



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF COMPLAINT AGAINST PAKISTAN ENGINEERING COUNCIL
FILED BY M/S SPI INSURANCE COMPANY LIMITED

(FILE No. 2(32)/CompCell/CCP/2015)

Dates of Hearing

8 September 2015
15 September 2015
01 October 2015

Adjudicating Members

Ms. Vadiyya Khalil
Chairperson

Dr. Shahzad Ansar
Member

Mr. Ikram Ul Haque Qureshi
Member

On behalf of M/s SPI Insurance Limited

Mr. Farooq Qasim
Joint Director

Mr. Hussain Raza Khan
Manager Coordination

Mr. Aslam Ayan
Advocate

On behalf of M/s Pakistan Engineering Council

Engr. M. Mazhar-ul-Islam

Engr. Khadim Hussain Bhatti,
Registrar PEC

Engr. M. Musaib Qureshi,
Additional Registrar PEC

Sh. Rizwan Nawaz, Advocate

Engr. Abdul Rauf Sheikh

Mr. Abdul Jabbar, Executive

Mr. Arshad Dad



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ORDER

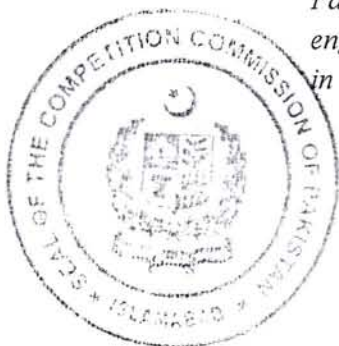
1. This order shall dispose of the proceedings initiated pursuant to show cause notice no.12/2015 dated 20 August, 2015 (the 'SCN'). The SCN was issued pursuant to an enquiry carried out by the Competition Commission of Pakistan (the 'Commission') into allegations of violations of Section 4 of the Competition Act, 2010 (the 'Act'). The enquiry was initiated under Section 37(2) of the Act, following a complaint from M/s SPI Insurance Company Limited, formerly Saudi Pak Insurance Company Limited (the 'Complainant').
2. The main issue under consideration is whether M/s Pakistan Engineering Council (the 'Respondent' or 'PEC') has taken a decision in terms of Section 4(1) of the Act by setting a minimum requirement of 'AA' rating for insurance companies in *prima facie* violation of Section 4(1) read with sub-section (2) (a) and/or Section 4(1) read with sub-section (2) (f) of the Act.

FACTUAL BACKGROUND

3. The Commission initiated an enquiry under Section 37(2) of the Act after review of a complaint received from the Complainant on 16 February 2016, which was concluded vide an enquiry report dated 12 August, 2015, (the 'Enquiry Report'). The complaint alleged that the Respondent had restricted insurance coverage of public civil works to only 'AA' rated insurance companies. This condition had the effect of placing insurance companies not having an 'AA' rating at a disadvantage.
4. The provisions under contention are Provisions *IB.15 (Bid Security)* and *10.1 (Performance Security)* (hereinafter 'Impugned Provisions') of the 'Standard Form of Bidding documents (Civil Works)' (hereinafter 'Bidding Documents') prepared by PEC. PEC contends that the same were approved by the Executive Committee of the National Economic Council (ECNEC) in its meeting on 12 November, 2007 and notified by the Planning Commission, Planning and Development Division vide Notification No. 8(60)WR/PC/2008 dated 12 December, 2008. The Bidding Documents are applicable to procurement of all engineering works undertaken by the federal, provincial departments/organizations and district governments funded locally or through donor agencies.
5. The relevant portions of the SCN issued to the Respondent are reproduced below:

WHEREAS, you, M/s Pakistan Engineering Council, (the 'Undertaking') are both a statutory body constituted under the Pakistan Engineering Council Act, 1976 which regulates the engineering profession and, as a group of professionals engaged in the engineering trade, an 'association of undertakings' in

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terms of Section 2 (1) (q) of the Competition Act, 2010 (the 'Act');

