

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 109/2009

Dated: 4th September, 2009

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. H.L. Bajaj, Technical Member**

IN THE MATTER OF:

Lanco Infratech Ltd.

Plot No. 397
Udyog Vihar, Phase-III
Gurgaon – 122 016 (Haryana)

... Appellant

Versus

Punjab State Electricity Regulatory Commission

S.C.O. No. 220-221

Sector 34-A

Chandigarh – 160 034

...Respondent 1

Punjab State Electricity Board

The Mall

Patiala – 147 001 (Punjab)

...Respondent 2

Nabha Power Ltd.

Thermal Shed No. T-2, PSEB

Near Railway Crossing No. 22

Patiala – 147 001 (Punjab)

... Respondent 3

State of Punjab

Through Secretary to the Government

Department of Power

Punjab Civil Secretariat

Chandigarh – 160 034

... Respondent 4

Counsel for the Appellant : Mr. Abhisek Manu Singhvi, Sr. Advocate
Mr. Krishnan Venugopal, Sr. Advocate
Mr. Kamal Budhiraja
Mr. Amit Bhandari
Mr. H.S. Popli

Counsel for the Respondent(s): Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan &
Ms. Swapna Seshadri for PSEB, R2
Mr. Mr.Sitesh Mukherjee,
Mr. Vishal Anand &
Mr. Sakya Singha Choudahri for PSERC, R1
Mr. Pradeep Misra & Mr. Daleep Dhyani

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

JUDGMENT

1. Lanco Infratech Ltd. is the Appellant herein.
2. The Punjab State Electricity Regulatory Commission on 27.5.2009 passed an Order in the Application filed by the Punjab State Electricity Board (R2 herein) rejecting to give approval for the grant of letter of intent in favour of the Lanco Infratech Ltd., the Appellant herein being the sole bidder and directing for the fresh bid. Aggrieved by this Order, the Lanco Infratech Ltd. has filed this Appeal.
3. The short facts leading to this Appeal are these:

4. The State of Punjab (R4) decided to set up a Thermal Power Plant of 1320 MW capacity in Patiala District to increase the power generation in the State of Punjab. Accordingly, the State Electricity Board (R2) invited competitive bids on 18.1.2008 for setting up the power plant.

5. Totally 13 bidders participated in the bidding process and out of them 9 bidders were declared qualified, including the Appellant. Out of the 9 bidders, 7 bidders including the Appellant purchased the Request for Proposal (RFP) documents. Out of these 7 bidders, the Appellant alone submitted the RFP document. Thus, the Appellant became the sole bidder.

6. As per Clause 5.7 of the bid guidelines, if there is a single bidder and if the State Electricity Board wishes to proceed with bidding process, it has to obtain the consent from the State Commission to proceed with. Accordingly, the Electricity Board filed the application.

7. On 8.12.2008, the State Commission passed an interim order allowing the State Electricity Board (R2) to continue with the bidding process of the single bidder on the condition that the State Electricity Board has to obtain the opinion of the Evaluation Committee with regard to the price quoted by the sole bidder and place it before the Commission to enable the Commission to decide about the final approval. Accepting the

said condition, the R2, the Electricity Board proceeded with the bidding process and opened the bid and found that the amount quoted by the Appellant the sole bidder in the bid was Rs. 3.386 per KWH. Then the Evaluation Committee was constituted. On examining the bid of the Appellant, the Evaluation Committee gave its opinion that the levelised capacity charges quoted by the Appellant were on the higher side when compared to the similar tariff levied in other projects and referred the matter to the State Electricity Board (R2) and Nabha Power Ltd., the Procurer (R3) to consider and verify as to whether the price quoted is in line with the prevailing market rates.

8. Thereupon, both R2 and R3, namely, State Electricity Board and Nabha Power Ltd. requested the State Government to constitute a Negotiation Committee to negotiate the price with the Appellant. Accordingly, a High Level Committee, namely, the Negotiation Committee was constituted by the State Government. The said Committee had deliberations with the members as well as the Appellant as a result of which the Appellant agreed to reduce the levelised capacity charges from Rs. 3.386 to Rs. 3.309 per KWh.

9. The High Level Committee thereupon gave 3 options and placed before the Council of Ministers. Ultimately, the Council of Ministers took decision to accept the negotiated bid amount of the Appellant. In accordance with the condition imposed by

the State Commission in the interim order dated 8.12.2008, the State Electricity Board (R2) came back to the State Commission and filed the Petition seeking for final approval for the grant of letter of intent in favour of the Appellant for developing the project on the basis of the decision of the Council of Ministers. The State Commission, however, sought the opinion of the Evaluation Committee with reference to the aspect as to whether the negotiated price is aligned with the prevailing market rate or not. But the Evaluation Committee instead of giving clarification over the said aspect sent a report to the Commission stating that the Committee was not inclined either to give any opinion on the said aspect or to comment upon the decision taken by the Council of Ministers to accept the price quoted by the Appellant. On receipt of this report sent by the Evaluation Committee giving no answer to the relevant question, the State Commission passed an Order dated 27.5.2009 rejecting the consent to issue letter of intent to the Appellant on the ground that the negotiated amount is not in line with the prevailing market price and consequently directed for the fresh bid.

10. Challenging this Order, the Appellant has filed this Appeal before this Tribunal.

11. The Learned Senior Counsel for the Appellant while assailing the Order impugned dated 27.5.2009 would make the following contentions:

- (i) The State Commission having allowed the bid process to proceed by order dated 8.12.2008 cannot reject the adoption of the negotiated price as being high when six agencies including the Council of Ministers in unanimity had accepted the tariff in violation of Section 63 of the Electricity Act, 2003.
- (ii) The State Commission under Section 63 of the Act has to only consider whether the process of bidding adopted was transparent or not. If it was transparent, then it has no jurisdiction or power to go into the price. The State Commission has committed a serious error in examining the price after having noted that the bidding process was transparent.
- (iii) The State Electricity Board approached for the consent under Clause 5.7 of the Guidelines. Once consent is given by the order dated 8.12.2008, the procurer need not have gone to the Commission for getting a final consent since the consent which has been given on 8.12.2008 shall be considered to be the final consent. Therefore, the last part of the order dated 8.12.2008 directing the matter to be referred back to the Commission before the issue of letter of intent has to be excluded as beyond jurisdiction.

