higher insurance and financing cost, (ii) unusual increase in fuel cost being a major part of the bidders total cost, and (iii) devaluation of about 30% of the Pakistan Rupee against the US Dollar, however given the peculiar facts of the matter it could very much be the outcome, due to lack of competition amongst competitors through collaboration under the Consortium Agreement.

86. Further, it needs to be appreciated that, after the promulgation of the Ordinance and establishment of the Commission on 2nd October 2007, the Commission issued a General Order published in the Official Gazette vide SRO 51(I)/2008 dated 15-01-08 informing and requiring all the undertakings to seek exemption within (90) days from the issuance of the General Order, in respect of all the agreements falling within the ambit of Section 4 of the Ordinance which were entered into with or without intimation to the defunct Monopoly Control Authority (a competition authority subsisting at the time of promulgation of the Ordinance). Thereafter, reminders to comply with the said General Order were also published in all the leading newspapers.

87. In view of the foregoing, we are of the considered view that, the Consortium Agreement falls within the purview of prohibited agreement and such collaboration has prevented restricted, reduced or distorted competition within the relevant market in terms of Section 4(1) read with Section 4(2)(e) of the Ordinance. Accordingly, such prohibited agreements in the absence of exemption are hereby declared void in terms of Section 4(3) of the Ordinance. We are not inclined to hold the award of the KPT Project to CWE void as this contract is under execution and it would not be in the public interest to do so. The continuance and performance of the KPT Project in our considered view clearly outweighs the adverse effect of absence of lessening the competition.

88. As for the quantum of penalty to be imposed on the undertakings concerned the main objective for imposition of penalty is to reflect the seriousness of the infringement and to cause deterrence. At the same time Commission has been taking a somewhat soft approach in the imposition of penalties giving consideration to the fact owing to poor

communications and low level of awareness, economic agents in Pakistan may not have fully taken on board the country's new competition regime. However, this is clearly not applicable to the parties in this case in view of their sophisticated nature, international exposure and standing. All these parties, despite having the knowledge of Competition Law, and giving express undertakings to PQA about complete awareness about the law of the land, have violated the provisions of the Ordinance. DI, JDN and CHEC, and even CWE are well reputed international undertakings. It cannot even be assumed that undertakings of such stature are unaware or unfamiliar with the competition issues.

89. The parties to the Consortium Agreement namely CHEC, DI and JDN have clearly violated Section 4 (1) read with Section 4 (2)(e) of the Ordinance. They have also attempted to misrepresent and mislead us. The maximum fixed penalty under Section 38 of the Ordinance is fully justified. Therefore, CHEC, DI and JDN will each pay penalty of Rs. 50 million (Fifty Million Rupees).

90. CHEC and CWE are also in violation of Section 4 (1) read with Section 4 (2) (b) (e) of the Ordinance by filing cover bids and dividing territories. Their conduct before the Commission has also not been co-operative either. CHEC has already been imposed the maximum fixed penalty as per para 93 above, since the PQA Project has not yet been awarded and keeping in view the duration of the infringement, we are not imposing any further penalty on CHEC. As for CWE, we see no justification for imposing a penalty less than the maximum penalty prescribed under Section 38 of the Ordinance. CWE will, therefore, pay a penalty of Rs. 50 million (Fifty Million Rupees).

91. PQA is hereby cautioned that in future consortium bidding be scrutinized carefully and/or to require such consortiums to seek exemption from the Commission, in accordance with the Ordinance.

92. In terms of the above Order, the show cause notices no. 70-73 of 2009 issued to CHEC, DI, JDN & CWE are hereby disposed.

(KHALID A. MIRZA)
CHAIRMAN

(RAHAT KAUNAIN HASSAN)
MEMBER (LEGAL & OFT)

ISLAMABAD THE 23RD OF JULY, 2010.