

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

**Appeal No. 44 of 2010**

**Dated: 6<sup>th</sup> May, 2010**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member**

**Appeal No. 44 of 2010**

**In the matter of:**

**Madhya Pradesh Power Trading Company Ltd.  
Block 2, Shakti Bhawan  
Rampur,  
Jabalpur-482 008**

**... Appellant**

**Versus**

- 1. Madhya Pradesh Electricity Regulatory Commission  
Metro Plaza, 4<sup>th</sup> and 5<sup>th</sup> Floor  
Bittan Market, E-5, Arera Colony  
Bhopal-462 016** **... Respondent-1**
- 2. Madhya Pradesh Power Transmission Co. Ltd.  
Shakti Bhawan,  
Rampur,  
Jabalpur-482 001** **... Respondent-2**
- 3. Department of Energy  
Government of Madhya Pradesh  
Sachivalaya, Vallabh Bhavan  
Bhopal-462 004** **... Respondent-3**
- 4. Reliance Power Limited  
Dhirubhai Ambani Knowledge City  
I-Block, 2<sup>nd</sup> Floor, North Wing  
Thane Betapur Road, Koparkhairana  
Navi Mumbai-400 710** **... Respondent-4**



State Commission by the order dated 06.01.2010. Being aggrieved by the same, the Appellant has filed this Appeal.

3. The background of the case as well as the short facts leading to this Appeal are as follows.

4. The Appellant undertakes the activities of bulk purchase and bulk supply of electricity in the State of Madhya Pradesh. The bulk purchase of electricity by the Appellant is predominantly for making the electricity available in bulk to the distribution licensees in the State for onward distribution and supply to the consumers.

5. Under Section 63 of the Electricity Act,, 2003, 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. Pursuant to the above provisions, the Government of India on 19.01.2005 issued guidelines for determination of

tariff by bidding process for procurement of power by distribution licensees. Further, on 06.01.2006, the Government of India notified the tariff policy. Under this policy, a mandate has been provided for procurement of power by distribution licensees through competitive bidding process in the interest of the consumers.

6. In view of this policy, the future long-term power requirement to be supplied to the consumers in the State has to be procured by the distribution licensees through a transparent competitive bidding process as per the guidelines issued by the Government of India under the provisions of Section 63 of the Electricity Act, 2003.

7. In pursuance of the above, the Appellant initiated process for procurement of 2000 MW of power through the tariff based competitive bidding process. The Appellant prepared a competitive bidding documents in terms of section 63 of the Electricity Act, 2003 and in accordance with the competitive

bidding guidelines issued by the Government of India. Thereupon on 22.03.2007, the Appellant filed a petition in Petition No. 10/07 before the State Commission seeking approval for bidding documents prepared by the Appellant for procurement of power on a long-term basis.

8. The State Commission, after scrutinizing the bid documents and other records accorded approval and by the order dated 26.09.2007 to the bidding documents prepared by the Appellant with a condition that as and when final bids are received, the Appellant should approach the State Commission for approving the final bid costs and for purchase of electricity by distribution licensees or its authorized representatives.

9. In pursuance of the above approval accorded by the State Commission, the Appellant invited bids for procurement of 2000 MW of electricity. On 12.12.2007 the Appellant received 4 bids as under:

<b>S.No.</b>	<b>Name of the Company</b>	<b>Capacity contracted (MW)</b>	<b>Quoted Price (Rs. Per Kwh)</b>
1.	Lanco Infratech Ltd.	600 MW	2.340
2.	Reliance Power Ltd.(RPL)	1241	2.701
3.	Essar Power Limited (EPL)	300 300	2.955 3.044
4.	KSK Energy Ventures Ltd	300	Non responsive bid

10. The above mentioned bids were evaluated by the Expert Committee which in turn recommended the acceptance of the Lanco Infratech bid and also recommended negotiations with RPL and EPL for reduction in their quoted prices, by the minutes of the meeting dated 24.12.2007.

11. The Appellant then filed an application on 07.01.2008 before the State Commission seeking approval and adoption of tariff as quoted by the Lanco Infratech Limited reserving the right to approach the State Commission for approval of the tariff for other bidders later if found suitable after negotiations. Accordingly, the State Commission passed an order dated

07.03.2008 accepting and adopting the tariff of Lanco Infratech Ltd. under the bidding process and directed the Appellant to place before the State Commission the outcome of the negotiations with RPL and EPL before the expiry of the bid period.

12. The Appellant thereafter constituted a Negotiation Committee for negotiation of tariff for procurement of power from RPL and EPL based on the bids submitted by them. During the negotiation process, the RPL reduced their tariff from Rs. 2.701 per kWh to Rs. 2.45 per kWh of power. The Board of Directors of the Appellant considered the reduced tariff of RPL and evaluated the tariff at Rs. 2.45 per kWh and approved the acceptance of the same, subject to the approval of the State Commission. It further suggested for further negotiations on the price with the Essar Power Limited. On 12.05.2008, the Appellant filed an application before the State Commission praying for approval of the price at Rs. 2.45 per kWh for procurement of 1241 MW from RPL. Thereupon the Appellant

received a letter from the State Commission dated 09.07.2008 seeking for a clarification with reference to the negotiations made with the parties without the approval of the State Commission. In the meantime, the Appellant received a letter dated 02.08.2008 from Lanco Infratech Ltd. Expressing inability to proceed further. Immediately, the Appellant placed this information with reference to inability of Lanco Infratech Ltd. through the letter dated 20.08.2008 and also clarified the queries raised by the State Commission by the letter dated 09.07.2008. Even thereafter, by the letter dated 26.08.2008 the State Commission called upon the Appellant to clarify the delivery point of 1241 MW of power from RPL. Again on 29.09.2008, the State Commission asked for further clarification on various aspects of the bid submitted by RPL and EPL and also in respect of the aspects of negotiations held between the Appellant and RPL for bringing down the bid price. In the meantime, on 24.07.2009, the EPL had reduced the tariff from bid price of Rs. 2.955 per kWh to Rs. 2.45 per kWh of power. Accordingly



Letter of Intent (LOI) was issued by the Appellant to EPL subject to the approval of the State Commission.

