

# Competition Commission of Pakistan

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## OPINION ON COMPETITION CONCERNS IN

### PUBLIC PROCUREMENT OF ELECTRIC POWER EQUIPMENT

This opinion is issued as culmination of the Open Hearing held under Section 29(c) of the Competition Act, 2010 (hereinafter "**the Act**"). on 17 February 2015 pertaining to certain restrictive, exclusionary and discriminatory terms and conditions in tenders floated by public sector organizations for the supply of electric power equipment.

#### I. BACKGROUND

As per the Public Procurement Regulatory Authority's (PPRA)<sup>1</sup> estimate the public procurement comprises 15-25% of GDP in Pakistan. Whether 15, 20 or 25% (approx 38 Billion USD - 63 Billion USD), such a large volume of procurement demands strict measures against anti-competitive practices in order to ensure that public money is used in an efficient, effective and economically advantageous manner. This objective can only be achieved by ensuring free competition, a level playing field and maximum possible participation of bidders. For efficient procurement it is essential that new entry is encouraged, barriers to entry are minimized for local manufacturers/suppliers, and international participation is not restricted by means of impractical pre-requisites for participation. Efficient procurement leads to a healthy economy through best utilization of public funds, growth of local industry and creation of means of employment.

The Commission has received numerous complaints from manufacturers and suppliers of electrical equipment regarding certain conditions contained in tenders floated by procurement agencies, i.e., distribution companies (hereinafter "**DISCOs**") and the National Transmission and Despatch Company Limited (hereinafter "**NTDC**"), (together referred to as "**Procuring Agency (ies)**"), that precluded certain undertakings from participating in those tenders at the bidding stage. Due to the multiplicity, recurrence and technical nature of issues raised in complaints made to the Commission, an Open Hearing under Section 29(c) of the Act was held where all stakeholders were invited to share their views on the competition concerns raised in the procurement of electric equipment. To ensure maximum participation letters of invitation were sent to various stake holders including the Procuring Agencies. In addition notices in Urdu and English and were also published in the local news papers on 3 February 2015, 6 February 2015 and 11 February 2015 respectively (copies attached).

<sup>1</sup> [http://www.thefirstnews.com.pk/newsmag/mag/detail\\_article.asp?id=8483&magId=10](http://www.thefirstnews.com.pk/newsmag/mag/detail_article.asp?id=8483&magId=10)

<sup>1</sup> <http://www.tfansparency.org.pk/news/newsdetail.php?nid=4882>

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notices in Urdu and English and were also published in the local news papers on 3 February 2015, 6 February 2015 and 11 February 2015 respectively (copies attached).

## II. UNDERTAKINGS

Following is a list of undertakings that appeared in the open hearing conducted by the Commission under Section 29(c) of the Act. They include some of the procuring agencies but predominantly they are those entities who through numerous complaints and their presence in the Open Hearing apprised the Commission of the various contentions that are the subject of the discussion to follow in the proceeding paragraphs.

- i. M/s. Emco Industries (Pvt) Limited
- ii. M/s. KBK Electronics
- iii. All Pakistan Cable & Conductor Manufacturer Association
- iv. M/s. 7AAYs Corporation
- v. M/s. J.I Enterprises
- vi. Trace Engineering Company
- vii. M/s EMEC Trading Co.
- viii. M/s Universal Cable Industries
- ix. M/s MK Engineering Works
- x. Islamabad Electric Supply Corporation (IESCO)
- xi. M/s Jaffer Brothers (Pvt.) Ltd
- xii. M/s. OTCL
- xiii. Water And Power Development Authority (WAPDA)
- xiv. M/s. Transpower Industries (Pvt) Limited
- xv. M/s. Electrade International
- xvi. Hapam Pakistan JV
- xvii. M/s. Al Amin Enterprises
- xviii. Empirical Traders Sialkot
- xix. M/s Xian Xibian Zhingte Electric Co

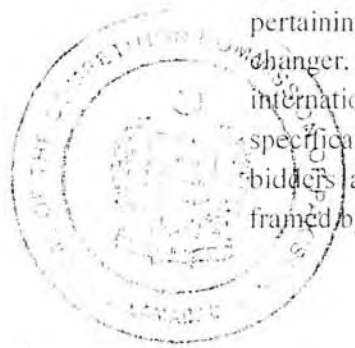


xx. Associated Commercial Agencies (Pvt) Ltd

xxi. National Transmission & Despatch Company (NTDC)

### III. SUBMISSIONS OF PARTIES

1. M/s. Electrade International, M/s. J.I Enterprises, M/s. J.Z International and M/s. HAPAM Pakistan JV raised the issue of lumping of similar items into lots in tenders. According to the parties, lumping has the effect of excluding specialist manufacturers that may, for example, manufacture a single item and not all items included in the lot. The parties argued that it is very rare for international manufacturers to produce all the parts. This claim was not contested by the Procuring Agencies. It was further submitted that if equipment is purchased separately, Procuring Agencies can save up to thirty percent (30%) in costs, and further that individual apparatus purchase allowed for maximum participation and competition. The response from DISCOs was that placement of this requirement was only done in donor-funded tenders, wherein international obligations had to be met by the procurement agencies.
2. Another issue that was highlighted by M/s. J.I Enterprises and M/s. J.Z International was that of absence of specifications or technical data /drawings for the equipment included in the tender coupled with insufficient delivery times. A supplier wishing to import equipment may not be able to participate in the tender since it would be unaware of the technical specifications of equipment to be supplied. In the same vein, foreign manufacturers following global standards of specifications may be excluded from participation as well.
3. The biased development of specifications to favour selected bidders was also one of the concerns raised by M/s. Electrade International. It was suggested that the practice of making modifications in specifications in order to favour selected bidders should be abolished.
4. M/s. Electrade International, M/s. Xi'an Xibian Zhongte Electric Co. Ltd, M/s. Empirical Traders, M/s. 7AAY's Corporation and M/s. Jaffer Brothers raised the issue of reference to particular brands particularly in procurements pertaining to a component of power transformer called the on load tap changer, ("OLTC") and energy meters, despite the existence of a generic international standardization regime (IEC) and brand-neutral NTDC specifications. It was alleged that such practice was adopted to favor select bidders and is against rules framed by PPRA and procurement guidelines framed by foreign donor agencies.



