



# TRANSPARENCY INTERNATIONAL-PAKISTAN

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TL16/1304/1A

13<sup>th</sup> April, 2016

Chairman  
Water and Power Development Authority  
703 WAPDA House  
Lahore,

Sub: Legal Opinion by WAPDA Lawyers, on PPRA Rules for award of Contract to M/s Alstom  
Rehabilitation of Units 5 & 6 – Generators, Mangla Dam-Delay caused loss of about Rs 10 billion

Dear Sir,

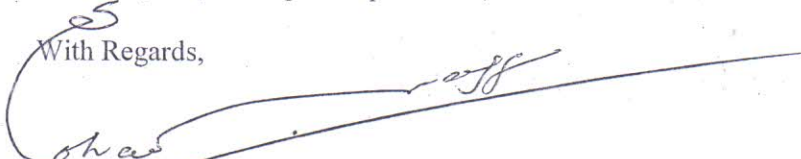
With reference to your letter dated 29.3.2016, regarding the status of Alstom for the subjected tender, TI-Pakistan would like to make following comments;

- WAPDA should have followed the rules and awarded the contract to responsive lowest bidder in 2014, but due to collusion of M/s Alstom with Consultants and WAPDA, the Contract was not awarded to responsive lowest bidder, and it was discharged in January 2015.
- WAPDA has wasted one year and 4 months, which has delayed supply of additional 310 MW, and nation has caused loss of about Rs 10 billion.
- You have assured in your letter dated 29.3.2016 that WAPDA will strictly follow the disciplinary code and take prompt action on malpractices.
- But it is strange that WAPDA had not acted upon its own legal adviser, as it had sought legal opinion on this Bid Evaluation with relation to Alstom from M/s Saad Rasool, Law Associates in January 2016, vide its letter No LF-31/2016/43637 dated 28.1.2016, the legal opinion was given by M/s Saad Rasool on 24.2.2016, declaring M/s Alstom as violating PPRA Rules and WAPDA Tender Condition 59.1 which requires the bidder "to observe the highest standard of ethics."
- TI Pakistan has sent another letter to Minister on 7.4.2016 to take action on this case.

Transparency International Pakistan request the Chairman to take immediate action and get the contract awarded to lowest responsive bidder, and also action should be taken against the responsible officers, contractors and all the colluding parties under NAO 1999.

Transparency International Pakistan is striving for across the board application of Rule of Law, which is the only way to stop corruption.

With Regards,

  
Sohail Muzaffar  
Chairman

Encl: Legal Opinion of WAPDA Legal Adviser dated Feb 2016

Copies forwarded for the information with request to take action under their mandate to:

1. Secretary to Prime Minister, Islamabad.
2. Chairman, NAB, Islamabad,
3. Khawja Asif, Minister of W&P, Islamabad
4. Chairman, Prime Minister's Commission Against Corruption
5. Registrar, Supreme Court of Pakistan, Islamabad
6. Managing Director, PPRA, Islamabad.

24<sup>th</sup> February, 2016.

Mr. Shehzad A. Sheikh  
Director (Legal)  
Law Division  
711, WAPDA House,  
Lahore.

**Subject: Opinion on Financial Bid Evaluation Report for Package I & VII – Refurbishment and upgradation of generating units 1 – 6.**

Dear Sir,

We, *Saad Rasool Law Associates* (hereinafter the “Firm”), vide letter dated 28<sup>th</sup> January, 2016, bearing No. LF-31/2016/43637 as well as subsequent meetings and telephonic conversations (hereinafter the “Request”), have been requested by you to review and comment on the legal complexities arising out of the evaluation process for the bids, which were submitted pursuant to the publication of a request for proposal for package I and VII, Refurbishment of Generating Units 1- 6, of Mangla Power Station (hereinafter the “Project”), and its repercussions for Water and Power Development Authority (hereinafter the “WAPDA”).

At the very outset, it is brought to your attention that the only information that has been shared with the Firm is to the extent contained in the Request. The Firm neither has any access to the additional details about the background of the Project, nor any access to the official paperwork and documents pertaining to the Government policies.