- (iv) The Appellant has vested right in getting the bid accepted in view of the fact that the Appellant is the only person who submitted the bid and there is no allegation of any lack of transparency or unfairness in the process adopted as against the bid submitted by the Appellant.
- (v) There is no separate process or consideration for single bid as compared to multiple bids under the competitive bidding Guidelines except for the consent to be taken from the State Commission to proceed which is ministerial. The State Commission wrongly exercised jurisdiction without properly considering the views of the Power Finance Corporation of the price comparison by making its own comparison on price comparison. Therefore, the order of the Commission directing for re-bid is not valid in law.

12. In reply to the above submissions, the Learned Counsel for the Commission R1 and the Learned Counsel for R2 to R4 have submitted the following:

- (i) Section 63 of the Act would apply only in the case of more than one bid where the State Commission is required to adopt the bid tariff of the successful bidder if selected by the distribution licensee who initiated the process in a transparent manner and in accordance with the Guidelines. In this case, the Appellant was the sole

bidder in the bidding process. Therefore, the State Electricity Board ought to file a petition for seeking the consent as provided under Clause 5.7 of the Guidelines seeking permission to continue with the bidding process. When the State Commission has got the jurisdiction to grant consent, it has also got the power to give a conditional consent by giving some direction before giving the final consent.

- (ii) The State Commission rightly stipulated the condition in the order dated 8.12.2008 that the State Electricity Board has to come back to the Commission with the opinion of the Evaluation Committee which is more relevant under Clause 5.9 and 5.15 of the Guidelines in order to decide over the final approval.
- (iii) The order of the State Commission is consistent with the bid Guidelines and standard bid documents. The Appellant's right to the contract does not come into existence till the issue of letter of intent in favour of the Appellant. The fact that the negotiation took place and the Electricity Board recommended the acceptance of the bid on the basis of the decision taken by the Council of Ministers cannot confer any right to the Appellant. Similarly, non-rejection of the bid by the Evaluation Committee also does not by itself give any right to the Appellant.

- (iv) All the opinion or recommendation given by all six agencies shall be subject to the final approval of the State Commission as provided under the bid Guidelines 5.7 and 5.16.

- (v) From the reading of the relevant Guidelines, namely, 5.7, 5.9, 5.15 and 5.16, it is clear that the State Commission alone is the final authority to decide whether the rate quoted are in line with the prevailing market rates, when there is a deviation from the Guidelines and when the bidder happens to be a single bidder.

13. We have heard the Learned Counsel for the parties and gone through their citations as well as their written submissions. We have also given our anxious considerations to their rival contentions. The main questions that arise for the consideration in the instant case are these:

- (i) Whether the State Commission is vested with the jurisdiction to reject the recommendations of the Negotiation Committee and acceptance by the Council of Ministers determining the tariff accepted by both bidder and the procurer as per Section 63 of the Act even after having granted permission to continue with the bidding process in accordance with Clause 5.7 of the Guidelines thereby nullifying the entire bidding process?

- (ii) Whether Section 63 of the Electricity Act, 2003 mandates upon the Appropriate Commission has to simply adopt the tariff if such a tariff has been determined through a transparent process of bidding in accordance with the Guidelines issued by the Central Government?
- (iii) Whether the Appellant being the sole bidder has got vested right in claiming the letter of intent particularly when its offer as a bidder was accepted by the procurer?

14. According to the Learned Senior Counsel for the Appellant, as per Section 63, the State Commission is duty bound to accept or adopt the price determined by the R2 to R4 after taking into consideration the report of the Evaluation Committee and the Negotiation Committee. Let us now quote Section 63 of the Electricity Act, 2003:

“63. The determination of tariff by bidding process.– Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

15. As referred to above, Section 63 has got two ingredients:

- (1) There shall be a transparent process of bidding.
- (2) The price is fixed in accordance with the Guidelines of the Central Government.

Unless these two ingredients are satisfied, the Commission cannot blindly adopt and accept the tariff determined. It is not correct on the part of the Appellant to contend that when there is a transparent bidding process, it is sufficient to adopt the price determined by the authorities. It is to be stated that for invoking Section 63 of the Act not only the transparent bidding process has to be followed but also has to be verified as to whether the bidding Guidelines issued by the Central Government have been followed. In other words, Section 63 of the Act provides that there shall be not only a transparent bidding process but also the same shall be in accordance with the bidding Guidelines. In the light of these things, the Commission is bound to apply its mind whether both the ingredients are satisfied. Admittedly, there is no material to show that there was no transparent bidding process. Thus, the first ingredient is satisfied for invoking Section 63 of the Act. But in the absence of fulfillment of the second requirement, namely, bidding process in accordance with the Guidelines, the Commission cannot straightaway adopt the price merely because the same is accepted by the R2 to R4. In the instant case, it has been held by the State Commission that the Guidelines have not been followed. Therefore, the Commission cannot be compelled to adopt the price which has been

accepted by the various agencies including the Council of Ministers.

16. In this context, the provisions of Clause 5.7 of the bidding Guidelines assume significance. We now refer to Clause 5.7 of the Guidelines of the Central Government.