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5. Issues highlighted by M/s. Fast Cables, M/s. Electrade International and M/s. Junaid Private Limited include the requirement of submitting a valid type test report at the prequalification stage, rather than at the award of contract. It was submitted that there is also inconsistency among the DISCOS in the placing of this pre-requisite. For instance in the donor-funded procurement of power transformers by two separate DISCOS, one of the DISCOS required submission of the type-tests at the bidding stage while the other allowed the bidder to fulfill the requirement at the award of the contract provided it does so at its own expense, without affecting the delivery schedule. A separate complaint was concerning a tender for the procurement of PCC poles by DISCOS, wherein the report of a prototype test was required at the bidding stage; while the same was performed upon award of a contract by the pertinent authority and which expired in three years. In this particular case, an amendment was made in the tender documents by only one of the DISCOS to allow for the submission of prototype approval before mass production or at the manufacturing stage instead of requiring the same at the bidding stage.
6. During the hearing, it was alleged that new entrants also suffer due to the demand of submitting a valid type test report or provisional educational order, since they are unable to submit the same in time for the tender, as the process for testing equipment is unreasonably long and mired with bureaucratic red tape. The DISCOs submitted that not all of them require the submission of a valid type test report at the prequalification stage. as one of the DISCOS affirmed that it allowed a relaxation of this pre-requisite in one of its tenders.
7. Another contention raised by complainants was that Procuring Agencies had limited procurement to equipment manufactured in a limited number of countries, excluding at least one other country that apparently manufactured equipment that met international standards and offered the equipment at a lower price. This, it was alleged, defeated the goal of ensuring maximum participation in tenders. In one such instance brought to the attention of the Commission by Al Amin Enterprises, the procurement of insulating gloves used by live line workers was limited to manufacturers from the U.S.A, U.K, Germany and France, in addition to local manufacturers. Malaysia, which also produced insulating gloves conforming to international standards, was barred as a country of source despite competitive pricing. The Procuring Agency in question maintained that such restriction was only placed after deliberations by the specification review committee as the equipment concerned involved the safety of workers.
8. Price preference given to local manufacturers who achieve a certain degree of value addition, under S.R.O 827(1) /2001 (Import of Engineering Goods (Control) Order, 2001) (hereinafter 'SRO') was another issue raised in the submissions by M/s. EMCO Industries, M/s. Zhongli Sci-Tech Group Co. Ltd and M/s. HAPAM Pakistan JV. This SRO allows for a price evaluation



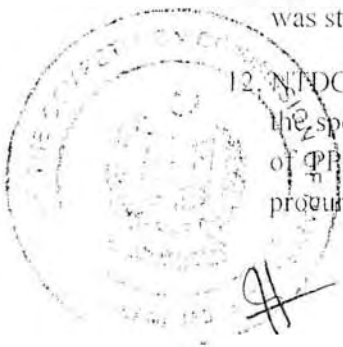
advantage for local manufacturers able to prove thirty percent (30%) deletions, which is fifteen percent (15%) in the case of donor funded tenders, and twenty-five percent (25%) otherwise. It was suggested that this price preference should be enhanced in order to encourage local manufacturing in view of increasing production costs. It was further alleged that Procuring Agencies misinterpret the SRO in order to favour local manufacturing, to the detriment of foreign suppliers.

9. Transparency of the evaluation process has also been cited as an issue by M/s. Overseas Trade Corporation Private Limited. It was stated that lack of transparency in the evaluation process raised concerns as bidders were not aware of the evaluation criteria prior to bidding, and that procurement agencies did not disclose the basis on which the successful bidder had won the contract.
10. Another contention brought forward by M/s. Electrade International was that the Bidders are required to complete CIF/C&F delivery of equipment within one hundred and twenty (120) days from issuance date of notification of award, which is impossible owing to the following contractual obligations to be fulfilled between the supplier and the Procuring Agency:

- a. signing of contract agreement and establishment of letter of credit
- b. approval of technical drawings and nomination of engineers
- c. completion of type tests and pre-shipment inspection/routine tests

11. M/s. Fast Cables and M/s. Transfo Power Industries also raised the issue of the "experience clause" in tenders. The requirement of bidders to have experience of a certain number of years of supplying to a particular procurement agency was stated to be a barrier to entry for new entrants.

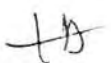
12. NTDC stated that it must draw a line between ensuring fair competition and the specific requirements of end users of electrical equipment. Representative of PPRA also stated that there should be a level playing field in public procurement, but not at the cost of quality.



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#### IV. ANALYSIS AND OPINION

The most common contentions which raise competition concerns with respect to the procurement of electric equipment carried out by Procuring Agencies which have been brought to the attention of the Commission through means of numerous complaints, written submissions, and finally in person at the Open Hearing conducted by the Commission under Section 29 (c) of the Act are summarized as follows:

- a. Requirement to submit type-test reports
- b. Arrangement in lots (lumping)
- c. Restrictions regarding country of origin
- d. Reference to a specific brand
- e. Lack of information for participation in bidding
- f. Domestic Price Preference
- g. Biased development of specifications
- h. Provision of insufficient delivery time
- i. 'Experience clauses' as a barrier for new entrants
- j. Ancillary Concerns

A seriatim discussion of the concerns raised is provided herein below.