13. Then on 28.10.2008, the Appellant filed an application before the State Commission for approval of purchase of 150 MW of power from EPL at the reduced rate of Rs. 2.45 per kWh. Even then, further clarification was sought by the State Commission from the State Government. Accordingly, the State Government also gave the clarification to the queries raised by the State Commission. Despite these clarifications, on 06.01.2010 the State Commission rejected the prayer of the Appellant in respect of the bids submitted by RPL and EPL observing that they do not confirm to the requirement of section 63 of the Electricity Act, 2003 and the guidelines of the Central Government. Aggrieved by this order dated 06.01.2010, the Appellant has filed this present appeal.

14. The Learned Counsel for the Appellant would make the following contentions:

- (1) The State Commission is wrong in holding that there cannot be any negotiations for reducing the bid price in the bids submitted by the bidders under the competitive bidding process for the competitive bidding procurement in terms of section 63 of the Electricity Act, 2003 or under the guidelines issued by the Government of India. Under section 61 of the Electricity Act, 2003, the State Commission has to ensure that the interest of the consumers is protected. Accordingly, the Appellant was acting in the best interest of the consumers in reducing the bid price in the negotiations payable to the successful bidders.
- (2) The State Commission erred in holding that the negotiations undertaken by the Appellant with the parties do not have the approval of the State Commission. This is wrong because through the application filed on 07.01.2008, the Appellant indicated that it is in the process of negotiations with other bidders, as recommended by the Expert

Committee, and shall approach the Commission thereafter and in pursuance of the said information and request, the State Commission passed an order on 07.03.2008 directing the Appellant that the outcome of the negotiations with the bidders be placed before the State Commission before expiry of the bid validity for finalizing the prices. Only in pursuance of the said directions, the negotiation process was undertaken and as directed by the State Commission, after price reduction in negotiations, the Appellant approached the State Commission for approval. The State Commission held that the Appellant had delayed the process of finalization of the bid. This is factually wrong. The Appellant had been discussing with the RPL and EPL for reduction in the bid price and the Appellant acting in the best interest of the consumers through a Negotiating Committee. The State Commission also went on asking for a clarification after clarification which was

periodically replied by the Appellant. Therefore, there is no delay on the part of the Appellant.

- (3) As per the bid documents, it was open to the bidder to indicate the delivery point at any place of inter-connection of the State Transmission Utility system in the State with the Central Transmission Utility or any other point of the State Transmission Utility. Accordingly, any changes in the specific delivery point stated in the bids, so long as it confirms to the delivery point as specified in the bid documents cannot be considered to be a deviation. Therefore, the finding of the State Commission on this aspect is wrong.
- (4) The State Commission is wrong in holding that this validity period has expired. In fact, the extension validity of the bid beyond 730 days from the date of issue of the bid documents has been granted by the bidders. Therefore, the extension beyond 730 days was made with a view to enable the negotiations for

reduction in tariff. Further, in terms of clause 5.8 of the bidding guidelines, the conclusion of the bidding process from the date of the issue of Request for Qualification (RFQ) document is not an absolute mandate. Admittedly, the RPL and EPL had extended the bid guarantee validity up to May 2010.

15. In reply to this contention, the Learned Counsel for the Commission has elaborately made submissions by refuting the various contentions urged by the Learned Counsel for the Appellant and also pointing out the relevant reasonings given by the State Commission in the impugned order and submitted that the impugned order of the State Commission is well justified.

16. We have carefully considered these submissions made by both the parties.

17. The question that arises for consideration by this Tribunal is this. Whether in the fact and circumstances of the case, the

State Commission is correct in rejecting the approval sought or by the Appellant by holding that the bidding process adopted by the Appellant in respect of the bids submitted by RPL and EPL do not conform to the requirement of section 63 of the Electricity Act, 2003 and the guidelines of the Central Government?

18. Before dealing with this question, let us first refer to the main grounds on the basis of which the State Commission refused the approval for adoption of the price submitted by the bidders. It is quoted as under:

- (1) There is no provision for negotiations during or after the bidding process for determination of tariff by bidding process. Therefore, negotiations are not permissible. Further, the Appellant did not obtain any prior approval of the State Commission for negotiations.
- (2) There has been a change in the delivery point and no delivery point has been given by the bidders in the

bid documents. This amounts to deviation from the bidding documents.

- (3) The lowest price offered by one of the bidders namely Lanco Infratech Ltd is Rs. 2.340 per kWh but the negotiation has not led to any reduction in price to the level of the said lowest bid. Therefore, the price negotiated is on higher side.
- (4) The time limit specified in the guidelines namely 730 days for completing and closing the bid process has already expired and there has been inordinate delay.
- (5) The State Government has entered into a Memorandum of Understanding (MOU) with the RPL at different tariff for purchase of power from the same source and there cannot be 2 different tariffs for procurement of power in the same State.