AND WHEREAS, in terms of the Enquiry Report in general and paragraphs 13,14 and 15 in particular, the market for bid and performance security for public-sector civil works engineering services in Pakistan has been identified as the 'relevant market' in terms of Section 2 (1) (k) of the Act;

AND WHEREAS, in terms of the Enquiry Report in general and paragraphs 19-37 and 39 in particular, it appears that the Undertaking, in its capacity as an association of undertakings, has taken a decision in relation to an economic activity by including the provisions 'IB.15' and '10.1' in the 'Standard Form of Bidding documents (Civil Works)' which prohibits insurance companies not having an 'AA' credit rating from providing bid and performance securities to public-sector civil works engineering service providers;

AND WHEREAS, it appears that the decision taken by the Undertaking prima facie constitutes a decision in respect of the provision of services which has the object and effect of preventing, restricting or reducing competition within the relevant market, in contravention of Section 4 (1) of the Act;

AND WHEREAS, it appears that the decision taken by the Undertaking restricts insurance companies not having an 'AA' rating from fairly competing in the relevant market, and thus prima facie constitutes a restrictive trading condition with regard to the provision of services, in contravention of Section 4(1) read with sub-section 4 (2) (a) of the Act;

AND WHEREAS, it appears that no similar credit-rating restrictions have been placed on banks providing bid and performance securities, therefore the decision taken by the Undertaking prima facie constitutes the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage, in contravention of Section 4(1) read with sub-section 4 (2) (f) of the Act;



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SUBMISSIONS

6. Subsequently, written replies were filed by the Respondent and hearings in the matter were held on 8 September, 2015, 15 September, 2015 and 1 October, 2015. Oral submissions were also made by the Respondents who reiterated arguments provided in their written replies. The collective submissions of the Complainant and the Respondent are summarized below.

Complainant:

- i. The Complainant's single 'A' rating did not, until recently, prove an impediment to providing bid securities including bid and performance bonds in favor of different employers in Pakistan, including the National Highway Authority, the Capital Development Authority and the National Logistics Cell to name a few.
- ii. The restrictions imposed by PEC in the Bidding Documents were leading to the Complainant being denied the opportunity to effectively do business.
- iii. Furthermore, the provisions of the Bidding Documents are conflicting in themselves to begin with. For example the mobilization advance guarantee/bond can be placed with either a scheduled bank of Pakistan or any insurance company acceptable to the employer. However the performance and bid securities can be sought from a local bank, a foreign bank or an insurance company with an 'AA' rating.
- iv. The Complainant requested PEC to place it on the list of insurers approved by PEC, but no response was received.
- v. The Complainant then sent a legal notice to the PEC on 24 December, 2014 requesting that the provisions in the Bidding Documents be amended to rectify the internal conflict as well to be compliant with the Act.

Respondent:

- i. PEC stated that the issue does not fall within the mandate of the Commission, as it is a regulatory body created by Parliament under the Pakistan Engineering Council Act, 1976 ('PEC Act'). It provided that under Section 8(p) of the PEC Act, one of the functions of PEC is to establish standards for engineering contracts, cost and services.
- ii. It submitted that the Bidding Documents were developed by the 'PEC Act and Byelaws Committee' and approved by PEC's governing body. They were circulated to all relevant stakeholders both in the public and private sectors for



comments, before being debated in an ECNEC meeting and obtaining the requisite approvals under Section 25 of the PEC Act, from the Ministry of Law and Justice.