“5.7 To ensure competitiveness, the minimum number of qualified bidders should be at least two other than affiliated company or companies of the procurer. If the number of qualified bidders responding to the RFQ/RFP is less than two and procurer still wants to continue with the bidding process, the same may be done with the consent of the Appropriate Commission.”

This Clause 5.7 of the Guidelines would indicate two aspects:

- (1) If the number of qualified bidders is less than two, the procurer need not accept the same and it can go for the fresh bid.
- (2) If the procurer still wants to continue with the bidding process, it can be done with the consent of the State Commission

17. Thus, this provision starts with the important principle that to ensure competitiveness there should be at least two minimum number of qualified bidders and they should not be

the affiliated companies of the procurer to make it transparent. The underlying principle is that there cannot be competition if there is a single bidder. The object of a competition is that two or more bidders will compete with each other to give the best possible price in order to succeed in the bidding process and the bid price for the procurer reduces substantially by operation of the competition between them. If there is only one single bidder, the competitive bidding process cannot succeed. Hence, the procurer can go for fresh bid to ensure competitiveness. On the other hand, if the procurer wishes to proceed further in the bidding process with the single bidder as per Clause 5.7 of the Guidelines, the State Commission shall be approached seeking for consent for allowing the same to be continued. In other words, the bidding process could be proceeded with two or more bidders on its own without the intervention of the State Commission. But in the case of single bid, the bidding process can proceed further provided the single bid is made subject to the supervision and control of the State Commission.

18. The term “consent” is used in Clause 5.7 of the bidding Guidelines in the case of single bid. This means it is not a mere “adoption” but it is “consent” which is distinct and specific. The term “consent” is used in contrast to the term “adopt” used in Section 63 of the Act. In other words, it is no longer a mere adoption of the tariff determined through a competitive bidding process but a specific proactive

consideration and consent by the State Commission. Therefore, the role of the State Commission as provided in Clause 5.7 of the Guidelines in contrast to the words contained in Section 63 is not a mere procedural but that of a supervising authority deciding finally whether the bidding process should be continued or not.

19. The nature of power to be exercised by the State Commission under Clause 5.7 of the bidding Guidelines cannot be characterized as a mere routine or ministerial act thereby accepting or adopting whatever the price fixed by the other authorities as a matter of course.

20. While the bidding Guidelines allow the role of the State Commission to be only the ministerial for the adoption of tariff when there is more than one bidder, there is a specific reference to the consent in the case of a single bid. This variation denotes that “adoption” is routine and the “consent” is the outcome of the proactive consideration. Once there is a power to grant consent in contrast to the term “adoption”, it would include the power to give conditional consent. In other words, when the State Commission has the jurisdiction to give the consent or to reject the consent after active consideration, then all the more reason, the State Commission has to exercise its power to give interim conditional consent to the Procurer asking the Procurer to collect the materials to be placed before the State Commission to enable it to apply its

mind to consider those materials to take final decision as to whether this is a fit case for giving a final consent. In other words, giving a consent is not a routine nor ministerial. The State Commission, however, has to undertake its own procedure and process for finding out the reasons either to give consent or to reject the consent. This only necessitated the State Commission to pass the interim order giving a conditional consent.

21. In the light of the above situation, we may now look into the conditional consent which has been given by the State Commission by the order dated 8.12.2008. The relevant portion of the same is quoted below:

“ORDER

3. The petitioner has averred that the specific provision of the Guidelines relating to this petition is clause 5.7 which states that to ensure competitiveness, the minimum number of qualified bidders should be at least two other than any affiliate company or companies of the procurer. If the number of qualified bidders responding to the RFQ/RFP is less than two, the procurer can continue with the bidding process only with the approval of the Appropriate Commission. The petitioner has further submitted that in order

to start the Project in time considering its relevance to the benefit of the public at large, PSEB has unanimously decided to continue the bidding process with single RFP bid, subject to the prior approval of the Commission. A prayer has been made that the Commission may allow the petitioner to open the RFP bids of the single bidder (Lanco Infratech Limited) and continue the bidding process as per clause 5.7 of the Guidelines. It is further stated that after approval of the Commission, the Evaluation Committee will evaluate the bids and make its recommendations in line with clause 5.15 of the Guidelines. The petitioner will thereafter again seek approval of the Commission for acceptance of final recommendations before issue of letter of intent (LOI).

4. The petitioner was heard on 25.11.2008 and allowed to submit additional information which was duly filed. The petitioner was again heard on 4.12.2008. As per Section 63 of the Electricity Act, 2003 (Act), the Commission shall adopt the tariff if such tariff has been determined through a transparent process of bidding in accordance

with the Guidelines. The Commission notes that such a process has been followed by the petitioner even through a solitary bid has been received. The Commission also takes note of the clause 5.7 of the said Guidelines which specifically provides that the process of procurement can, with the prior approval of the Commission, be carried forward even if the number of qualified bidders is less than two. Further, in view of the submission made by the petitioner that the decision of the Evaluation Committee and recommendations of NPL, PSEB and the State Government shall be submitted to the Commission, the petitioner is allowed to continue with the bidding process with the direction that the LOI shall be issued only after seeking approval of the Commission.

The petition is disposed of, accordingly.”

22. The above order indicates that the State Commission has taken into account the following aspects to give the conditional consent:

- (i) There is only a single bidder. The Procurer decided to proceed with the bidding process and hence it prays to allow the Procurer to open the bid.

- (ii) After opening of the bid, the Evaluation Committee will examine and make recommendation.
- (iii) The Petitioner/Procurer after getting the recommendation will approach the State Commission for its approval.
- (iv) In view of the above undertaking, the bid can be opened and the Petitioner after getting the recommendation of the Evaluation Committee and decision of the Board and the Government, shall come to the Commission to seek for final approval.