19. While dealing with the correctness of the grounds of rejection of approval in this impugned order, it would be necessary to deal with the relevant provisions under which the

bidding process is undertaken by the procurer and the scope of the powers of the Commission while granting approval for the bid price determined through transparent bidding process and under the guidelines framed by the Central Government.

20. Section 63 of the Electricity Act, 1002 provides as under:

**“63. Determination of tariff by bidding Process: Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such a tariff has been determined through the transparent competitive bidding process and in accordance with the guidelines issued by the Central Government.”**

21. The above provision would make it clear that the Commission shall adopt a tariff accepted by the procurer if such a tariff has been determined through the (i) transparent process of bidding and (ii) in accordance with the guidelines issued by the Government of India.



22. Let us now quote Section 61 of the Electricity Act, 2003 which provides for the following guidelines for the State Commission in the matter of tariff:

**“61. Tariff Regulations:**

*The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely –*

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;**
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;**
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;**

- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;**
- (e) the principles rewarding efficiency in performance;**
- (f) multi year tariff principles;**
- (g) that the tariff progressively reflects the cost of supply of electricity and also reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;**
- (h) the promotion of co-generation and generation of electricity from renewable sources of energy;**
- (i) the National Electricity Policy and tariff policy:**

**Provided that the terms and conditions for determination of tariff under section 43-A of the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a**

**period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.”**

23. The reading of the above Section would clearly indicate that each of the above issues provided in section 61 of the Electricity Act, 2003, requires effort be made by all parties concerned to reduce the impact of tariff on the consumers.

24. The entire scheme of the Electricity Act, 2003 is towards achieving the objective and getting electricity to the consumers at large at the lowest possible tariff. The bidding documents clearly provided that the Appellant has a right to reject any or all bids if the quoted tariffs are not aligned to the prevailing market prices.

25. Therefore, the State Commission is bound to grant approval to the determination of the bid price submitted by the procurer if the bidding process is transparent and the said

process has been done in accordance with the guidelines issued by the Central Government.

26. In this context, it is appropriate to quote section 62 of the Electricity Act, 2003, as under:

**“ 62. Determination of Tariff – (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –**

**(a) supply of electricity by a generating company to a distribution licensee:**

**Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity.**

**(b) transmission of electricity;**

- (c) wheeling of electricity;**
- (d) retail sale of electricity**

**Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.**

**(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.**

**(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any**

**area, the nature of supply and the purpose for which the supply is required.**

**(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.**

**(5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.**

**(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.”**

27. The perusal of both the Sections i.e. 62 and 63 of the Act would clearly indicate that powers under section 62 of the Electricity Act, 2003 relating to the determination of tariff is entirely different from the powers under section 63 of the Electricity Act, 2003, Under section 63 of the Act, the Commission concerned shall approve and adopt the tariff accepted by the procurer. It means the State Commission shall have a limited jurisdiction in as much as the words “shall approve and adopt” used in this provision would clearly show that the role of the State Commission in determination of the tariff is not like that of section 62 of the Act but is so limited..

27. In the light of the above principles, let us now deal with the grounds mentioned in the impugned order. The main grounds on which the approval was rejected by the State Commission are 3 in numbers. These grounds are as under:

- (1) Negotiations for reduction in the price are not provided for, either in the guidelines of the Central

Government nor in the RFP documents pursuant to which these bids were invited. Further, there is no prior approval obtained by the procurer from the State Commission before the negotiations.

- (2) The original bids have undergone changes in substantive issues like delivery point, source of fuel etc. And that these changes have substantial tariff implications.
- (3) The bidding process cannot be extended beyond the time frame of 730 days from the date of publication of RFQ as specified in clause 5.18 of the guidelines. The tariff in case of L<sub>2</sub> bidder is again proposed to be renegotiated. Further, the negotiated price also, while compared to the price offered by Lanco Infratech Limited who are lowest bidders cannot be considered to be the lowest. Thus, the requirements of section 63 of the Electricity Act have not been fully met.



28. The Learned Counsel for the Appellant mainly contended that the Appellant through the negotiations with L<sub>2</sub> and L<sub>3</sub> took much pains to reduce the bid price to Rs. 2.45 per kWh of power from Rs. 2.74 and Rs. 2.99 per kWh respectively and in the absence of any material to show that it was not aligned to the market prices, the State Commission cannot simply reject the approval on the ground that the negotiations was not permissible either under the bidding documents or under the guidelines of the Central Government. According to him, the consequences of rejection is that the Appellant will not be in a position to execute the Power Purchase Agreement (PPA) with RPL in respect of 1241 MW of power and with EPL for 150 MW to procure much needed long-term power requirement of the State of Madhya Pradesh for 25 years and more at a levelised tariff of Rs. 2.45 per kWh of power.

29. As pointed out by the Learned Counsel for the Appellant, the main ground of rejection by the State Commission is with reference to the negotiation process undertaken by the

Appellant. According to the State Commission there is no provision for negotiations and further no prior approval has been obtained from the State Commission.