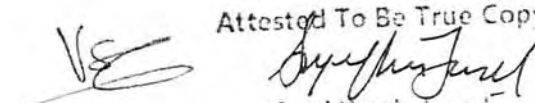
##### a. Requirement to submit type test reports

The requirement to submit type-test reports at the bidding stage appears to have created barriers to entry, ostensibly preventing 'widest possible competition' in scenarios such as procurement of power transformers, switchgear equipment and PCC poles.

The primary cause of concern in the issue at hand is embedded in the decision whether to require submission of a type-test report at the bidding stage or upon award of a contract. In respect of the procurement for the PCC Poles, this requirement appeared to only favor the existing suppliers whose prototype test remained valid and ostensibly foreclosed the market to others, particularly any probable fresh entrants, and those whose test validity period had expired. Discouraging new entry can have a very harmful impact on economic progress as the

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Page 6 of 23

  
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substitute for that is complete reliance on the incumbents. The inevitable outcome of this is limiting of competition with an apparent negative impact on the growth of local industry and less than optimum utilization of public money, which is unfavorable under any circumstances.

The instant issue becomes particularly pertinent when a foreign manufacturer is involved who has both competence and experience but whose equipment does not conform to local specifications, as prescribed by NTDC, or who has not had the opportunity to have its equipment tested by the local authorities every five years. The dilemma here is that equipment from such a manufacturer may be in conformity with the widely accepted international standards in addition to having a record of successful performance in world markets, but the manufacturer may still be barred from participation in the local tender owing to the breadth of time required in fulfilling the local test requirements in time. While existing prequalified manufacturers could still participate, any potential challenge for carrying out improvement in their equipment in terms of price, quality or other metrics may be seriously constrained as a result of this measure. Such an outcome appears not only harmful to the interest of a potential bidder, but also more importantly, from a local perspective, threatening to the efficiency and effectiveness of the procurement process.

We observe the foregoing dilemma in the procurement of power transformers by the NTDC and several DISCOs. While the procuring agencies attribute the existence of this requirement to directions/advice by the donors, it is worth noting that in two separate procurements funded by the same donor, one Procuring Agency required type test at the bidding stage while the other allowed having this requirement fulfilled at the post award stage provided certain minimum thresholds were met at the bidding stage. Thus we do see examples of a less restrictive alternative with regard to the requirement of prototype testing in the prevailing practices of the procuring agencies.

### Recommendation:

In the light of the foregoing it is our considered view that the Procuring Agencies i.e. the NTDC & DISCOs should adhere to a common policy in respect of the type test requirement at the bidding stage especially with regard to the procurement of material/equipment that falls in the same category and under similar circumstances in order to avoid unnecessary restrictions or barriers to entry amidst less prohibitive but viable alternatives. These alternatives may include adherence to well known international standards such as IEC and/or a type test report from any of the Internationally accredited Independent Laboratories (IAIL). The list of IAIL should be clearly displayed in the tender documents. Once the standard thresholds of quality are met by an undertaking, it should not be barred from participation in the bidding, and if a specific type test requirement is still deemed necessary, it must be allowed to fulfil the same upon award of a contract.



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With regard to the placement of unnecessary restrictions, the Directive 2014/24/EU of the European Parliament and of the Council, of 26 February 2014 on public procurement<sup>4</sup> may be referred to for guidance. The relevant portion is reproduced below:

*Where contracting authorities require the submission of certificates drawn up by a specific conformity assessment body, certificates from equivalent other conformity assessment bodies shall also be accepted by the contracting authorities.*

*Contracting authorities shall accept other appropriate means of proof than those referred to, such as a technical dossier of the manufacturer where the economic operator concerned had no access to the certificates or test reports referred to, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the economic operator concerned and provided that the economic operator concerned thereby proves that the works, supplies or services provided by it meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.*

**b. Arrangement in lots (lumping)**

Keeping other considerations constant, it is evident that maximum participation of bidders leads to the most efficient procurement in terms of quality as well as price.

It is natural that manufacturers that specialize in making a selected number of switchgear components would produce the best quality products as they are specialists in the same. This aspect amply caters to the quality considerations in the procurement of sensitive electrical equipment.

Considering the price aspect, the suppliers of the switchgear components have claimed and the NTDC & DISCOs have not contested that if the same equipment is procured separately it results in savings of 30-40 percent. Looking at the scale and scope of such projects the quantum of such savings appears to be substantial. With regard to the defense used by the Procuring Agencies that such arrangement in lots is carried out at the advice of the donor entity one must not look farther than the guidelines provided by the donors themselves. A discussion of the article 2.4 of the ADB Guidelines<sup>5</sup> says:

*"Article 2.5 of the Guidelines [Article 2.4 of ADB Guidelines] allow procurement agencies to arrange similar items into groups. The guidelines*

<sup>5</sup>Please note that the content of the Guidelines issued by the Asian Development Bank (Published March 2013) and the World Bank and its Affiliates (Published January 2011) are identical for the most part, and therefore are dealt with under one heading in this document. Also note that any references to specific articles of the Guidelines refer to Guidelines on the Procurement of Goods, Works, and Non Consulting Services published by the World Bank in January, 2011 followed by the Article of Asian Development Bank's guidelines in [brackets].

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*state that for a project requiring similar but separate items of equipment or works, bids may be invited under a slice and package procedure that would attract the interest of both small and large firms, which could be allowed, at their option, to bid for individual contracts (slices) or for a group of similar contracts (package). "[Emphasis supplied].*

While the aforementioned article allows the lumping or grouping of equipment that is similar but separate, it also makes it very clear that such arrangement should be carried out to attract the interest of both small and large firms.