23. The reading of the above interim order would indicate that the order in entirety is a composite and comprehensive one. It cannot be said that the permission to continue the bidding process is valid and the condition that the letter of intent would be issued after the approval of the State Commission is not valid. The conditional consent contained in the order dated 8.12.2008 requires to be considered as a whole. If the last part of the order needs to be excluded and if it was represented that it had no power to impose any condition by way of interim order, the State Commission would not have granted the conditional consent and would have rather refused to give the consent even to open the bids on the ground that as on 8.12.2008 there was no sufficient material to give the final consent.

24. It is not disputed that the State Commission has the power to reject the consent in terms of Clause 5.7 of the

bidding Guidelines. When the conditional consent has been obtained on 8.12.2008 with the condition that the procurer shall come back to the Commission with other materials in order to verify the rate quoted by the bidder is in line with the prevailing market rates while considering for final consent, the Appellant had known about this conditional consent. Only after knowing this, it had willingly participated in the negotiation process and reduced the price knowing fully well that this price will be subject to the final approval of the State Commission. The Appellant having taken advantage of the said interim order participated in the negotiation process and allowed the bidding process to be continued and agreed for the reduction of the price is now strangely raising the issue with reference to the jurisdiction of the State Commission which granted conditional consent as prayed for by the Procurer himself.

25. It is contended on behalf of the Appellant that in terms of Section 63 of the Act, the State Commission is not entitled to enquire into the validity of price to be adopted. This submission is without merit for two reasons.

Firstly, once it is a single bid, the fundamental aspect of competitive bidding is missing. Therefore, before granting consent the State Commission shall have to take into consideration the relevant aspects including the price. Secondly, the State Commission in exercising the above power

under Clause 5.7 of the Guidelines is not determining the tariff as provided under the Act but it is only considering whether the contract should be entered into at the tariff which has been discovered in the bidding process and negotiated further between the parties. Therefore, it is not correct on the part of the Appellant to contend that the State Commission cannot take into account the validity of the price negotiated at Rs. 3.309 per KWh in deciding the acceptance of the bid to give the consent under Clause 5.7 of the Guidelines.

26. It has been projected by the Appellant that the price of Rs. 3.309 per KWh was accepted by six different agencies including the Council of Ministers and therefore, the State Commission ought to have accepted the price agreed upon between the procurer and the bidder. This submission has no substance. As a matter of fact, the Evaluation Committee did not recommend that the price of Rs. 3.386 per KWh originally quoted in the bid should be accepted. It is noticed that the Evaluation Committee on the other hand gave an opinion that the price quoted is on the higher side. It is also to be noted that the Evaluation Committee on both the occasions i.e. both before negotiation or after negotiation on the query put by the Commission, did not give any opinion as to whether the price quoted or negotiated is in line with the prevailing market rates as referred to in Clause 5.15 of the Guidelines.

27. Similarly, the Power Finance Corporation also did not make any specific recommendation. On the other hand, it merely compared some of the aspects of tariff of different projects. In fact, they specifically stated in their report in the first paragraph as a disclaimer that their opinion is not recommendatory.

28. In the same way, the Negotiation Committee as well did not come to the conclusion that negotiated price of Rs. 3.309 is a good price. On the contrary, the Negotiation Committee suggested three options:

- (i) Accept the price
- (ii) The project can be undertaken by the Procurer himself
- (iii) To go in for a fresh bid.

29. This will show that the Negotiation Committee had reservation for acceptance of the price of Rs. 3.309. The implications on the other two alternatives suggested by the Negotiation Committee and providing three alternatives would clearly indicate the nature of the decision of the Negotiation Committee. If the price was good and fully acceptable, there is no reason whatsoever for the Negotiation Committee to suggest other two alternatives.

30. The Council of Ministers had taken the decision to accept the price based on the various prevalent situations. They do

not refer to the aspect whether the price is good and the same is aligned with the prevailing market price. This cannot be said to be a satisfactory acceptance of the price of Rs. 3.309 by the R2 to R4 namely Procurer and the State Government in the absence of any material to show that the price negotiated and fixed either in accordance with the Guidelines issued by the Central Government or in accordance with the condition put by the Commission in the conditional consent order dated 8.12.2008.

31. In any event, the decision made by the State Government to accept the price and the decision of the R2 and R3 to accept the said decision of the Council of Ministers cannot be construed to be final as the same shall be subject to the approval of the State Commission. That was the reason as to why the Procurer R2 and R3 came back to the Commission for getting the final consent or final approval intimating the process of negotiation and opinion of the Government.

32. It must be made clear that the acceptance by the State Government with reference to the phrase “negotiated” cannot have binding effect on the State Commission. On the other hand, the State Commission is legally bound to consider whether the Guidelines have been followed and whether conditions which were imposed by the Commission on 8.12.2008 have been complied with by the Procurer by getting

the particulars to show that the negotiated price is in line with the prevailing market price.

33. The acceptance of the State Government cannot be construed to be a policy direction issued by the Government. If such a policy direction has been issued then the price accepted should be implemented and no more approval is required to be taken from the State Commission.

34. The only question which was to be answered by the State Commission at the time of considering for grant of final consent is as to whether the price quoted or negotiated is in line with the prevailing market price. Admittedly, this has not been clarified either by the Evaluation Committee or by the Negotiation Committee. On the other hand, the Council of Ministers simply accepted one of the options suggested by the Negotiation Committee without going into the aspect whether the price quoted is aligned with prevailing market rates. In such an event, the State Commission is duty bound to consider the said question on the basis of the materials available before the Commission as to whether the price negotiated is in line with the prevailing market price which has been accepted in respect of other project which is situated in the very same State.