30. This finding, in our view, is not only factually incorrect but also perverse. If we peruse the order dated 07.03.2008 passed by the State Commission, it is clear that the Appellant requested for negotiations in respect of the price offered by the other bidders and the same was considered by the State Commission and then the Commission directed the Appellant to approach the State Commission for approval after such negotiations besides passing the order granting approval in respect of the Lanco Infratech Ltd. The relevant observations of the State Commission are as under:

*“12. The petitioner had also submitted a certificate from the Bid Evaluation Committee on conformity of bid evaluation according to the provisions of RFP documents. This is required as per the revised guidelines issued by MoP on 27.09.2007 wherein it has been provided that*

*after conclusion of bid process, the evaluation committee constituted for evaluation of RFP bids shall provide appropriate certification on conformity of bid evaluation according to the provisions of RFP documents. The petitioner had also submitted a certificate on the letter head of the Company which indicates that the present petition is filed to seek the approval of Commission for procurement of 600 MW of power for M/s Lanco Infratech Ltd. and the petitioner will negotiate with the other qualified bidders viz. M/s Reliance Power Ltd and M/s Essar Power Ltd the quoted tariffs to bring down the same for the benefit of consumers of the State and it will approach the Commission again for approval of tariff if the negotiated tariffs with these bidders are found suitable. The petitioner had also submitted that the power procured as above would be allocated to all the distribution companies in the following manner:*

*(1) In equal proportion to all the Discoms, OR*

- (2) *In proportion to the energy consumed by each Discoms averaging last three years consumption OR*
- (3) *As decided by State Government/Commission as the case may be.*

*31. Based on the submissions made in the application and the documents furnished to the Commission on records, the Commission accepts that the tariff discovery for Case 1 of bidding process as carried out by the MP Power Trading Co. Ltd. in the subject case, has been carried out through a transparent process for bidding in conformity with the guidelines for determination of tariff by bidding process for procurement of power by distribution licensees or their authorized representatives. Accordingly, in terms of Commission order of 26<sup>th</sup> September 2007 and also section 63 of the Electricity Act, 2003, the Commission considers the request. The Commission, thus, accord its approval to adopt the evaluated levelised tariff of Rs. 2.34 per kWh for procurement of 600 MW of power from M/s Lanco Infratech Limited by the*

*distribution licensees or their representatives. This approval is subject to the following conditions.*

- a. Signed copy of the Power Purchase Agreement shall be submitted to the Commission immediately after signing.*
- b. The above approval is for evaluated levelised tariff for a period of 25 years. However, actual payment shall be regulated as per the provisions of the RFP Bid documents.*
- c. MP Power Trading Co. Limited is also directed that the outcome of negotiations with L<sub>2</sub> and L<sub>3</sub> bidders should be placed before the Commission before the expiry of the bid validity.*

32. This order would indicate 3 aspects

- (1) Approval is accorded in respect of the procurement of 600 MW of power from M/s Lanco Infratech Limited since the bidding process as carried out by the Appellant in the subject case has been carried out

through a transparent process for bidding in conformity with the guidelines for determination of tariff for bidding process for procurement of power by distribution licensees or their authorized representatives.

- (2) The State Commission was informed by the Appellant that they will negotiate with other qualified bidders namely RPL and EPL with reference to their quoted prices to bring down the same for the benefit of the consumers in the State and requested the Commission to give liberty to approach the Commission again for approval of the price if the negotiated price with these bidders is found to be aligned with the market prices.
- (3) In pursuance of the said consideration of the request made by the Appellant, the State Commission directed the Appellant to approach the Commission after negotiations process is over and to report to the Commission the result or outcome of the

negotiations carried out with the other bidders for further consideration.

33. These three aspects would indicate that the State Commission has granted approval in respect of Lanco Infratech Limited and permitted the Appellant to approach the Commission again after negotiations with the other bidders and place the result of the negotiations before the Commission who in turn will consider the same for necessary approval. This indicates that the Commission did not stand in the way of negotiation and instead the Appellant was directed to approach the State Commission again after the negotiation is over, thereby giving liberty to the Appellant to have such negotiation.

34. When such a liberty has been given with a direction that they should approach the State Commission after such negotiation is over, it is quite strange on the part of the State Commission to hold that such an approval to the negotiation has never been obtained from the Commission. Further, the peculiar

part of it is that the State Commission having blamed the Appellant, as if he has not obtained any approval for the negotiations from the State Commission, has hastened to add in the same breadth that there is no provision for negotiation at all. This observation is, in our view, mutually contradictory and without the application of mind. As a matter of fact, the perusal of the relevant provisions as quoted above along with the reading of the RFP documents would clearly indicate that there is no apparent restriction, either in the guidelines issued by the Central Government or in the bidding documents prohibiting the procurer to have negotiations with bidders for bringing down the price.

35. It cannot be debated that the negotiations, as claimed by the Appellant before the State Commission, is only for reduction in the prices which is in the best interest of the consumers. In this case the negotiations also have actually resulted in the reduction in prices considerably. According to the Counsel for the Appellant negotiations with RPL has resulted in a great



impact due to the fact that the bidders have reduced their prices to a great extent. In the case of RPL, the difference in price of Rs. 0.25 per unit on 1241 M power procurement for 25 years at a Plant Load Factor of 80% would be equal to Rs. 5457 crores and at PLF of 90% would be equal to Rs. 6139 crores. In the case of EPL the reduction of price by Rs. 0.50 per unit on the procurement of 150 MW of electricity power for 25 years at 80% PLF would result in a saving of Rs. 1337 crores and at 90% PLF it will save Rs. 1493 crores. So, the reduction in the prices which is considerable could be highly beneficial both to the State as well as to the consumers at large in the State.