It is very important to delve into and understand the objective of grouping as emphasized in the aforementioned article. It is very clear that such grouping should attract participation and not prohibit it. In the instant case the available information shows that very few suppliers can fulfill the grouping requirement and that too at a heavy cost in terms of price and quality. The concept of maximum participation for highest efficiency in procurement is further emphasized in a note adapted from guidelines prepared for proposed power generation projects in a South Asian country, wherein it is stated that:

*"The requirements for pre-qualification will be reasonable and efficient and must not necessarily create constraints that limit the number of bids or the possibility of maximizing competition."*

To seek an example, if we look at some recent tenders and compare tenders where circuit breakers and isolators were arranged in the same lot as in Tender Nos. ADB Tranche IV FESCO 01-2014, ADB Tranche IV GEPCO 01-2014 and ADB Tranche IV QESCO 01-2014 versus a tender where they were placed in separate lots as in NOR-30 LOT I (132 kV & 220 kV Circuit Breaker) and LOT II (132 kV & 220 kV Isolator) opened on 11-3-2014, we see that in the former tenders the number of bidders was two (2), two (2) and one (1) whereas in the later arrangement the total number of bidders was seven (7). This example is a clear demonstration of how lumping can inhibit competition and create a scenario where such a limited number of bidders either have an opportunity to collude or in case of a single bidder seek monopoly charges, both of which are cases that are detrimental to public welfare.

Apart from the concerns discussed thus far, lumping in lots as discussed above may also discourage the local industry to develop, as providing for all the equipment lumped together may require large scale manufacturing ventures that could be prohibitively capital intensive and infeasible at the budding stage of an industry.



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Page 9 of 23

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**Recommendation:**

In light of the aforementioned we are of the considered view that the Procuring Agencies i.e. the NTDC and DISCOs should avoid lumping disparate equipment into lots to the farthest extent possible. If they must partake in the same due to inevitable reason/reasons, they must also be able to demonstrate that such grouping is not carried out with the effect of foreclosing the market to the maximum number of local suppliers especially at the cost of quality or price both of which are essential determinants of efficiency in the procurement process. Since we have rarely observed grouping of equipment in tenders not having the undesired outcome mentioned above, it should be avoided at all costs.

**c. Country of origin**

The principle of widest possible competition also envisaged in the rules devised by the Public Procurement Regulatory Authority (hereinafter PPRA) and international procurement guidelines entails that a supplier should not be discriminated against from participation in a tender based on its country of origin. Although the context of the foregoing implies that a foreign country should not be discriminated against to favor the local suppliers which is not necessarily the case here, one thing is clear that this kind of restriction not only places a bar on the existing suppliers that do not fall in the approved category but also any potential entrants who may have to offer quality equipment in the future.

**Recommendation:**

Appreciating the performance and safety concerns in respect of such procurements, we are of the considered view that instead of discriminating on the basis of country of origin, the pertinent Procuring Agency whether the NTDC or a DISCO should employ its in-house expertise, or outsource it if the same is not available, to develop specifications that are reflective of the safety and quality standard they expect in the procurement equipment. This is so because discrimination, as in the aforementioned example, bears the potential hazard of basing a procurement on subjective evaluations rather than objective standards which may be detrimental to the interests of the Procuring Agency as well as the public/consumers at large.

**d. Reference to a specific brand**

Rule 10 of the PPRA Rules, 2004<sup>6</sup> prohibits reference to specific brand names unless it is essential to complete the specifications. The rule reads:

*Specifications shall allow the widest possible competition and shall not favour any single contractor or supplier nor put others at a disadvantage.*

<sup>6</sup><http://www.ppra.org.pk/Rules.asp>



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Page 10 of 23  
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*Specifications shall be generic and shall not include references to brand names, model numbers, catalogue numbers or similar classifications. However if the Procuring Agency is convinced that the use of or a reference to a brand name or a catalogue number is essential to complete an otherwise incomplete specification, such use or reference shall be qualified with the words "or equivalent".*

Similarly, the guidelines published by various donor agencies/banks (for example, the ADB and the World Bank)<sup>7</sup> regarding competition related issues that may arise in the pre-qualification stage in the procurement of public works and/or procurement of equipment by public sector organizations state the following regarding use of reference to brand names:

*Article 2.20 of the Guidelines state that specifications shall be based on relevant characteristics and/or performance requirements. References to brand names, catalog numbers, or similar classifications shall be avoided. If it is necessary to quote a brand name or catalog number of a particular manufacturer to clarify an otherwise incomplete specification, the words "or equivalent" shall be added after such reference. The specification shall permit the acceptance of offers for goods which have similar characteristics and which provide performance at least substantially equivalent to those specified.[Emphasis supplied]*

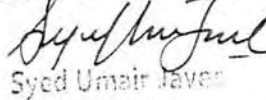
The Guidelines emphasize that reference to a brand name is to be primarily avoided and instead specifications should be prepared that are based on relevant characteristic and/or performance requirements. The Guidelines make it clear that reference to a brand name followed by the words 'or equivalent' may only be made for the sake of clarification in an otherwise incomplete specification.

This principle is further strengthened by Directive 2014/24/EU of the European Parliament and of the Council, of 26 February 2014 on public procurement<sup>8</sup> which reinforces the same by stating that:

*"Technical specifications should be drafted in such a way as to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator."*

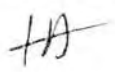
<sup>7</sup> Ibid 3.  
<sup>8</sup> Ibid 2.

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Page 11 of 23









The Directive further states that:

*"Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words 'or equivalent'."*

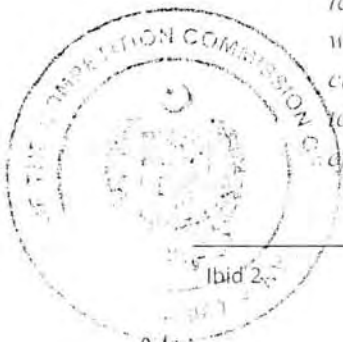
In their submissions in the hearing, the Procuring Agencies and their advisory in the subject procurement i.e. the NTDC demonstrated their understanding of the performance requirements or relevant characteristics that they were looking for in the OLTC procurements. For instance, they argued that in terms of quality they wanted equipment that could perform well in extreme temperatures of Pakistan. They also implied in their statements that they were interested in equipment capable of performing in large scale operations and not limited scale operations. The Procuring Agencies may have other such metrics in perspective in the subject procurements. It thus appears that Procuring Agencies have a vivid understanding of performance standards they expect in an OLTC.

