



**Appeal No. 181 of 2011**

**In the matter of**

1. Aravali Transmission Service Company Ltd.  
25/1, Skip House,  
Museum, Road, Bangalore – 560025. ....Appellant No.1

2. Maru Transmission Service Company Ltd.  
25/1, Skip House,  
Museum, Road, Bangalore – 560025. ....Appellant No.2

And

1. Rajasthan Electricity Regulatory Commission  
Vidhyut Viniyamak Bhawan, Sahakar Marg,  
Near State Motor Garage, Jaipur – 302005 ----Respondent

**Appeal No. 21 of 2012**

**In the matter of**

Rajasthan Rajya Vidyut Prasaran Nigam Ltd.  
Vidyut Bhawan, Janpath, Jaipur-302 005.  
Through its Superintending Engineer .....Appellant

Vs.

1. Rajasthan Electricity Regulatory Commission --Respondent No.1  
Vidhyut Viniyamak Bhawan, Sahakar Marg,  
Near State Motor Garage, Jaipur – 302005  
Through its Secretary

2. Aravali Transmission Service Company Ltd. Respondent No. 2  
387, Arvind Marg, Gayatri Nagr – A,  
Maharani Farn, Durugapur, Jaipur – 302018  
Through its Managing Director

3. Maru Transmission Service Company Ltd. Respondent No.3  
387, Arvind Marg, Gayatri Nagr – A,  
Maharani Farn, Durugapur, Jaipur – 302018  
Through its Managing Director

4. Jaipur Vidyut Vitran Nigam Ltd.,  
Vidyut Bhwan, Janapath,  
Jaipur – 302005  
Through its Chairman and Managing Director

5. Ajmer Vidyut Vitran Nigam Ltd.,  
Hathi Bhatta, City Power House,  
Jaipur Road, Jaipur – 302005  
Through its Managing Director

6. Jodhpur Vidyut Vitran Nigam Ltd.,  
New Power House, Industrial Area,  
Jodhpur – 342003.  
Through its Managing Director

Proforma Respondents

Counsel for the Appellant : Mr. Aman Abhinav.  
(In Appeal No.177/2011  
&181/2011)

Mr. Gopal Jain  
Mr. Ankur Sood

(In Appeal No.21/2012)

Mr. Pradeep Mishra

Counsel for the Respondents :  
(In Appeal No.177/2011  
&181/2011)

Mr. R.K. Mehta

Mr. David A.  
Mr. Antrayami Upadhyay for R-1

Mr. Pradeep Mishra for R-2

(In Appeal No.21/2012)

Mr. R.K. Mehta

Mr. David A.  
Mr. Antrayami Upadhyay for R-1  
Mr. Aman Abhinav for R-2 and R-

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### **JUDGEMENT**

**HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER**

These three appeals are being disposed of by this common judgment and order in view of the fact that they arise out of two separate orders but emanating from the same facts. One order namely, the order dated 30.9.2011 was passed by the Rajasthan State Electricity Regulatory Commission in Petition no RERC/255/11 and RERC/256/11 filed separately by the two appellants in Appeal no.177 of 2011 whereby the Commission declined to adopt the transmission charges arrived at by the Appellants with the M/s GMR Energy Ltd. through the competitive bidding process as contemplated in Section 63 of the Electricity Act,2003. The other Appeal, being Appeal no.181 of 2011 has been preferred by the same Appellants namely Aravali Transmission Service Company Ltd. and Maru Transmission Service Company Ltd against the order dated 24.10. 2011 passed by the State Commission whereby the Commission declined to grant transmission license for transmission of electricity. Thus, the Appellants in the Appeal No181 of 2011 and Appeal No.177 of 2011 are Aravali Transmission Service Company Ltd. and Maru Transmission Service Company Ltd., while the Appellant in Appeal No. 21 of 2012 is Rajasthan Rajya Vidyut Prasaran Nigam Ltd. which challenges the Commission's order dated 30.9.2011 whereby the Commission refused to make adoption of transmission charges arrived at through competitive bidding processes. The facts are these:-