- iii. The Bidding Documents were notified through 'Notification No. 8 (60) WR/PC/2002' dated 21 August, 2002 issued by the Planning Commission, Planning and Development Division. Subsequently, revised documents were notified again vide Notification No. 8 (60)/WR/PC/2008 dated 12 February, 2008.
- iv. The Bidding Documents were adopted by the Public Procurement Regulatory Authority (PPRA) vide SRO 805 (I) 2008 dated 11 July, 2008.
- v. In response to the Complainant's contention that they had been able to provide all types of insurance cover until recently, the Respondent expressed its concern and submitted that it reserved the right to issue notices to the constructors named by the Complainant for misconduct under the PEC Act.
- vi. The Respondent also submitted that bid and performance securities can be provided by insurance companies having at least a 'AA' rating or higher as one of the options among three alternatives in the Bidding Documents. It further noted that:

This is to be noted that provisions of insurance bond was incorporated by PEC only for these two instruments i.e. Bid Security and Performance Security which were otherwise to be submitted from scheduled banks of Pakistan as Bank Guarantees. All other insurances such as damages against persons and property, third party insurances, against works and accident of workmen etc. as described in detail in Section 21.1, 21.2, 23.1, 24.1 and 24.2 of the General Conditions of Contract (GCC) are acceptable from any insurance companies.

- vii. The Respondent denies that these provisions are conflicting. It stated that the provisions for insurance securities as an alternative to bank guarantees were introduced with an aim to develop the construction sector of Pakistan, and that they were made in the context of poor performance shown by insurance companies.

- viii. It argued that it does not favour any one particular insurance company and that the monopoly of the National Insurance Company in 2008 was in fact curtailed by PEC to some extent.



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- ix. With regards to the Complainant's request to be placed on a PEC-approved list of insurers, the Respondent submitted that it does not maintain any list of approved insurance companies, or act as an equivalent of a rating agency.
- x. The Insurance Association of Pakistan (IAP) also had two meetings with the PEC to pursue amendments in the Bidding Documents, but was unsuccessful in its attempts to persuade the Respondent to change the Impugned Provisions.
- xi. In response to specific queries posed by the Bench, PEC responded that the Impugned Provisions amount to the setting of a standard, which has been done keeping in mind the interests of the construction sector. It further submitted that the setting of standards does not amount to regulation. It emphasized that PEC has used PACRA ratings since there are no other benchmarks by which insurance companies may be categorized. It also submitted that the Bidding Documents specify 'scheduled' banks, which is similarly a standardized requirement which allows for better risk-management.
- xii. Finally, PEC submitted stated that it would encourage all insurance companies to elevate their PACRA rating as required for bid securities and performance securities to be able to compete effectively with other insurance companies.

ISSUES

- 7. In light of the above, the primary issues that require determination are as follows:
 - A. Whether PEC, being a statutory regulator, is precluded from the definition of '*association of undertakings*' in terms of Section 2(1) (q) of the Act, and thus the mandate of the Commission;
 - B. Whether the Impugned Provisions of the Bidding Documents constitute a decision by an association of undertakings with the object or effect of preventing, restricting or reducing competition within the relevant market in terms of Section 4(1) read with sub-section (2) (a) and/or Section 4(1) read with sub-section (2) (f) of the Act;



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DELIBERATION & ANALYSIS

8. We proceed now to address the issues raised.
- A. **Definition of ‘association of undertakings’ and jurisdiction of the Commission:**
9. Section 2(1)(q) of the Act defines ‘undertakings’ as follows:

means any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services

10. PEC is a statutory body, legislated into existence under the PEC Act to regulate the engineering profession in Pakistan. It is a body constituted of professional engineers who are involved in a similar trade i.e. the provision of engineering services and thus undertakings in terms of Section 2(1)(q) of the Act.
11. The Enquiry Report has in paragraphs 18-25 discussed how PEC being the regulator of a professional body performs both statutory functions as well as those of an association. We are agreed with the Enquiry Report in finding that the matter at hand is analogous to that **In The Matter Of Price Fixing Directive Issued By The Institute Of Chartered Accountants Of Pakistan** (ICAP Order)¹. The Commission in the ICAP Order had held that where an overwhelming majority of the members of such a body taking a decision consists of undertakings as defined in Section 2(1)(q) of the Act, and that the decision in question pertains to the sphere of economic activity, such a body will be considered an association of undertakings for the purposes of the Act.²
12. The principle iterated in the ICAP Order, was propounded by the European Court of Justice in its judgement in **Wouters v Algemene Raad van de Nederlandse Orde van Advocaten**³ (hereinafter ‘**Wouters**’), wherein it was observed:

When it adopts a regulation such as the 1993 Regulation, a professional body such as the Bar of the Netherlands is neither fulfilling a social function based on the principle of solidarity,

Available at <http://www.cc.gov.pk/images/Downloads/Order-%20ICAP.pdf>

This follows the two-step methodology adopted by the European Court of Justice as summarized by Paul Gorecki in a case comment titled: "A Decision of an Association of Undertakings: Reflections on a recent Irish Supreme Court decision, Hemat v The Medical Council".

Available at <http://curia.europa.eu/juris/liste.jsf?&num=C-309/99>



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unlike certain social security bodies (Poucet and Pistre, cited above, paragraph 18), nor exercising powers which are typically those of a public authority (Sat Fluggesellschaft, cited above, paragraph 30). It acts as the regulatory body of a profession, the practice of which constitutes an economic activity.⁴

13. To claim that the Impugned Provisions of the Bidding Documents fall under the category of powers generally exercised by a public authority, PEC has cited Section 8(p) of the PEC Act which states that one of the functions of PEC is '*establishing standards for engineering contracts, costs and services*'.
14. In its written submissions as well as during the hearings, PEC has emphasized that the Bidding Documents have the approval/endorsement of the Federal Government, and have been formally notified through Government SROs. It has provided that it was directed by a decision of ECNEC '*to prepare a set of country specific six bidding/contract documents to regulate the engineering profession in Pakistan.*'
15. The Enquiry Report took the timing of the ECNEC approval into consideration, based on the Complainant's submission that it had been able to provide both bid and performance securities to public sector enterprises until June 2014. It held that the ECNEC approval for the Bidding Documents appeared to have been given before the Impugned Provisions had been added, and was thus insufficient.
16. During the course of the hearings, the Commission again sought clarification from PEC regarding the dates of ECNEC approval for the first version of the Bidding Documents as well as dates and documentary evidence of the approval for subsequent changes. PEC did not however provide any further documents to corroborate its assertions and reiterated the arguments made in its written submissions.
17. With respect to the argument therefore that the Commission does not have jurisdiction in the matter because the Impugned Provisions were made in pursuance of PEC's statutory mandate and with executive sanction, we will now assess if this is the case.
18. The PEC Act in Section 8 provides under the heading of 'Functions of the Council' that PEC can establish standards for engineering contracts, cost and services. The provision allows the Respondent to formulate the norms to be followed when engineering services are being procured. The Bidding Documents for example, are one manifestation of this statutory intention.

Wouters being a seminal case, has been followed in many successive judgements of the European Commission and the ECJ such as **Barème d'honoraires de l'Ordre des Architectes Belges** (2004), **Ordre National des Pharmaciens en France** (ONP)(2010), **Ordem dos Técnicos Oficiais de Contas** (2013) and **Consiglio Nazionale dei Geologi** (2014).



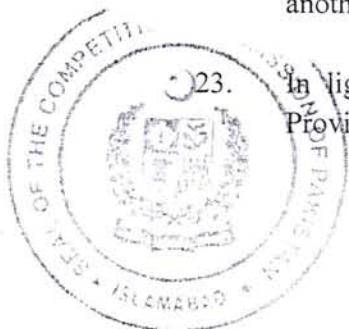
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19. With regards to the Impugned Provisions however, we are of the opinion that the PEC Act in no way permits PEC to determine which insurance companies can provide bid and performance securities under specific contracts. By specifying that only 'AA' rated insurance companies may provide bid and performance securities, PEC is not 'setting a standard' as it has claimed.
20. It is pertinent to clarify that the setting of standards generally consists of providing specifications which must be followed to achieve a certain level of quality. It pertains therefore to what product or service is required, and the form and manner in which it is required. It does not pertain to who it must be provided by. This concept is effectively illustrated by PEC itself, where in the instructions for usage of the Bidding Documents, it states under 'G-Specifications-Technical Provisions' as follows:

Precise and clear Specifications are prerequisite for bidders to respond realistically and competitively to the requirements of the Employer without qualifying or conditioning their bids. In the context of both national and international competitive bidding, the Specifications must be drafted to permit the widest possible competition and, at the same time, present a clear statement of the required standards of materials, Plant, other supplies, and workmanship to be provided. Only if this is done will the objectives of economy, efficiency, and equality in procurement be realized, responsiveness of bids be ensured, and the subsequent task of bid evaluation facilitated

21. For PEC to set a standard of the type of insurance required, it could specify objective requirements that must be met by a bank or insurance company to be eligible, and include such specifications in the Bidding Documents. In the absence of such specifications, we find that PEC is clearly transgressing the mandate of its parent act.
22. Finally, with respect to the question of executive sanction, it must be clarified that the notifications by the Planning Commission dated 21 August, 2002 and subsequently 12 February, 2008 on the matter relate exclusively to the applicability of the bidding documents for procurement of engineering goods, works and services. They impose an obligation on federal and provincial departments and organizations, as well as on district governments to use the Bidding Documents in relation to all procurements. By no stretch of interpretation can the notifications be read to mean that the Federal Government is expanding the scope of PEC's functions to include the regulation of another sector.

23. In light of the discussion above therefore, in the promulgation of the Impugned Provisions, PEC has acted in its capacity as the regulator of a profession, and not in



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pursuance of public law powers prescribed by statute. The Respondent is therefore an association of undertakings in terms of Section 2(1) (q) of the Act.

B. Whether the Impugned Provisions of the Bidding Documents constitute a decision by an association of undertakings with the object or effect of preventing, restricting or reducing competition within the relevant market in terms of Section 4(1) read with sub-section (2) (a) and/or Section 4(1) read with sub-section (2) (f) of the Act;

24. We begin this discussion by reproducing the prohibition as enunciated under the Act:

4. Prohibited agreements. — (1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5. [Emphasis supplied]

25. The first step in deciding whether or not the Respondent is in violation of this provision is to determine if it has taken a ‘decision’. As denoted in previous judgments by the Commission, a decision under the Act holds the ordinary dictionary meaning of the word,⁵ and reflects an understanding between its members.⁶

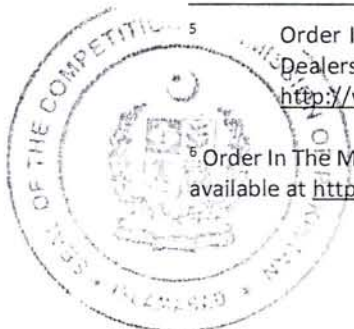
26. PEC has submitted that the Bidding Documents, inclusive of the Impugned Provisions, were formulated by the PEC Act and Byelaws Committee and approved by its governing body. The Impugned Provisions have therefore been validly made with the participation and concurrence of the members of PEC and as such constitute a decision of PEC.

27. The second part of the prohibition requires that the decision have anti-competitive objects or effects. It is useful here to provide a brief overview of the legal interpretation that has been given to these terms by the Commission in previous orders.

28. The Commission held in its Order In The Matter Of Show cause notice dated 24 December 2007 (**‘Banks’ Order’**) that *‘The term ‘object’ in section 4 does not refer to*

⁵ Order In the Matter of Show Cause Notice Issued to Pakistan Automobile Manufacturers Authorized Dealers Association (PAMADA) and its Member Undertakings, available at http://www.cc.gov.pk/images/Downloads/show_cause_notice_issued_to_pamada.pdf

⁶ Order In The Matter Of Show cause notice dated 24 December 2007 for Violation of Section 4 of the Ordinance, available at http://www.cc.gov.pk/images/Downloads/Order_of_Banks.pdf



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the subjective intention of the parties but to the objective meaning and purpose of the agreement. The words object or effect do not have a cumulative impact and are to be read as importing distinct meanings'.⁷ This interpretation has been upheld in various successive orders of the Commission.⁸