**Recommendation:**

In view of the foregoing we are of the considered view that the procuring agencies should avoid making reference to a brand and employ all means to develop specifications that are reflective of the performance standards they expect in an OLTC or other such equipment, or alternatively develop an effective evaluation mechanism that does not base the award of contract on price considerations only but also includes quality considerations that match their performance expectations.

This is explained in the Directive 2014/24/EU of the European Parliament and of the Council, of 26 February 2014 on public procurement<sup>9</sup> wherein it is stated that:

*It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only. It is furthermore appropriate to recall that contracting*



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authorities are free to set adequate quality standards by using technical specifications or contract performance conditions.

In order to encourage a greater quality orientation of public procurement, Member States should be permitted to prohibit or restrict use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate.

A note of caution here is that such evaluation should be transparent in accordance with the international procurement rules and reasons should be provided to each bidder who fails to secure the contract.

The NTDC and DISCOs should only resort to brand specification when all the possibilities of implementing the suggested measures have been exploited. Even where reference to a specific brand is inevitable international procurement guidelines suggest as observed in the Procurement Guidelines<sup>10</sup> of Sri Lanka that:

*The specification shall permit the acceptance of offers for Goods which have similar characteristics and which provide performance at least substantially equivalent to those specified.*

*Technical specifications in this instance should be descriptive and give the full requirements in respect of, but not limited to, the following:*

- *Standard of materials and workmanship required;*
- *Details of factory tests required (type and number);*
- *Details of all work required to achieve completion;*
- *Details of all precommissioning and commissioning activities to be performed by the contractor; and*
- *Details of all functional guarantees required and liquidated damages to be applied in the event that such guarantees are not met.*
- *Sample of specifications from previous similar procurements are useful in this respect. Care must be taken in drafting specifications to ensure that they are not restrictive. For wide range of works ICTAD has issued specifications. NPA will issue specifications for limited category of goods. PE shall use such specifications to the extent possible.*

<sup>10</sup> [http://www.treasury.gov.lk/depts/pfd/publications/ProcurementGuidelines2006\\_ amended12June.pdf](http://www.treasury.gov.lk/depts/pfd/publications/ProcurementGuidelines2006_ amended12June.pdf)

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In this regard, the DISCOs may also attach the specification / complete catalogue of their required brand with the tender document.

Lastly we are of the opinion that onus also lies on a potential bidder to prove that the goods or service offered by it meet the performance and functional requirements of the contracting authority as stated in the Directive 2014/24/EU Of The European Parliament And Of The Council, of 26 February 2014 on public procurement<sup>11</sup>, as reproduced below:

*In its tender, the tenderer shall prove by any appropriate means, including those referred to in Article 44, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.*

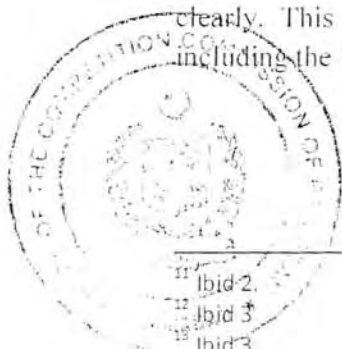
**e. Lack of information for participation in bidding**

The World Bank's sample guidelines<sup>12</sup> for prequalification and competitive bidding process for use with PPP projects provide as follows:

*The request for pre-qualification shall be announced and publicized well in advance of the date for bid submission, in two or more national and international newspapers, on the website of [relevant Ministry] and any website available to the Procuring Entity.*

*The Procuring Entity will publish the intention to award a [Project], describing clearly the characteristics of the project and the minimum technical, financial and operational qualifications and requirements for participation.*

Two things are emphasized here, the first of which is the announcement of tender well in advance, and publication of the same on all relevant media such as national and international newspapers and the websites of the relevant ministry, PPRA and any other available to the procuring entity. The second is that the characteristics of the project should be described clearly. This view is also reflected in the guidelines released by various donor banks including the World Bank and the ADB as seen in the following article:<sup>13</sup>



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Article 2.11 of the Guidelines state that the bidding documents shall furnish all information necessary for a prospective bidder to prepare a bid for the goods, works, and non-consulting services to be provided. While the detail and complexity of these documents may vary with the size and nature of the proposed bid package and contract, they generally include: invitation to bid; instructions to bidders and bid data sheet; form or letter of bid; form of contract; conditions of contract, both general and particular; specifications and drawings; relevant technical data; list of goods (including quantities); delivery time or schedule of completion; and necessary appendices, such as formats for various securities. The basis for bid evaluation and selection of the lowest evaluated bid shall be clearly outlined in the instructions to bidders and/or the specifications.

**Recommendation:**

In light of the above we are of the considered view that since importers of electrical equipment may be unable to import the same without access to the relevant technical specifications within the time allotted, once a tender is announced by the NTDC or any of the DISCOs, all the relevant technical specifications or requirements must immediately be communicated in the tender documents, or any other relevant forum as mentioned above, to ensure that competition is not impeded in the subject procurement owing to lack of access to necessary information for potential bidders.

**f. Domestic Price Preference**

Specifically with regard to the issue brought forth to the Commission regarding the procurement of cables, the Commission appreciates the step taken by the pertinent Procuring Agency to scrap the subject tender and re-initiate bidding once there was suspicion that SRO 827 was not being applied in its true spirit.

While the action by the Procuring Agency seems positive in this instance, the Commission deems fit to offer its comments/suggestions regarding approaching a matter of such nature.