36. As indicated above, the bid documents provide that the Appellant has the right to reject any bids or all bids, if the quoted prices of tariff is not aligned to the market prices. This shows the procurer itself can reject all the bids or any other bids if the quoted price is not acceptable or it is not aligned to the market prices. This would mean, the procurer can make efforts to ensure that it gets supply for the reduced price from the very

same bidders. Therefore, instead of rejecting the bids outright, the procurer is well within its right to negotiate with the parties to bring down the price which is aligned to the prevailing market price. In other words, when the procurer has the right to reject the bid, the procurer has got similar right to negotiate with the parties to bring down the price quoted in the bids.

37. If we go through the entire bidding documents, we can easily conclude that the negotiation is inherent and in-built in the bidding process. With regard to the principle relating to negotiation for reduction in prices, the Supreme Court has held in *Food Corporation of India vs. Messrs Kamdhenu Cattle Feed* (91993) 1 SCC 71, as under:

*“10. From the above, it is clear that even though the highest tender can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action.*

*The object of inviting tenders for disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. The inadequacy may be for several reasons known in the commercial field. Inadequacy of the price quoted in the highest tender would be a question of fact in each case. Retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest. A procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for*

*acceptance and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer, in which case acceptance of the highest offer within the time the offers remain open would be a reasonable exercise of power for public good*'.

38. The above principle has been laid down by the Supreme Court in a case of sale of foodgrains where higher price was beneficial for the public good. The present case relates to the purchase of electricity by the procurer for consumers for the lower price in the public interest. The ratio decided by the above decision taking note of public interest squarely applies to the present case as well.

39. As a matter of fact, during the proceedings before the State Commission, the Appellant pointed out through letter dated

20.08.2008 to the clarification letter dated 09.07.2008 sent by the State Commission that negotiation is permissible and various precedents with regard to such negotiations were quoted in the letter. Relevant portion of the above letter is as follows:

*“Although there is no specific provision in the RFP document for negotiation, however, it is respectfully submitted that in the absence of such provision, the procurer may negotiate with the L1 bidders, in case the quoted tariff is found to be on higher than the market rates, it is under good business practice. Even Central Vigilance Commission vide Order No. 005/CRD/012 dated 3<sup>rd</sup> March 2007 (copy enclosed) have permitted negotiations with L1 bidder(s)”*

*“Hon’ble Commission would also appreciate that the competitive bidding is a time consuming process. Cancellation of the bids and re-invitation of the fresh bids would result into substantial time loss, financial implications due to inflation and discomfort to the power starved consumers of the State. Keeping the foregoing*

*facts in view there was no option other than to negotiate with qualified bidders having responsive bids. The Hon'ble Commission would also appreciate that the negotiations has been carried out with the sole intention of providing cheap, competitive and timely power to the consumers of the State. Even in case of Sasan Ultra Mega Power Project, Central Electricity Regulatory Commission (CERC) has adopted the tariff arrived after negotiation with the remaining bidders (as per Clause 16© of the Order dated 17<sup>th</sup> October 2007, copy enclose for ready reference please)".*

40. Admittedly, after the explanation submitted before the State Commission with reference to the negotiation, there was no further direction by the State Commission on the issue of negotiation. In other words, thereafter the State Commission did not seek any clarification on the aspect of the negotiation.

41. We would like to deal with this aspect from yet another angle. If the State Commission actually is of the view that there is no provision for negotiation or procurer has no right for negotiation, the State Commission ought to have rejected information or request made by the Appellant to permit them to approach the Commission in respect of other bidders after negotiation. On the contrary, as indicated above, the State Commission referred to the request made by the Appellant for doing so, in its order dated 07.03.2008 and permitted the Appellant to approach the State Commission again with the outcome of the negotiation which the Appellant had with the other bidders.

42. Admittedly, at that stage the State Commission did not choose to mention in the said order that there is no right for negotiation with the parties by the procurer as there was no provision for the same either in the bid documents or in the guidelines.

43. The stand of the State Commission as per the order dated 07.03.2008 is that the Appellant can go on with the negotiation process for reduction of prices and he shall approach the State Commission to place the outcome of the negotiation to proceed further. But the stand taken by the State Commission while passing the impugned order dated 06.01.2010 that it has not given any approval for negotiation but had merely noted the recommendations of the Evaluation Committee on this aspect and that there is no provision for negotiation, This stand taken by the State Commission is quite contrary to the earlier stand taken by the State Commission on 07.03.2008.

44. It is to be reiterated, if the State Commission was of the view that negotiation was not permissible, there should have been an express rejection of the relief sought for by the Appellant in the order dated 07.03.2008 itself,

45. It is also quite surprising to know that having held that there is no provision for negotiation and there is no prior



approval for negotiation, the State Commission has given another strange reason to reject approval i.e. the negotiated price is not the lowest. According to the State Commission the approval for negotiation was never obtained from the State Commission. In the same order it is mentioned that there is no provision for negotiation. When there is no right for negotiation as per the guidelines as well as the bid documents, as pointed out by the State Commission, there cannot be any power for the State Commission to grant such an approval. Therefore, the question of granting approval by the State Commission for negotiation will not arise when there is no provision made available in the guidelines or in the bid documents. Similarly, where there is no provision of approval for negotiation, as held by the Commission, question whether negotiated price is lowest or not does not arise.