29. Section 4(2) of the Act provides a non-exhaustive list of anti-competitive agreements. These serve as examples of practices through which undertakings can prevent, reduce, or restrict competition. Section 4(2)(a) has been cited by the SCN to refer to the Impugned Provisions as 'restrictive trading conditions', whereas Section 4(2)(f) has similarly been cited in relation to the application of 'dissimilar conditions to equivalent transactions with other trading parties'. Whether the Respondent's decision amounts to either of these practices is discussed further below.
30. The third aspect that requires consideration is of the relevant market. A relevant market is defined under Section 2(1)(k) of the Act, which is reproduced below for reference:

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

31. The SCN and the Enquiry Report have defined the relevant product market in this case as 'the market for bid and performance security for public-sector civil works engineering services' and the relevant geographic market as 'the whole of Pakistan'. We agree with the definition given in the Enquiry Report. In any event, no objections have been raised by the Respondent in this regard.

⁷ Idem

⁸ The Commission's Orders in The Matter Of Karachi Stock Exchange, Lahore Stock Exchange and Islamabad Stock Exchange, available at <http://www.cc.gov.pk/images/Downloads/KSE%20Order%2018March.pdf> and In The Matter Of Show Cause Notices Issued To All Pakistan Cement Manufacturers Association And Its Member Undertakings, available at [http://www.cc.gov.pk/images/Downloads/Cement%20\(final%20order\)%2027-08-2009.pdf](http://www.cc.gov.pk/images/Downloads/Cement%20(final%20order)%2027-08-2009.pdf)



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32. Both sub-sections will now be discussed individually. The Impugned Provisions are reproduced below for reference at the outset:

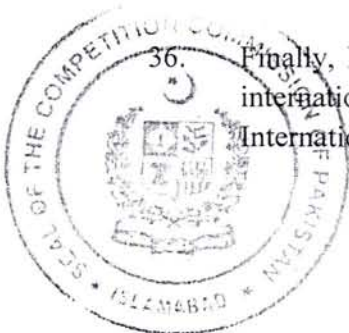
IB 15 Bid Security: 15.2 "The Bid Security shall be, at the option of the bidder, in the form of Deposit at Call or a Bank Guarantee issued by a Scheduled Bank in Pakistan or form a foreign bank duly counter guaranteed by a Scheduled Bank in Pakistan or an insurance company having atleast AA rating from PACRA/JCR in favour of the Employer valid for a period of 28 days beyond the Bid Validity date".

10.1 Performance Security: "...such Security shall, at the option of the bidder, be in the form of either (a) bank guarantee from any Scheduled Bank in Pakistan or (b) bank guarantee from a bank located outside Pakistan duly counter-guaranteed by a Scheduled Bank in Pakistan or (c) an insurance company having atleast AA rating from PACRA/JCR".

i. 4(2)(a): Application of Restrictive Trading Conditions:

33. The Complainant has submitted that the Impugned Provisions create a bias in favor of a few select, larger insurer companies. The Enquiry Report has considered the positions of IAP and SECP before reaching the conclusion that the Impugned Provisions amount to restrictive trading conditions and thus have a negative effect on competition in the relevant market.
34. The Respondent, through both written and oral submissions, contended that the Impugned Provisions were included keeping in view the poor performance by insurance companies in the past. It submitted that it had previously received complaints from contractors with regards to the encashment of bonds. It further submitted that the same had been done to develop the construction sector of Pakistan and that they were meant to reduce the cost of procurement and facilitate the expedited completion of work.
35. PEC also submitted that the 'AA' conditionality had only been imposed with regards to bid and performance securities. It submitted that '*all other insurances, such as damages against persons and property, third party insurances, against works and accident of workmen etc. as described in detail in Section 21.1, 21.2, 23.1, 24.1 and 24.2 of the General Conditions of Contract (GCC) are acceptable from any insurance companies*'.