A *prima facie* perusal of the SRO reveals that while it intends to encourage the local industry/manufacturers, it does not intend to do so at the cost of competitive pricing or technical aptness. This is evident from subsection 4 of Section 6 of the SRO<sup>14</sup> which states:

*"Decision for award of contract shall be made on the basis of competitive prices and technical suitability and preference shall be given to the*

<sup>14</sup>ibid 1.

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*manufacturers or contractors having obtained certification of quality and standards such as ISO 9000, ASME, API etc. EDB will help and facilitate and local industry in achieving quality standards and timely completion of large projects."*

Thus, what is important when applying the provision of the SRO is that while encouraging the local manufacturers is important, their inefficiencies should not be rewarded, and a balanced approach should be adopted in protecting local interests and achieving efficiency objectives. The SRO is very clear in that it applies to value addition, but not factors such as costs affected as a result of lack of natural resources owing to energy crisis or any other such dilemmas that an industry may face. Such issues need to be dealt with separately on a policy level and cannot be deemed to be interlinked with concessions earned as a result of value addition.

A suggestion was also aired in the open hearing regarding offering the local industry a chance to match the price by its competitors. While procurement rules in general discourage price matching and the same is also rarely endorsed by competition agencies, there are instances of governments adopting these practices at policy level to encourage the local industry. Some examples are as follows:

i. Philippines<sup>15</sup>

Price matching is only allowed if the winning bidder happens to be a party that doesn't belong to the province where the project is to take place, companies that are located in the province are given a chance to match this bid. Basically the purpose of this policy is to give preference to a company located in the province for certain provincial projects.

ii. Escambia County, Florida, U.S.A<sup>16</sup>

A similar policy is put in place to give preference to the companies that belong to the county.

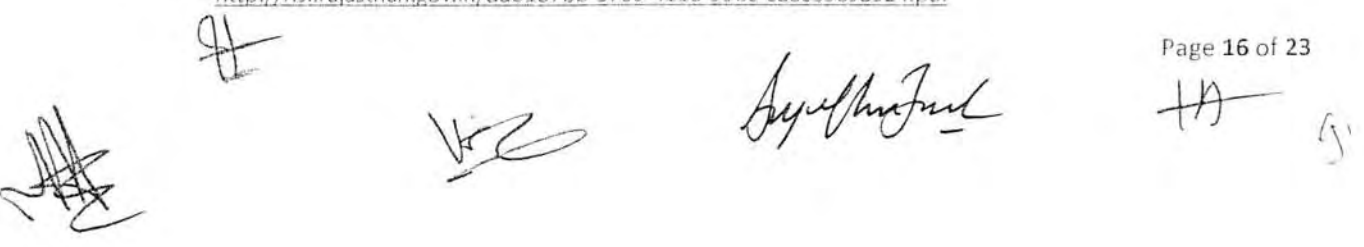
iii. Rajasthan, India<sup>17</sup>

The initiative of price matching is introduced in order to enable more businesses to participate in the process. For instance, if the government wants two companies to participate it will divide the quantity between the winning bidder and the second best bidder by giving the second best bidder the opportunity to match the

<sup>15</sup> <http://www.gppb.gov.ph/downloadables/forms/GPM%20-%20Vol.2.pdf>

<sup>16</sup> <http://www.myescambia.com/sites/myescambia.com/files/pages/2012/Oct/Uniform%20Contract%20Forma%20t/Bid.Sample.pdf>

<sup>17</sup> <http://risl.rajasthan.gov.in/da0167bb-3786-411a-91bc-cd8c55898524.pdf>



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winning bidder's price. In case the second bidder is not able to do it the entire contract goes to the winning bidder.

**Recommendation:**

In view of the aforementioned, we are of the opinion that other than an accurate implementation of the SRO in place, price matching in special circumstances appears to be a way to allow the local manufacturers to match the efficiency of foreign bidders in being awarded a contract. As guardians of competition, we discourage domestic price preference in its entirety and in any form, however the cases of price matching given above serve as examples of domestic business preference where the local business is given the opportunity to meet the efficiency of the least cost bidder or lose out. Any measure that bases domestic preference on reasons emanating from complacency or inefficiency is not only bound to ruin the local industry by halting its growth but also effectively hurting public interest and must therefore be avoided.

**g. Biased development of specifications:**

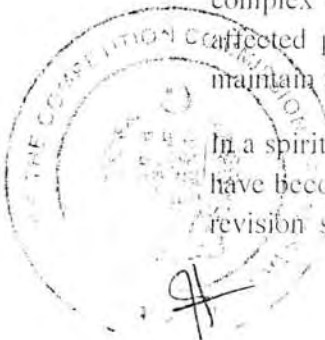
The aforementioned concern was raised in respect of the procurement of substation connectors and fittings by the NTDC. The basic concern was that a change in the technical specification requirements for the said procurement in 2011 by the concerned Procuring Agency rendered the complainant unfit for participation in the bidding process, and the said amendment ended up favoring its competitor who had been out of business for several years.

Regardless of the veracity of the allegation regarding favoring any particular supplier, it is evident that whenever such amendments are carried out without a cogent reason or justification to the affected parties, the entire process becomes susceptible to mistrust.

**Recommendation:**

In view of the above, we are of the opinion that Procuring Agencies (NTDC and DISCOs) must ensure that any changes that are being introduced in technical specifications of the required equipment, if necessary, must be backed by very practical performance related reasons supported by a technical committee review where the equipment concerned is of complex or sensitive nature. The process carried above should be transparent and all the affected parties must be informed of the justification for such change in specifications to maintain the sanctity of the procurement procedure.

In a spirit contrary to the above concern many of the specifications of the procuring agencies have become old and need to be revised as per latest/prevaling international standards. Such revision should be carried out by a committee of sector experts to ensure that whatever



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Page 17 of 23

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revisions that are made are transparent and being done in the best interest of the end consumers and public at large.