46. In fact, as indicated above, the Appellant in the letter dated 20.08.2008 has clarified the entire aspect of the issue raised by the State Commission by pointing out that such a negotiation

was in the interest of consumers and the cancellation of the bid would not serve any purpose. In the said letter the Appellant quoted some precedent where the tariff was adopted by the Commission after negotiation. Admittedly, after receipt of this letter from the Appellant dated 20.08.2008, there was no direction or clarification in respect of negotiation by the State Commission. Even the subsequent letter sent by the State Commission the State Commission only raised the question of delivery point and not about the issue of negotiation.

47. Even assuming that there is no explicit approval obtained by the Appellant from the State Commission, it shall be remembered that there is no explicit embargo on the Appellant from having negotiations with the bidders for reduction of the prices so as to make them agree to the reduced price which is aligned with the market prices in the interest of the consumers at large. Therefore, the ground for rejection of the petition that there is no provision for negotiation as per the guidelines and

the RFP documents and that there is no approval for negotiation obtained from the State Commission is totally wrong.

48. The next ground of rejection relate to the delivery point. According to the State Commission, there has been a change in the delivery point or no delivery point has been mentioned by the Appellant in the bid documents. According to the Learned Counsel for the Appellant, the State Commission has mixed up the aspect of delivery point to be specified in the bid as per the bid documents and specific delivery point is premature as it is to be finalized only subsequent to the Power Purchase Agreement. Let us refer to the definition of “Delivery point” as given in the RFP document.

.49. Clause 2.1.2 of definition of delivery point reads as under:  
*“2.1.2 “The Delivery Point” shall be the CTU/MPSTU or direct MPSTU interconnection point, as specified by the Bidder in Annexure 2, format 2, in both cases whether the station is located within the State of Madhya Pradesh or*

*located outside the State. The Bidder shall be responsible for obtaining all the clearances/approvals including open access, wherever required, from the Central/State Government and statutory bodies for supply of power up to the Delivery Point. For the convenience of the Bidder, a list of substations currently being operated by Madhya Pradesh Power Transmission Company Limited is being provided under Annexure 13”.*

50. This definition section would refer to the Annexure-4 format-2. This appendix requires filling up of the table only in the case of bidders using CTU network. It is specifically mentioned in the note attached to format-2 that this table is applicable only in case of bidder using CTU network. So delivery point shall be either to the CTU or MPSTU interconnection point. At the stage of bidding, all that the bidders were required to specify whether they agree to deliver electricity at the CTU/MPSTU interconnection point as provided in clause 2.1.2. In terms of the above, the delivery

point could be anywhere in the State of Madhya Pradesh. The cost based on delivery point has to be incurred by the bidder. In fact, this would be uniform in the system being maintained by the State. Accordingly, the RFP documents proceed on the basis that it is sufficient for the bidders to specify whether they would use CTU network or not. There is no issue of any cost implication, as if the electricity is delivered at the CTU network, as the cost is the same irrespective of place of delivery. The draft PPA provides for finalisation of the specific delivery point for supply of power by the seller in consultation with the procurer within 12 months from the effective date or 14 months from the issue of LOI, whichever is later. The relevant clause of the PPA is as follows:

*“3.1.2 The Seller agrees and undertakes to duly perform and complete the following activities within (i) 12 months from the Effective Date or (ii) 14 months from the date of issue of Letter of Intent, whichever is later, unless such completion is affected due to the Procurer’s failure to comply with their obligations under Article 3.1.2A of this*

*Agreement or by any Force Majeure event or if any of the activities is specifically waived in writing by the Procurer*

51. In view of this provision contained in the Draft PPA there cannot be any issue of specific delivery point being mentioned as part of the bidding process.

52. The RPL in its bid filled up format-2 of Annexure-4 by specifying in the column “Transmission charges” as ‘not applicable’. However, it did not say any delivery point as such. That was taken into consideration by the Expert Committee/the Evaluation Committee while recommending for negotiation. The relevant observation of the Evaluation Committee is as follows:

*“(iv) M/s Reliance Power Limited: In case of financial bid by Reliance Power Limited (RPL), the RPL has not mentioned any delivery point in annexure-4, Format-2 and mentioned against the column transmission charges – Not applicable. It means that RPL has not specified any separate transmission charges for supply of offered power*

*and the power will be delivered by them at the delivery point as per RFP documents, without any extra charges.”*

53. This was informed to the State Commission and the same was referred to by the State Commission in the order dated 07.03.2008 itself. This order refers not only relating to the negotiations but also in relation to the delivery point.

54. However, the issue of delivery point was again raised by the State Commission in the order passed by the State Commission on 26.8.2008 and 29.09.2008. The clarifications were given by the Appellant in their application filed before the State Commission on 29.12.2009. The following is the averment made in the application by the Appellant:

*“The Petitioner submitted clarification through an affidavit on 22.11.2008. The extract of the same are as under:*

*(a) insistence of the Hon’ble Commission on the substation level clarify on the Delivery Point is premature at this juncture as CTU/STU do not*

*entertain request for detailed system studies and cost estimates for system strengthening until firm Power Purchase Agreement (PPA) is in place between the Buyer and the Seller and PPA can be entered between the parties only when the tariff is adopted by the Hon'ble Commission.*

*(b) The Petitioner believes that under the petition the Hon'ble Commission has to only ascertain compliance of the bid process with the guidelines notified by the Government of India (GoI) under section 63 of the Electricity Act. Hon'ble Commission's going into the details of the commercial agreements/MoU signed by the Selected Bidder would be beyond the object, intent and scope of the petition.*

55. Therefore, the issue raised by the State Commission is premature. Further, RPL had agreed to bear all the costs of delivering electricity MP STU interconnection as and when



decided based on load studies etc. In the case of EPL the delivery was agreed to be at 220 KV Sidhi substation of MP STU and therefore, the same is consistent with the bidding documents. The earlier proposal by the EPL for making power available at Power Plant bus bar was never agreed upon by the Appellant.