35. The Appellant was able to negotiate with R2 to R4 and also the Negotiation Committee only because of the order

dated 8.12.2008 passed by the State Commission. In the said order, the State Commission had permitted the bidding process to be continued with the condition that the acceptance of the bid by issue of letter of intent shall be with the prior approval of the State Commission. If the State Commission had refused to give the conditional consent, there was no occasion for the Appellant to proceed in the matter. Furthermore, the Appellant duly accepted the terms and conditions of the bidding Guidelines. The Request for Qualification and the Request for Proposal provide for the terms and conditions subject to which the bid will be considered. These include the conditions that the bid given by the bidders may be rejected at any stage. Having accepted those conditions, the Appellant cannot be allowed to contend that any of the terms and conditions of the bidding documents should not be given effect to.

36. The role of the State Commission in dealing with the grant or refusal of the consent in the case of single bid is not of an adjudicator. The bidding Guidelines provided under Clause 5.7 would indicate that the State Government has to consider for granting consent in the case of single bid as opposed to more than one bid. Therefore, the bidding process in the case of single bid comes under the supervision and control of the State Commission. In other words, the role of the State Commission is more extended than merely the adoption of the tariff discovered through the bidding process

under Section 63 of the Act. The State Commission needs to consider on behalf of the one contracting party as to whether the single bid should be accepted or not.

37. In this context, it has to be stated that the Commission has been vested with responsibility to regulate electricity purchase and procurement process having regard to the various factors that ensure a reasonable procurement price and ultimately a reasonable tariff in the interest of the consumers. The power to regulate carries with it full power over the things subject to regulation. This power must be regarded as a preliminary power. The power to regulate implies the power to check. In this context, it would be worthwhile to refer to the Statement of Objects and Reasons of the Act.

“Over a period of time, however, the performance of State Electricity Boards has deteriorated substantially on account of various factors. For instance, though power to fix tariffs vests with the State Electricity Boards, they have generally been unable to take decisions on tariffs in a professional and independent manner and tariff determination in practice has been done by the State Governments. Cross-subsidies have reached unsustainable levels. To address this issue and to provide for distancing of government from determination of tariffs, the”

Electricity Regulatory Commissions Act, was enacted in 1998.”

38. From the reading of the object of the Act, it is clear that Regulatory Commissions Act has been enacted and Regulatory Commissions were constituted in order to determine the correct price of tariff without allowing the Government to decide about the tariffs. The Commission is required to regulate such purchases in order to ensure that the distribution company does not procure power at an exorbitant cost and does not burden the ultimate consumers with such a cost. The discovery of reasonable purchase price for procurement of electricity by the distribution licensee is a part of the Commission's function to regulate the power procurement process, where the tariff is determined or discovered under Section 63 of the Act. In this case, the Commission having found that the price quoted by the Appellant is excessive having regard to the tariff of Talwandi Sabo, a similar project bid out six months earlier, has correctly disallowed the procurement of power by the State Electricity Board from the Appellant.

39. Section 63 provides that the bid has to be carried out in accordance with the Guidelines issued by the Central Government. As per Clause 2.3 of the Guidelines, the provision of the Guidelines shall be binding on the procurer. Under Clause 5.16 of the Guidelines, in case there is any

deviation from the Guidelines, the same shall be subject to the approval by the Appropriate Commission. Under Clause 5.9 of the Guidelines, the Evaluation Committee is constituted for the evaluation of the bids. This has been done to ensure objectivity in the decision making process of the procurer. Under Clause 5.15, the Evaluation Committee while evaluating the bids has to consider whether they are aligned to the prevailing market prices and if they are not aligned, it shall have the right to reject the price bids. In the present case, the Evaluation Committee has not followed the Guidelines in spite of the fact that the Evaluation Committee has given a finding in its report dated 16.12.2008 that the bid of the Appellant, Lanco Infratech Ltd. was significantly on the higher side. Thus, it is clear that the Evaluation Committee did not go into the question whether the rate quoted by the Appellant in the bid is in line with the prevailing market prices. On the other hand, it simply referred to the opinion of the procurer without performing its duty under Clause 5.15 of the Guidelines. Even subsequently, when the procurer approached the State Commission to seek for final consent/approval, the Commission having not satisfied with the decision taken by the Council of Ministers and other authorities made a direct reference to the Evaluation Committee again sought its view on the alignment of the negotiated prevailing market price. Even for this reference, the Evaluation Committee did not respond to the relevant question posed by the Commission and on the other hand it refrained from making any

observation with reference to the said aspect on the ground that it was not appropriate on the part of the Evaluation Committee to make any comment on the decision of the Council of Ministers.

40. From this, it is clear that the Evaluation Committee did not follow or was not inclined to follow the Guidelines particularly Clause 5.15 by not collecting the actual information as to whether the negotiated prices are aligned with the prevailing market prices. When these Guidelines have been violated by the Evaluation Committee by merely referring the matter to the Negotiation Committee and subsequently to the decision of the Council of Ministers, then the Commission has necessarily to undertake its process to find out as to whether the negotiated price accepted by the Council of Ministers is aligned with prevailing market price on the basis of the available materials and in that process the Commission has found that the price quoted by the Appellant is higher than the price bid out to the similar project situated in the same State.

41. As referred to in the Objects and Reasons of the Act, the Commission is not bound by the decision of the Government. On the other hand, the Government has to be distanced in the process of finding out the appropriate price. The Commission has to take independent decision de hors the opinion given by the various agencies including the Council of Ministers. The

Commission has to proceed only in accordance with the Guidelines. When the Guidelines have not been followed, the Commission need not adopt the price accepted by the Government under Section 63 of the Act and on the other hand, the Commission is bound to decide as per the procedure referred to in Clause 5.16 of the Guidelines.

42. Under Clause 5.16 of the Guidelines when there is a deviation from the Guidelines, the Appropriate Commission shall have to decide with reference to the approval. In other words, the Commission need not be bound by the decision of the Government and on the contrary, it is bound by the Guidelines where the Commission shall ensure that the appropriate price is fixed in the interest of the consumers. It is clear from the conjoint reading of Clause 5.7 and Clause 5.15 of the Guidelines that the State Commission has been given a special role to decide about the validity of the said price, when there is a single bidder and when there are violations of the Guidelines.