**h. Provision of insufficient delivery time**

In a World Bank Note<sup>18</sup>, adapted from guidelines on public procurement power sector projects in a South Asian Country, it is stated that:

*"The requirements for pre-qualification will be reasonable and efficient and must not necessarily create constraints that limit the number of bids or the possibility of maximizing competition."*

**Recommendation:**

In view of the foregoing we are of the considered view that the Procuring Agencies i.e. the NTDC and DISCOs should deliberate whether the requirements that have to be fulfilled by a supplier without affecting the delivery schedule are being done in the most efficient manner possible, particularly where the processes concerned are dependent on Procuring Agencies. Factors affecting the delivery timelines, such as bureaucratic hurdles, and testing requirements must be considered by the Procuring Agency for remedies and improvement. Similarly, best practices of international Procuring Agencies that can be adhered to in order to minimize the time in fulfilling such requirements should be used to bring about efficiency in the fulfillment of these requisites. If it is established that such efficiency may not be reached upon immediately, a reasonable relaxation should be allowed in the delivery schedule to allow for maximum participation.

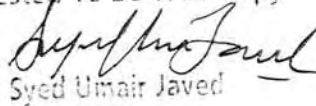
**i. 'Experience clauses' as a barrier for new entrants**

For healthy competition it is necessary that barriers to entry are reduced to the farthest extent possible for new entrants. Threat of entry is among the most major means to bring about growth and economic efficiency in an industrial sector. If barriers are not removed or sufficiently reduced, the existing suppliers tend to become complacent due to lack of competition and the new entrants who may have the potential to offer superior product and challenge the incumbent for improvement may be discouraged to enter the market potentially leading to an overall loss to the economy. Barring entry in local procurement also appears to impede the growth of local industry, which is necessary from a competition perspective as in the absence of the same foreign entrants could take over the local market without feeling any pressure to improve upon their products/services. Any hopes of emergence of local industry could also die down in that process.

<sup>18</sup><http://siteresources.worldbank.org/INTINFANDLAW/Resources/prequalificationandbidding.pdf>

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Page 18 of 23

  
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Commissioner of  
Government of Punjab  
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**Recommendation:**

In view of the above we are of the considered view that in order to encourage the local industry and fresh entry the procuring agencies i.e. the NTDC and DISCOs must initiate measures to strongly encourage educational/provisional orders in the year round procurements

Secondly sector experts should be consulted for formulation of any other reforms that may be necessary to serve as a substitute for the requirement of 5-10 years trial order for the new entrants. This may entail widening of testing options, efficiency and speediness in testing mechanisms and removal of bureaucratic hurdles where necessary. Considering the enormity of the matter, changes in the policy may also be approached where deemed appropriate and in the best national interest.

**j. Ancillary Concerns**

Through complaints and oral submissions in the public hearing a couple of other notable concerns were also brought to the Commission's attention. These include: (1) the condition that bars a bidder from participation if it is involved in litigation against the procuring agency concerned and (2) the delay in the sale of tender documents to bidders after it has been announced.

Regarding the first concern, it must be appreciated that a legal person may not only approach a court of law or any other higher forum with a mal intent, but it could be a case where the effected party is seeking a rightful remedy as per its basic legal right. Merely going into Litigation against the procuring agency neither determine its merits nor its intent.

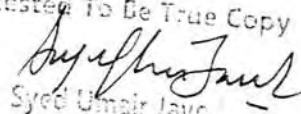
In respect of the second issue, it is important to note that if the tender documents are not made available immediately after the announcement of a tender, some new entrants or importers may not have the required specifications available to them in time to participate in the bidding process as against the existing suppliers who are familiar with the same.

**Recommendation:**

In light of the discussion regarding the former concern, we are of the opinion that no prospective bidder should be barred from participation in the bidding process on mere grounds that it is in litigation with the purchaser. If there are genuine concerns in respect of a bidder whose participation may affect procurement efficiency against public welfare, the same should be qualified, however mere litigation against the procuring agency should not serve as a definitive entry barrier as it could be for rightful reasons.

In light of the latter issue, we are of the considered view that the gap between the announcement of a tender and sale of documents pertaining to it, create a predicament of denying level playing field to some categories of bidders at the expense of competition. This

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is an unnecessary restraint that must be looked into and remedied by the procuring agencies i.e. the NTDC and DISCOs.

## V. Conclusion

The issues that we have discussed within the context of this opinion involve some sort of foreclosure or barriers to entry at the bidding stage of procurement in the Pakistan Power Sector. The primary issues raised through complaints and during the course of public hearing conducted under Section 29(c) of the Act are Requirement to submit type-test reports, Arrangement in lots (lumping), Restrictions regarding country of origin, Reference to a specific brand, Lack of information for participation in bidding, Domestic Price Preference, Biased development of specifications, Provision of insufficient delivery time and 'Experience clauses' as a barrier for new entrants.

These may be in the form of discrimination on the basis of national origin or restrictive conditions for entry such as grouping of equipment in a way that only select few can cater to, or introducing the condition for conforming to tests whose scope is as per local specifications, a condition that cannot be fulfilled early enough to participate in a tender if required as a prerequisite for bidding.

All these concerns appear to have one thing in common that they inhibit competition from reaching its full potential. As mentioned earlier public procurement constitutes 15-25% of GDP in Pakistan. Since the power sector is a significant contributor to it, the quantum and potential being looked at here in terms of promotion of local industry, existing competitors and foreign investment is huge. In this regard one must not over look the byproduct of efficient procurement particularly in the context of promotion of local industry that comes in the form of increased employment and domestic consumption leading to a booming economy. Efficient procurement also translates to optimal use of public money by obtaining task oriented and long lasting equipment at competitive prices.

To ensure the aforementioned outcome, the Procuring Agencies must take a proactive approach in resolving issues that serve as impediments to achieving the widest possible competition in the area of power procurement.