*Factual Background:*

The factual background leading to the acceptance of the financial bids of bidders, including, inter alia, M/s Alstom Hydro France (hereinafter the “Company”), for the Project is as follows:

By way of background, it is pointed out that the Project consists of turbine model testing, design and supply of replacement and refurbished parts of turbines, governors, generators and excitation systems for Units 1 – 6, including dismantling and refurbishment of existing equipment, erection and installation of the new and refurbished components and startup and commissioning activities.

WAPDA invited bids on ICB basis on Single-Stage-Two-Envelope, from eligible firms, including foreign entities, per the bidding documents/process (hereinafter the “Bidding Document”), for the Project. Thereafter, proposals, including the technical and financial bids, were submitted by four firms i.e. Company, M/s Andritz Hydro JV, M/s Voith Hydro GmbH, and OJSC Power

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Machines (hereinafter the "Bidders"). The technical bids of the Bidders were opened on 17<sup>th</sup> September, 2015, and financials bids of the technically responsive Bidders i.e. Company, M/s Andritz Hydro JV, and M/s Voith Hydro GmbH, were opened on 3<sup>rd</sup> December, 2015.

It is pertinent to note that, per the Firm's instructions, the consultants at WAPDA upon detailed evaluation of the submitted bids, in a transparent and meritorious manner, in accordance with the relevant provisions of the law, recommended that the Company should be invited to *"participate in pre-award clarification meeting, while maintaining the option of inviting M/s Voith, the next lowest responsive bidder, in case it is not possible to come to an agreement with Alstom"*. The said recommendation was endorsed by the Project Office Review Committee (hereinafter the "PORC").

However, it is imperative to note that news pertaining to the alleged involvement of the Company in widespread corruption scheme, involving at least US\$ 75 Million in secret bribes paid to government officials in countries around the world was also published by the Department of Justice of United States on 13<sup>th</sup> November, 2015 and 22<sup>nd</sup> December, 2015 (hereinafter collectively referred to as the "Press Release"). The Press Release also states that the Alstom S.A. was sentenced by U.S. District Judge Janet Bond Arterton of the District of Connecticut, to pay US\$ 772,290,000 fine to resolve criminal charges.

As such, the Central Contracts Cell (hereinafter the "CCC") reviewed the financial bid evaluation report and commented, inter alia, that the consultants as well as the PORC must critically review the reports pertaining to alleged charges of corruption against Alstom S.A., French power and transportation company, as well as the price adjustments for omitted items, including omitted operational bid items from the Company (hereinafter the "Discrepancies").

Pursuant to the highlighted Discrepancies, the consultants vide letter dated 21<sup>st</sup> January, 2016, bearing No. MRP-M-140 (hereinafter the "Letter dated 21.01.2016"). The operative part of the Letter dated 21.01.2016 has been reproduced hereunder:

*"Alstom consists of many companies, all operating under the general umbrella of Alstom SA. In this case, the company actually submitting the Bid is "Alstom Hydro France". A copy of the Power of Attorney as submitted with the bid is attached for reference (Attachment 1).*

*The entities involved in the November, 2014 settlement are: Alstom SA, Alstom Network Schweiz AG, Alstom Power Inc., and Alstom Grid Inc. The company "Alstom Hydro France" is not associated with this settlement and was clear on all of the blacklisting/debarment websites specified when check as part of the evaluation of bids in the fall of 2015.*

*Further to that, the websites were revisited and new screenshots captured. Those screenshots are also attached (Attachment 2). As expected, there was no change in blacklisting/debarment status for Alstom Hydro France; they are not listed."*





It is imperative to note that the attachments i.e. screenshots and power of attorney submitted by the Company annexed with the Letter dated 21.02.2016, prima facie establish that the Company has neither been blacklisted nor is included in the group of companies that have been expressly mentioned in the Press Release.