43. In this case, in order to give the final consent on the bidding process the Commission wanted the opinion of the Evaluation Committee as well as the Departments of the Government as per the Guidelines. But no such opinion was given. Ultimately, the Commission having found that there are deviations from the Guidelines and there are no details with regard to the question whether the rate quoted is in line with

the prevailing market rates, the State Commission under Clause 5.16 has to come with its own decision over the question as to whether the rate quoted is aligned to the market rates. Accordingly, this has been correctly done in this case by the State Commission in accordance with the Guidelines 5.7 and 5.16.

44. It is strenuously contended by the Learned Counsel for the Appellant that once the offer offered by the bidder is accepted by the Procurer, it should be considered to be a binding legal contract between the parties and as such the Appellant has got a vested right to get the contract by way of legitimate expectation. In this case the bid submitted by the Appellant as a single bidder is only an offer. The offer remains an offer giving no legal right to the offerer till the time of valid acceptance. According to the Learned Counsel for the Respondent the offer in the present case can be said to have been accepted by the Procurer namely R3 only when the letter of intent is issued followed by the signing of Power Purchase Agreement after getting the consent of the State Commission. There can be no such issue of letter of intent till the State Commission has given its consent to issue of such a letter. The acceptance of price by the Council of Ministers and based thereupon by the R2 and R3 and filing of the petition before the State Commission requesting for the issue of letter of intent in favour of the Appellant does not amount to acceptance of the bid of the Appellant since acceptance is only

by the issue of letter of intent which could not be issued without the consent or approval of the State Commission.

45. The Learned Senior Counsel for the Appellant cited several authorities to substantiate his plea. The following are the decisions:

- (i) 1980 Supp. SCC 627 - Tata Consulting Engineers Vs. Workmen**
- (ii) UC Bank Vs. Their Workmen – AIR 951 SC 230**
- (iii) Kiran Singh Vs. Chaman Paswan – AIR 1954 SC 340**
- (iv) State of Maharashtra Vs. Ramdas Shrinivas Nayak – 1982 (2) SCC 463**
- (v) Hindustan Cooperative Insurance Society Ltd. Vs. Shyam Sunder – AIR 1952 Cal. 691**
- (vi) Mohinder Singh Gill & Anr. Vs. Chief Election Commissioner, New Delhi & Ors. – 1978 (1) SCC 405**
- (vii) State of MP Vs. Nandlal Jaiswal – 1986 (4) SCC 566**
- (viii) Union of India Vs. Dinesh Engineering Corpn. & Ors. – 2001 (8) SCC 491**
- (ix) United India Insurance Co. Ltd. Vs. Pushpalaya Printers – 2004 (3) SCC 694**
- (x) Raunaq International Ltd. Vs. IVR Construction Ltd. – 1999 (1) SCC 492**
- (xi) Jai Narain Parasrampuriah (dead) & Ors. Vs. Pushpa Devi Saraf & Ors. – 2006 (7) SCC 756**
- (xii) Food Corporation of India Vs. Kamdhenu Cattle Feed Ind. – 1993 (1) SCC 71**

46. The Learned Senior Counsel for the Appellant on the strength of AIR 951 SC 230 - UC Bank case; AIR 1954 SC 340 - Kiran Singh case; and 1980 Supp. SCC 627 - Tata Consulting Engineers case, has submitted that merely because the Electricity Board approached the State Commission and requested for a conditional order would not confer the jurisdiction to the State Commission to pass such an order. Similarly he has cited State of MP Vs. Nandlal Jaiswal – 1986 (4) SCC 566 in order to show that institutionalized decisions made by the six agencies in the instant case cannot be interfered with. He has also stated Food Corporation of India Vs. Kamdhenu Cattle Feed Ind. – 1993 (1) SCC 71 and submitted that negotiations which have been done in this case cannot be said to be outside the bid process. He has cited State of Maharashtra Vs. Ramdas Shrinivas Nayak – 1982 (2) SCC 463 in order to substantiate his statement that once the procurer before the Commission admitted in his petition that the price quoted in the bid is accepted by the procurer cannot be withdrawn and therefore he cannot take a different stand taken before the Commission. He has also cited 1975 (1) SCC 737 – Har Shankar & Ors. Vs. Dy. Excise & Taxation Commissioner; AIR 1952 Cal. 691 - Hindustan Cooperative Insurance Society Ltd. Vs. Shyam Sunder; and 1978 (1) SCC 405 - Mohinder Singh Gill & Anr. Vs. Chief Election Commissioner, New Delhi & Ors. wherein it has been laid down that once an offer is accepted then the contractual right of the party gets accrued. With reference to the principle

relating to the legitimate expectation, Learned Senior Counsel for the Appellant has cited 1993 (1) SCC 71 - Food Corporation of India Vs. Kamdhenu Cattle Feed Ind. case He has further cited 2001 (8) SCC 491 - Union of India Vs. Dinesh Engineering Corpn. & Ors. case and contended that the Commission cannot reject the bid price arbitrarily.

47. The Learned Counsel for the Commission cited the following authorities:

1985 (2) SCC 116 K. Ramanathan case

2009 ELR (SC) 246 – Tata Power Co. Ltd. case

1996 (4) SCC 208 – Laxmikant case

in order to show that the role of the Commission in deciding the bid price is significant and the word “regulate” as contained in Section 86(1)(b) of the Act has a broad import and the bidder cannot claim any right till the letter of intent is issued and also to point out the purport and object of the Electricity Act, 2003.