A summary of the opinion/recommendations made in respect of the above mentioned issues are provided herewith:

With regard to the requirement of type test reports as per local specifications at the bidding stage, we recommend a common policy among the procuring agencies and use of alternatives to the said requirement such as prevailing international standards or type test reports from internationally accredited agencies to allow for maximum participation.

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Competitions Commissioner, Pakistan


Page 20 of 23

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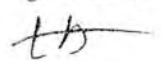
- i. Regarding the lumping of equipment in lots, we are of the opinion that lumping of disparate equipment should be avoided to the farthest extent possible, but if the same must be adhered to for an inevitable reason, it should not be at the cost of limiting competition and compromising on price and quality.
- ii. With regard to discrimination based on country of origin, we advise that competition should not be foreclosed to the existing or potential entrants by limiting procurement to certain countries, but instead specifications should be developed that are reflective of the performance expectations desired by the procuring agencies.
- iii. Regarding the aspect of Reference to a specific brand, we are of the view that a procuring agency should employ all means to develop specifications that define the quality and performance standards they are hoping for or alternatively develop an effective price and quality based evaluation mechanism particularly in the procurement of complex equipment. It may only refer to a brand followed by 'or equivalent', if all of the above have been exhausted. Even in that case the specifications should adhere to international procurement guidelines and the procuring agency should attach the specification / complete catalogue of their required brand with the tender document. On the part of the bidder the Commission is of the opinion that it must also prove that the goods or services offered by it meet the performance and functional requirements of the procuring agency.
- iv. Regarding a delay in provision of information in respect of a tender, we are of the view that there should be no lag between the announcement of a tender and availability of relevant technical specifications to those interested in bidding as this is an unnecessary delay that impedes competition in the pertinent market.
- v. In respect of the issue of Domestic Price preference we do not encourage it in any shape or form, however given the current scenario we are of the view that the SRO in place regarding domestic price preference must be implemented accurately and any other options may be explored or international examples may be looked into to apply local preference, however whatever means are adopted, they should by no means reward inefficiency on the part of the local business thereby hurting the public interest.

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Page 21 of 23



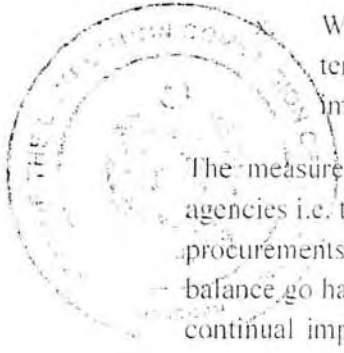
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Commission of Information  
Government of Punjab  
Lahore



- vi. With regard to the biased development of specifications, we are of the view that any change that is brought about in the existing specifications of the procuring agencies must be carried out by a technical expert. Additionally, the process should be transparent so as to demonstrate that a certain revision is carried out to adapt to latest international standards or for any other worthy reason and not to discriminate against or favor an existing supplier.
- vii. With regard to the aspect of 'insufficient delivery time' we are of the view that the procuring agencies should work on making their processes efficient by working on removing bureaucratic hurdles, introducing any remedies in the existing testing requirements or eliminating any other impediments on their part in the fulfillment of their requirements. Till such time that these changes are not brought about a reasonable relaxation in the delivery time must be offered to potential bidders in the interest of maximum participation.
- viii. With regard to the experience clauses serving as barriers to new entrants, we are of the opinion that the procuring agencies must initiate measures to strongly encourage educational/provisional orders in the year round procurements. Further changes may be approached at the policy level and sector experts could be consulted to find a substitute for the prohibitively long trial orders for the new entrants.
- ix. In respect of the issue of litigation involving a bidder we are of the view that litigation against the procuring agency should not serve as a sole reason for not allowing participation in bidding as it could be for rightful reasons and in exercise of a basic legal right.

With regard to the lag between the announcement of tender and sale of tender documents the same should be avoided as it creates an unnecessary impediment for healthy competition.

The measures thus mentioned require having a uniform policy on the part of procuring agencies i.e. the NTDC and DISCOs to attain best price and/or quality outcome in successive procurements. Maximum competition and the objective of attaining the best price and quality balance go hand in hand by ensuring that the existing players stay on their toes and carry out continual improvement in the face of threat of fresh entry or efficient foreign competition.



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 Director

Page 22 of 23


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 Government of Punjab  
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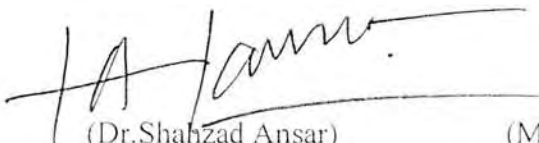
Maximum competition can only be achieved through promotion and strengthening of local industry and avoidance of instilling conditions at the bidding stage that may effectively or potentially serve as barriers to fresh or foreign entrants. If such measures are ignored and not carried out in earnest, they can lead to sub-optimal utilization of public funds, discourage growth of local industry, hamper foreign investment and consequently lead to an undesirable impact on national economy and public welfare.

Owing to the enormity of the matter and the far reaching implications it could have on the national economy and public welfare in general, the procuring agencies must take stock of the issues highlighted in earnest and devise an immediate action plan in the light of the opinion/suggestions laid out above. It must be noted that, if in future, such patterns of behavior recur at the cost of efficient competition and no serious headway is visible in this regard, the Commission will be moved as per its mandate to take action against such in accordance with law.

  
(Ms. Vadiyya Khalil)  
*Chairperson*

  
(Dr. Joseph Wilson)  
*Member*


  
(Mr. Mueen Batlay)  
*Member*

  
(Dr. Shahzad Ansar)  
*Member*

  
(Mr. Ikram Ul Haque Qureshi)  
*Member*



ISLAMABAD THE 10<sup>th</sup> APRIL 2015

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