36. Finally, PEC emphasized that the Bidding Documents were made keeping in mind international standards and that they were largely based on the standard provided in the International Federation of Consulting Engineers (FIDIC) form of contracts.



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37. We consider first if and how the Impugned Provisions might prevent, reduce or restrict competition in the relevant market. The Enquiry Report states in paragraph 41 that there are currently forty-one (41) non-life insurance companies registered with SECP out of which only 5 have a credit rating of 'AA', from PACRA or JCR. At the very outset therefore, it appears that limiting the provision of bid and performance securities to 'AA'-rated insurance companies forecloses the market to thirty-seven (37) insurance companies.
38. Evidently therefore, the placement of the 'AA' rating requirement has the effect of preventing a majority of market participants from competing altogether. The loss of business to the excluded insurance companies is not simply limited to the provision of bid and performance securities either. The Complainant and IAP have both submitted that contractors prefer to employ one insurance company to cater to all their risk management needs. By being unable to provide bid and performance securities, these insurance companies are also excluded, by and large, from providing any services to a project altogether. The cumulative effect of such loss thus has far more outreaching consequences than simply the inability to underwrite certain securities. Insurance companies which are unable to gain business cannot be expected to improve their ratings with PACRA or JCR either, leading to a situation which maintains the status quo by limiting the ability of insurance companies to improve through experience.
39. The detrimental effects of the rating requirement are not only restricted to the insurance companies concerned. By limiting the number of companies that can provide insurance, PEC reduces the choice available to consumers, thereby indirectly manipulating the costs of insurance in the relevant market. Since all federal and provincial departments/organizations and district governments are required to use the Bidding Documents for the procurement of engineering services, the raised costs of insurance can be expected to place a much greater burden on the public exchequer than would exist if a variety of companies were competing effectively. Lastly, by placing the rating requirement, the members of PEC itself are also restricted from procuring insurance from more than two-thirds of the insurance companies operating in the market.
40. We consider now the defenses raised by the Respondent. Firstly, with respect to the argument that the requirement has been implemented in reaction to the performance of insurance companies, we find that the same amounts to regulation of the insurance sector. Encouraging insurance companies to improve their performance or penalizing them for performing badly is solely within the mandate of the SECP, which is the apex regulator for the insurance sector. The Enquiry Report has in this regard provided the SECP's position on the matter, which is reproduced below for reference:

There is also a need to make these banks and public authorities understand that an insurer licensed with SECP is already



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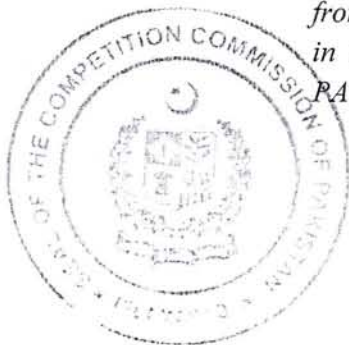
required under the Insurance Ordinance, 2000 to meet at all times the stringent requirements including but not limited to the paid-up capital, solvency, statutory deposit and adequate reinsurance arrangements which ensures a sound financial footing. Therefore, any such discrimination of denying business to licensed insurers without strong reasonable grounds is seen as unfair and unjustified.

41. Secondly, with respect to the argument that the Bidding Documents are based on international precedents, we have found that with respect to performance securities, FIDIC does not, in any of its contracts, place rating requirements on the providers of the guarantees/securities. Even otherwise, it must be remembered that FIDIC remains a precedent on which PEC may rely to formulate engineering contracts, but it cannot supersede the obligations which are binding upon PEC under the laws of Pakistan.
42. In light of the above, it is apparent that not only is the rating requirement unfounded and baseless, but that it also constitute restrictive trading conditions which have the object of preventing, reducing and restricting competition in the relevant market in violation of Section 4(1) of the Act in terms of Section 4(2)(a) thereof.

ii. 4(2)(f): Application of Dissimilar Conditions to Equivalent Transactions:

43. As a starting point to this discussion, we find it useful to summarize all the provisions in the Bidding Documents which pertain to securities/guarantees and/or insurance. These are as follows:

- i. MG-1- Mobilization Advance Guarantee/Bond:
'Scheduled Bank in Pakistan or Insurance Company acceptable to the Employer'
- ii. Instruction to Bidders: IB.15: Bid Security:
'Deposit at Call or a Bank Guarantee issued by a Scheduled Bank in Pakistan or from a foreign bank duly counter guaranteed by a Scheduled Bank in Pakistan or an insurance company having at least AA rating from PACRA/JCR'.
- iii. Clause 10.1 of Particular Conditions of Contract: Performance Security:
'(a) bank guarantee from any Scheduled Bank in Pakistan or (b) bank guarantee from a bank located outside Pakistan duly countersigned by a Scheduled Bank in Pakistan or (c) an insurance company having at least AA rating from PACRA/JCR'.



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iv. Clauses 21.1 and 25.5 of Particular Conditions of Contract: Insurance Company:

'National Insurance Company of Pakistan or any other insurance company operating in Pakistan and acceptable to the Employer'.

44. In the case of mobilization advance, performance security and bid security, the future contractor is provided with a choice between obtaining the requisite security from a bank or from an insurance company. With respect to all three guarantees, the Bidding Documents provide that 'any scheduled bank' may provide the requisite guarantee. No extra requirements are made of banks except that they be registered with the State Bank of Pakistan (SBP).
45. With respect however to insurance companies, the Impugned Provisions require that they be rated 'AA' by PACRA or JCR. A clear distinction therefore exists in the way banks and insurance companies are being treated. Both banks and insurance companies have to fulfill a multitude of regulatory requirements before being deemed of adequate financial footing and being licensed to operate. It is pertinent here to recall that SECP has expressly stated, as provided in paragraph 40 above, that all licensed insurers have met the requirements set by the regulator.
46. Furthermore, it is relevant also to consider the fact that while credit ratings for banks are also provided by PACRA and JCR, no equivalent rating requirements have been stipulated for banks. The Respondent has argued that the requirement on insurance companies was placed to ensure that only companies which have the adequate ability to meet obligations would be employed. Based on this logic, it could be expected that only banks which have a precedent of meeting their obligations be allowed to compete. Since no such requirement has been placed, the Respondent's argument for restricting insurance companies becomes invalid. Even otherwise, if the Respondent remains convinced that the employment of certain insurance companies could be detrimental to the insurance sector, the performance records of companies must be allowed to speak for themselves, as is the case with banks.
47. No rational basis has been provided for the divergent treatment of banks and insurance companies. To impose a further requirement therefore clearly amounts to the application of dissimilar conditions to equivalent transactions, which have the effect of placing insurance companies at a competitive disadvantage.

48. In light of the above therefore, we find the Respondent to be in violation of Section 4(1) of the Act in terms of Section 4(2) (f) thereof.

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REMEDY & PENALTY

49. We hereby hold the Impugned Provisions to be void in terms of Section 4(5) of the Act.
50. In case of a violation of Section 4 of the Act, the Commission is empowered to impose a fine under Section 38 of the Act and to issue appropriate remedial orders under Section 31.
51. The Respondent, thus, is hereby directed to:
- Pay a penalty of PKR 15,000,000 (Pakistani Rupees Fifteen Million) for each of the two violations for a total of PKR 30,000,000 (Pakistani Rupees Thirty Million); and
 - Amend the Impugned Provisions to remove the 'AA' rating requirement and submit a compliance report to the Registrar to the Commission within 30 days; and
 - Refrain from similar practices in the future.
52. SCN No.12/2015 is hereby disposed of in terms of the above.
53. Order accordingly.

Vadiyya Khalil / A. Ansari

(Ms. Vadiyya Khalil)
Chairperson

(Dr. Shahzad Ansar)
Member

Ikram Ul Haque Qureshi

(Mr. Ikram Ul Haque Qureshi)
Member

ISLAMABAD th 20 April, 2016