48. Similarly, the Learned Counsel for the R2 to R4 has cited the following decisions:

(i) 2006 (10) SCC 1 – Reliance Airport Development (P) Ltd. Vs. Airports Authority of India

(ii) 2007 (2) SCC 588 Ramchandra Murarilal Bhattad Vs. State of Maharashtra

- (iii) 1979 (3) SCC 489 – Ramana Dayaram Shetty Vs. International Airport Authority of India**
- (iv) 2001 (2) SCC 326 - State of WB Vs. Niranjana Singha**
- (v) 1993 (1) SCC 71 - Food Corporation of India Vs. Kamdhenu Cattle Feed Industries**
- (vi) 1983 (4) SCC 318 – Excise Commissioner Vs. Manminder Singh**

to contend that the Commission's decision cannot be ordinarily interfered with unless it is arbitrary, perverse and mala fide and the alleged acceptance by the Electricity Board before the Commission cannot be considered to be absolute acceptance and therefore, no right accrues to the Appellant.

49. We have carefully gone through all the Citations. In our view, the decisions cited by the Learned Senior Counsel for the Appellant would not be of any use as the ratio decided in those cases would not apply to the present facts of the case. The Learned Senior Counsel for the Appellant cited 1975 (1) SCC 737 (Har Shankar case) to show that once an offer is accepted, the bidder has got a contractual right to claim for the acceptance of the said bid by the State Commission. On the other hand, the Learned Counsel for the Commission has cited 1996 (4) SCC 208 – Laxmikant case to contend that till the letter of intent is issued, no right accrues in favour of the bidder. In Har Shankar case 1975 (1) SCC 737, it has been held that the bids given by the parties constitute offers and

upon their acceptance by the Government, a binding agreement came into existence between the parties. On the other hand, the Learned Counsel for the Commission cited 1996 (4) SCC 208 – Laxmikant case wherein it has been held that “even if the public auction had been completed and the respondent was the highest bidder, no right had accrued to him till the confirmation letter had been issued to him”.

50. Har Shankar case cited by the Learned Senior Counsel for the Appellant in our view would not apply to the present facts of the case. Here, as per the Guidelines, the question of acceptance by the parties concerned will arise only after getting the consent from the State Commission under Clause 5.7 of the Guidelines. So till the consent is obtained and in pursuance of the consent the letter of intent is issued then only right would accrue to the bidder. In this case, as laid down by the Supreme Court in 1996 (4) SCC 208 – Laxmikant case, it cannot be said that there is an acceptance by the Electricity Board in the absence of the issue of letter of intent. The letter written by the Procurer to the Appellant or the contents of the petition filed before the State Commission referring to the acceptance of the offer cannot be said to be an absolute acceptance. In this context, one more decision of the Supreme Court is quite relevant i.e. 1983 (4) SCC 318 – Excise Commissioner Vs. Manminder Singh. The relevant observation is as follows:

“Since the provisional acceptance of the highest bid at the auction already held by the Collector was subject to confirmation by the Excise Commissioner; no vested right had accrued to any one and if the Excise Commissioner on the consideration of the circumstances came to the conclusion that it was in the best interest of the revenue to order re-auction, it was not for the High Court to interfere with the discretion of the Excise Commissioner in the proceeding under Article 226 of the Constitution.”

This observation would apply in all fours to the present facts of the case. In this case, even assuming that there is some acceptance letter by the procurer, it cannot be construed to be an absolute acceptance and at the most it can be a provisional acceptance by the procurer and as held by the Supreme Court, unless the said acceptance is confirmed by the State Commission, no vested right would accrue to the bidder. Therefore, the contention that they have got a vested right to get the bid accepted has to fail.

51. Our conclusions are as follows:

- (i) Section 63 of the Act would be binding on the Commission only if the process of competitive bidding had been completed strictly in accordance with bidding guidelines issued by the Central Government.

In this case, there is no competitive bidding and bidding guidelines also have not been strictly followed. So the State Commission is not bound to adopt the price accepted by the Council of Ministers.

- (ii) When there is a single bidder, the State Commission alone is the competent and final authority to give consent for the bid process under Clause 5.7 of the Guidelines. Being the final authority, it can adopt the suitable procedure to collect materials to enable it to give final consent. When it has got the powers to give final consent, it cannot be disputed that it has the same powers to give conditional consent. Therefore, the State Commission is well within jurisdiction to pass the interim order dated 8.12.2008 giving conditional consent.

- (iii) The important ingredient of the guidelines as provided in Clause 5.15 of the Guidelines is that the lowest rate quoted must be appraised by the Evaluation Committee which is empowered to reject the same if it finds that the said rate is not aligned with the prevailing market rates. Since the Evaluation Committee has not undertaken the process of finding out whether the rate quoted is in line with the prevailing market prices even though it found that the price is on the higher side, the State Commission in this

case has correctly undertaken the task of finding out whether the price quoted is reasonable or on the higher side in comparison with the prices fixed for other project situated in the very same State and on that basis, it has come to the right conclusion.

- (iv) The negotiation process and the revised bid of the Appellant and the options suggested by the Negotiation Committee and the decision of the Council of Ministers are not contemplated by the bidding Guidelines laid down by the Central Government. When the Electricity Board filed petition seeking for final consent on the basis of negotiation process, the State Commission found that the same was not in accordance with the Guidelines. Therefore the State Commission sought the views of the Evaluation Committee on the revised bid, but unfortunately the Evaluation Committee shirked its responsibility to comment on the crucial issue of whether or not the final rate is in line with the prevailing market prices and did not incline to give any comment upon the decision taken by the Council of Ministers. Therefore, the State Commission by invoking the powers under Clause 5.7 and 5.16 has considered the relevant aspects and rejected the said bid price.
- (v) When the State Commission found it difficult to hold that the negotiated rate is in line with the prevailing

market rates, the State Commission is correct in declining to issue letter of intent in favour of the Appellant and directing for the re-bid in the interest of the consumers.