56. As regards source of fuel, the responsibility to arrange fuel is completely on the bidder as the bidding is under Case I mechanism where the location, technology or fuel is not specified by the procurer. As such there is no cost implication to the Appellant on the source of fuel. Therefore, the finding given by the State Commission that there was a change in the original bid in respect of fuel is clearly wrong.

57. Let us now come to the next point. According to the State Commission, the bid period of 730 days had expired. The State Commission in the impugned order has observed that the bidding process commenced on 01.01.2007 and as such the 730

days expired on 31.12.2008 and as such the application was filed only after the expiry of the said period that too with a long delay.

58. Now it is contended by the Appellant that the validity of the bid period was extended beyond 730 days by the bidders themselves. The validity period of EPL has been extended till 08.05.2010 and by RPL till 27.05.2010. The Appellant had approached the State Commission for adoption of the tariff in respect of RPL on 12.5.2008 itself. It is the State Commission which went on calling for clarification after clarification.

59. As indicated above, on 12.5.2008 approval was sought by the Appellant for procurement of power from RPL at levelised tariff of Rs. 2.45 per kWh, the reduced price after negotiation.. On 09.07.2008 the State Commission called upon the Appellant to clarify about the aspect of negotiation. In the meantime, Lanco Infratech Limited on 02.08.2008 expressed inability to proceed further and, therefore, Lanco Infratech Limited's bond

was encashed. This was also immediately informed to the State Commission 20.08.2008. On same date, the State Commission again passed an order giving time to the Appellant to consult all officials concerned including the State Government and send a comprehensive reply with regard to the price fixation. In the meantime, the Appellant finalized the reduced rate of Rs. 2.45 per kWh with EPL. Therefore on 24.07.2008 LOI was issued by the Appellant to EPL subject to the approval of the State Commission. Accordingly on 28.10.2008 a petition had been filed by the Appellant for approval for purchase of 150 MW from EPL at the reduced rate of Rs. 2.45 per kWh. State Government also gave a clarification to the State Commission by making elaborate submissions on 03.11.2008. Ultimately, the State Commission passed the impugned order on 06.01.2009. In view of above developments taken place during this period, it cannot be said that that there was a long delay which can be attributed to the Appellant.

60. The next ground of rejection is that the State Government has entered into a MoU with RPL one of the bidders, at a different tariff. According to the State Commission, in view of the fact that the State Government has entered into a MoU with RPL at different tariff for the purchase of power from the same source, two different tariffs cannot be determined. As pointed out by the Appellant there is no reason as to why the State Commission should raise this objection regarding two different tariffs. It must be made clear that, the procurement of 30% power from RPL under the MoU by the State Government is independent of the procurement of power under the competitive bidding which is the subject matter of the present Appeal. This position has been categorically clarified by the State Government in the communication dated 23.11.2009 directly addressed to the State Commission, which reads as follows:

*“M/s Reliance Power Limited (RPL) have signed MOU with GoMP for setting up of 4000 MW in district Singrauli. GoMP has taken following decision for supply*

*of power by M/s RPL under Case-1 to M.P. Power Trading Company Limited.*

*If the levelized tariff i.e. Rs. 2.45/kWh for the electricity under Case-1 for 1241 MW to be supplied by M/s RPL is assessed less than the power to be supplied by M/s RPL under MOU with GoMP, then the quantum of power to be supplied by M/s RPL under MOU shall be offset from 1241 MW and other terms and conditions shall be applicable as Case-1. If the rate of levelized tariff for the power under MOU is assessed less than the quantum of levelized tariff i.e. Rs. 2.4/ kWh for 1241 MW under Case-1, then M/s RPL shall have to supply 30 power separately under the provisions of MOU signed with the State Government and this power shall not be offset from 1241 MW under Case-1 M/s RPL shall be required to file all requisite documents with the Appropriate Commission for determination of tariff for the power to be supplied under MOU from the respective project”.*

61. Thus, there cannot be any issue on the impact of MOU. The State Government has retained the option to take the power under the MOU if the rate to be worked out as proposal rate in MOU is cheaper than Rs. 2.45/ kWh and if it is costlier, there is an option provided not to take the power. The above decision has been taken in the interest of State. Therefore, this objection also, in our view is not sustainable.

62. One more additional reason has been given by the State Commission stating that the negotiation the Appellant had with the bidders only led to reduction of prices to Rs. 2.45 per kWh which is higher than the price of Rs. 2.34 quoted by Lanco Infratech Limited, which is the lowest bidder. As we referred in earlier paragraphs this reason is quite strange. It is a fact known to the Commission that after the approval was given by the State Commission in regard to price of Rs. 2.34 per kWh offered by Lanco Infratech Limited by the order dated 07.03.2008, the Lanco Infratech Limited unfortunately has expressed inability through its letter dated 02.08.2008 addressed to the Appellant, to

accept the project addressed to the Appellant and this was conveyed to the State Commission on 20.08.2008 by the Appellant. It is clear that while the impugned order was passed, Lanco Infratech Limited was never in the picture. Hence, the State Commission cannot compare the prices which have been ultimately reduced to Rs. 2.45 per kWh with the other price of Rs. 2.34 per kWh which was originally offered by Lanco Infratech Limited. That apart, the State Commission should not have rejected on this technical ground especially when the State Commission has taken the ground of rejection of the approval that there is no provision for negotiation.