Issue:

Per instructions provided to the Firm, WAPDA is desirous of understanding the legal repercussions, if any, in case WAPDA decides to award the contract for the Project to the Company, despite the Press Release in line with observations of the Team Leader/Project Manager of the Project vide Letter dated 21.01.2016.

Legal Implications:

At the very outset, it is pointed out that the public procurement of goods, services, and works in the public sector are governed by the Public Procurement Regulatory Authority Ordinance, 2002 (hereinafter the "**Ordinance**") as well as the rules i.e. Public Procurement Rules, 2004 (hereinafter the "**PPRA Rules**") and regulations i.e. Public Procurement Regulations, 2008 (hereinafter the "**Regulations**") made thereunder.

In this regard, it is pertinent to mention that Rule 19 of PPRA Rules empowers the procuring agency (WAPDA) to specify a "*mechanism and manner to permanently or temporarily bar, from participating in their respective procurement proceedings, suppliers and contractors who either consistently fail to provide satisfactory performances or are found to be indulging in corrupt or fraudulent practices.*" [Emphasis Added] The said Rule also, however, states that the blacklisted supplier or contractor must mandatorily be accorded an adequate opportunity of being heard.

To this end, Rule 2(1)(f) of the PPRA Rules defines Corrupt and Fraudulent Practices as "*the offering, giving, receiving, or soliciting of anything of value to influence the action of a public official or the supplier or contractor in the procurement process or in contract execution to the detriment of the procuring agencies; or misrepresentation of facts in order to influence a procurement process or the execution of a contract, collusive practices among bidders (prior to or after bid submission) designed to establish bid prices at artificial, non-competitive levels and to deprive the procuring agencies of the benefits of free and open competition and any request for, or solicitation of anything of value by any public official in the course of the exercise of his duty.*" [Emphasis Added]

In compliance with the aforementioned PPRA Rules as well as the international guidelines/standards for public procurement, the Bidding Document for the Project contains a specific clause, entailing a detailed mechanism, pertaining to cases of fraud and corruption. The

said Clause i.e. Clause 59.1 of the Bidding Document stipulates that all bidders, the Contractor, their subcontractors, and their agents must compulsorily *"observe the highest standard of ethics"* throughout the procurement and execution of the contract for the Project. Moreover, Clause 59.1 prohibits a bidder from being awarded the contract for the Project if the same has been debarred, blacklisted or otherwise sanctioned by PPRA, agency/department of the United States Government, and any party to the Agreement for mutual enforcement of debarment decisions, which includes the World Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, African Development Bank, and Inter-American Development Bank.

Pertinently, Clause 59.1 of the Bidding Document also expressly mentions that *"a Bidder is prohibited from being awarded a Contract if it is a subsidiary of a parent company that is debarred, blacklisted, or otherwise sanctioned"*. [Emphasis Added]

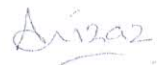
Prima facie, a bare perusal of the aforementioned clause of the Bidding Document as well as the operative legal provisions reveals that the Company cannot be awarded the contract for the Project if it is clearly established that the company mentioned in the Press Release is in fact the parent company of the Company. Additionally, it is important to point out that the screenshots attached with the Letter dated 21.01.2016 had been taken/collected on 21<sup>st</sup> January, 2016. Owing to the sensitivity of the instant matter, it will be prudent to repeat the same exercise i.e. collection/analysis of screen shots per mechanism stipulated under clause 59.1 of the Bidding Document for surety.

In view of the foregoing, the Firm recommends that WAPDA conduct a thorough in-house technical and cost-benefit analysis, in order to determine whether the Company in fact forms a part or is associated with the blacklisted/sanctioned company that has been mentioned in the Press Release, in order to ensure that there are no adverse impact on the Project or increase in WAPDA's risks associated with the same. Such an analysis, per the information and instructions provided in the Request, falls beyond the scope of review or expertise of the Firm.

We hope that this Legal Opinion of the Firm has helped in clarifying the structure and complexities of the issues at hand. If you have any questions or concerns, in regards to the same, please feel free to contact us at any time.

Thank you.

Best Regards,



Aitaz. A. Chaudhary.