- (vi) The acceptance of the price by the Council of Ministers and consequent acceptance by the R2 and R3 and the filing of the petition before the State Commission seeking for the consent does not amount to acceptance of the bid of the Appellant. The absolute acceptance is only by the issue of letter of intent which could not be issued without the approval of the State Commission.

- (vii) There is no vested right for the Appellant bidder to have his bid accepted only by the reason of bid submitted by him. When the bidding terms provide for the approval by a superior authority namely the State Commission, then the provisional acceptance of bid given by the procurer cannot be given effect to as binding till the consent is obtained from the State Commission.

52. In view of our above conclusions, we are of the opinion that the impugned Order passed by the State Commission is perfectly valid in law and does not suffer from any infirmity.

53. Before parting with this case, one other sad feature which reflects the conduct of the Appellant is to be pointed out with great anguish. The impugned order was passed by the State Commission on 27.5.2009. As against the Order, the Appeal before this Tribunal is provided under Section 111 of the Electricity Act, 2003. Instead of filing the Appeal before this Tribunal, the Appellant rushed to the Hon'ble Punjab and Haryana High Court and filed a Writ Petition in WP No. 9105 of 2009 on 7.6.2009 challenging the State Commission order and seeking the order of stay on the ground that the Appellant could not avail of the said remedy before the Tribunal since the Tribunal was not functioning during the course of summer vacation, namely, in the month of June. On that basis, the Writ Petition got numbered and came before the Division Bench of High Court on 8.6.2009. Since it was felt that there was no urgency involved in the matter as no steps had been taken for rebidding by the Respondent, the High Court was pleased to adjourn the matter to 2.7.2009. However, liberty was granted to the Appellant to approach the Hon'ble High Court in vacation itself if any notification has been issued by the Respondent with regard to the rebidding.

54. Then on coming to know that the Respondent issued a notification on the same day, i.e., on 8.6.2009 for rebidding of the project, the Appellant filed an application before the High Court for urgent hearing and the same was heard on 11.6.2009 by the High Court. When the matter was argued, the

Appellant sought interim orders from the High Court pending Writ Petition to restrain the R2 and R3 from proceeding with the rebidding. However, the Hon'ble High Court after hearing the Appellant directed the Appellant to place on record the report of the Bid Evaluation Committee to consider for passing interim order and adjourned the matter to 2.7.2009. Thus, on that day i.e. on 11.6.2009, no interim order was passed. Having failed to get interim orders from the High Court, the Appellant rushed to the Tribunal and filed an Appeal on 26.6.2009 during the vacation even before withdrawing the Writ Petition pending in the High Court. It is pointed out by the Learned Counsel for the Respondent that in the Writ Petition filed by the Appellant, it is mentioned that the Appeal could not be filed and pursued before the Tribunal on various reasons including the reason that the Tribunal was not discharging its judicial functions on account of summer vacations from 1.6.2009 to 30.6.2009. It is further pointed out that apart from this reason, the Appellant has raised various other issues in the Writ Petition like violation of the principle of natural justice and the infringement of the fundamental rights etc. so as to invoke Article 226 of the Constitution. Having raised various points which could be dealt with only by the High Court, the Appellant decided to come to this Tribunal and filed this Appeal even though a specific direction had been given by the High Court that the Appellant shall place the Bid Evaluation Committee Report before the High Court on 2.7.2009 to consider for the interim relief.

55. The above facts project 3 aspects:

- (i) One of the main grounds on which the Appellant approached the High Court is that the Tribunal was not discharging its judicial functions from 1.6.2009 to 30.6.2009 due to summer vacations.

This is factually wrong. The Tribunal issued a Notification on 27.5.2009 itself and published on the Notice Board indicating that during the vacations one Judicial Member and one Technical Member would constitute the Vacation Bench for hearing urgent matters and during the summer vacations, the urgent matters can be moved and the Registry will receive the matters. So even though the summer vacation starts from 1.6.2009 and ends on 30.6.2009, there is a specific Notification issued by the Tribunal that there will be a Vacation Bench during the summer vacation. So despite this, incorrect statement has been made by the Appellant both in the Writ Petition as well as in the Appeal grounds contending that he had to rush to High Court since The Tribunal was not discharging its judicial functions during the summer vacations.

- (ii) Having raised the several points including the violation of the principles of natural justice and the fundamental right being infringed which could be dealt with only by the High Court under Article 226 of the Constitution, there is no reason as to why the Appellant giving up

those points and rushed to the Tribunal and filed the Appeal on 26.6.2009 that too during the vacation.

- (iii) When a specific direction had been issued by the High Court to the Appellant on 11.6.2009 to place the Evaluation Committee Report before the High Court for considering the interim relief and adjourned the matter on 2.7.2009, there is no reason as to why the Appellant without complying with the said direction has approached this Tribunal to file an Appeal.

56. The above aspects would indicate that the only plausible reason which could be inferred is that the Appellant having failed in his attempt in getting the interim orders from High Court has rushed to the Tribunal to make the same attempt before this Tribunal.

57. These things in our view would reflect the conduct of the Appellant which is so reprehensible. The Learned Counsel for the R2 and R3 while projecting this conduct before the Tribunal prays for an exemplary cost to be imposed on the Appellant.

58. Though initially we felt a heavy cost to be imposed on the Appellant as we do not approve of the conduct of the Appellant, we refrain ourselves from doing so since we feel that it would suffice to express our displeasure over the conduct of the Appellant. Accordingly, we express the same.

59. With these observations, the Appeal is dismissed as devoid of merits. No costs.

(H.L. Bajaj)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Dated: 4th September, 2009.

REPORTABLE / NON – REPORTABLE