63. At this juncture, it is to be pointed out that as indicated above, the State Commission itself in the order passed on 07.03.2008 has observed that the bidding process has been carried out in the subject case through a transparent process for bidding in conformity with the guidelines for determination of tariff by bidding process for procurement of power by

distribution licensees or their authorized representatives. The said observation is quoted below:

*“Based on the submissions made in the application and the documents furnished to the Commission on record, the Commission accepts that the tariff discovery for the Case 1 bidding process as carried out by the MP Power Trading Co. Limited in the subject case has been carried out through a transparent process for bidding in conformity with the guidelines for determination of tariff by bidding process for procurement of power by distribution licensees or their authorized representatives”.*

64. As per Section 63 of the Act, the duty enjoined upon the State Commission to adopt and approve the tariff finalized by the procurer through the competitive bidding process once when it is found that the said bid process had been carried out in a transparent manner and in accordance with the guidelines framed by the Central Government. This compliance has already been referred to in the order of the State Commission dated



07.03.2008. Therefore, the other technical objections raised by the State Commission should not stand in the way of mandatory duty of the Commission for granting approval when the requirement of section 63 has been met. It is also to be pointed out that the powers have been given to the State Commission for according approval even in the case of deviation from guidelines as provided in clause 5.16 of the guidelines.

65. In view of the above discussion, we are constrained to conclude that the order impugned passed by the State Commission rejecting the approval claimed by the Appellant would suffer from these infirmities discussed as above and therefore the same is liable to be set aside.

66. However, at this stage we have to point out one slight deviation from the guidelines framed by the Central Government that can be cured now. As indicated above, referring to the Expert Committee recommendations, the State Commission gave a direction to the Appellant to approach the

State Commission again after the said negotiations are over and place before the State Commission the outcome of the negotiations. Thereafter in pursuance of the order of the State Commission dated 07.03.2008 referring to the recommendations of the Expert Committee, a Negotiation Committee was set up by the State Government to negotiate further reduction of tariff. The said Negotiation Committee started the process of negotiation with the parties and ultimately it reduced the prices to Rs. 2.45 per kWh. Thereafter, the Appellant instead of approaching the Expert Committee again for getting a recommendation for the reduced prices, it straightaway approached the State Commission for their approval.

67. As pointed out by the Learned Counsel for the Commission, the Commission cannot proceed purely on the recommendations of the Negotiation Committee set up by the State Government after bidding process. The constitution of the Expert Committee is provided in the Central Government guidelines. The Negotiation Committee is not envisaged under

the Central Government guidelines. So, in the absence of the certificate given by the Expert Committee as provided in the guidelines, the State Commission cannot accord any approval for the rate recommended by the Negotiation Committee.

68. Para 6.2 of the guidelines provide that the procurer shall approach the State Commission along with the certificate issued by the Evaluation Committee in conformity with the bid process and bid evaluation. Further, it is sated that still efforts are being made to have a further negotiation with the RPL for further reduction. So, this shows that negotiation with regard to RPL has not yet been over. Therefore, the Appellant is directed to finalize the negotiation with the RPL for the reduction of prices and then place it before the Evaluation Committee to enable it to consider whether the prices reduced through negotiation would be acceptable price or aligned with the market prices and then to give a certificate and a report recommending the said price. Thereupon, with that certificate the Appellant can approach the State Commission for approval.

69. As indicated above, the State Commission has to verify merely whether the bid process has been done in a transparent manner and in accordance with the guidelines framed by the Central Government and if that is complied with, the State Commission shall give approval and adopt the tariff recommended by the Evaluation Committee.

70. As indicated above, the wordings contained in section 63 of the Electricity Act, 2003 would make it clear that the power of scrutiny by the State Commission is so limited. When it is found that the bid process was done in a transparent manner as per the guidelines and when the certificate is issued by Evaluation Committee recommending the reduced prices through negotiations, it is the duty of the State Commission to give approval without raising any hyper technical objection. To put it shortly, the Commission as per section 63 of the Electricity Act, 2003 having only limited jurisdiction has to satisfy with reference to the compliance of the requirement of

Section 63 and cannot indulge itself to conduct a roving enquiry. In other words, the State Commission should act within the ambit of Section 63 of the Act and should not go beyond that as it is neither an Enquiry Commission nor a Vigilance Commission.

71. Accordingly, the following directions are given:

- (1) the Appellant is directed to finalise the price through negotiation and to place it before the Evaluation Committee, which in turn will consider the same and find out whether it is aligned with the market prices or reasonable or acceptable price and give suitable recommendations through the certificate.
- (2) Thereupon the Appellant shall approach the State Commission to grant approval on the basis of recommendations of the Evaluation Committee.
- (3) On this basis, the State Commission is directed to pass an order on the application filed by the Appellant in the light of the Evaluation Committee's

recommendations and also in the light of the findings given by the Tribunal. The Appeal is allowed. Order impugned is set aside. No cost.

**(RAKESH NATH) (JUSTICE M. KARPAGA VINAYAGAM)**  
**TECHNICAL MEMBER CHAIRPERSON**

**DATED: 6<sup>TH</sup> MAY, 2010.**

**INDEX: REPORTABLE/NON-REPORTABLE.**