2. The Govt. of Rajasthan by a communication dated 15.10.2008 constituted a State Level Empowered Committee with a view to encouraging competition in private sectors' participation of transmission projects in the State. A Member of the Rajasthan Electricity Regulatory Commission ( RERC) was made the Chairman of the Committee and the other members were Secretary (Energy), Secretary (Planning), Chairman of a Distribution Company and the Director (Technical) of the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. The functions of the Committee were as follows:-

- a) To identify the projects to be developed by competitive bidding.
- b) To facilitate preparation of bid documents and invitation of bids through a suitable agency.
- c) To facilitate evaluation of bids.
- d) To facilitate finalization and signing of TSA between developer and concerned utilities.
- e) To facilitate development of projects by competitive bidding for transmission.

3. The State Level Empowered Committee in its first meeting on 16.1.2009 identified the schemes to be implemented through competitive bidding process and authorized Rajasthan Rajya Vidyut Prasaran Nigam Ltd. to act as Bid Process Co-ordinator for the purpose of selection of successful bidder as Transmission Service Provider (TSP). In Appeal No.181 of 2011 and the Appeal no 177 of 2011 details have been mentioned about the three projects which were scheduled to be implemented through competitive bidding process. The second meeting of the State Level Empowered Committee was held on 26.2.2009 and in the said meeting it was decided that bidding documents approved by the Ministry of Power, Govt. of India be adopted and Rajasthan Rajya Vidyut Prasaran Nigam Ltd. may go ahead with publication of Request For Proposal (RFP) in newspapers, that single stage two envelope Bid Process be adopted, that cost of the document be fixed at Rs.10, 000/- and lastly bids should be invited on Build, Own and Operate basis. Now, in two state level newspapers, two national level newspapers, the Indian Trade Journal and in the Financial Times, London, the notice inviting bids were published for wide circulation. On 1.3.2009, Request For Qualification (RFQ), Request For Proposal (RFP) and Transmission Service Agreement (TSA) based on Standard Bidding Documents of the Govt. of India in the Ministry of Power were issued. On 31.3.2009 pre-bid Conference was held and the revised RFP project documents were issued on 15.4.2009. The pre-signed bidding documents were issued on 10.6.2009 and draft of Share Purchase Agreement (SPA) was issued on 1.7.2009. The last date of receipt of RFP and RFQ was fixed on 4.11.2009.

4. It is contended by the appellants that there were 10 bidders who included M/s GMR Energy Ltd. and who according to the Appellants was the lowest successful bidder. Now, Rajasthan Rajya Vidyut Prasaran Nigam LTD. having been designated as Bid Process Co-ordinator by the State Level Empowered Committee constituted by the Govt. of Rajasthan had to carry out the function of Bid process Co-ordinator as per Clause 3.1 of the Guidelines. Accordingly, Bid Evaluation Committee (Bid Evaluation Committee) which was required to be formed by the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. in its capacity as Bid Process Co-ordinator as per Clause 9.8 of the Guidelines was constituted on 29.12.2009 and this Committee was later reconstituted on 8.1.2010. The Committee consisted of different functionaries which we will notice as we will proceed with the deliberations in the sequel. The Committee, according to the Appellants, was constituted taking into considerations of the provisions of the Competitive Bidding Guidelines and the decision of the State Level Empowered Committee to authorise Rajasthan Rajya

Vidyut Prasaran Nigam Ltd. to act as Bid Process Co-ordinator. On 18.12.2010, the Bid Evaluation Committee submitted its recommendations regarding evaluation of the RFQ and the recommendations were approved by the Board of Directors of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. in its meeting on 23.2.2010. On 3.3.2010, the non-financial part of RFP was opened as was recommended by the Bid Evaluation Committee and the said recommendation was approved by the Board of Directors of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. . Similarly, the financial part of the Bid was opened on 13.5.2010 in the presence of the bidders who wished to be present, and on that day the levelized transmission charges for the projects were compared. On 18.6.2010, the Bid Evaluation Committee recommended M/s GMR Energy Ltd. for being the lowest successful bidder for issuance in their favour Letter of Intent (LOI) for the transmission projects. This recommendation was recorded in the minutes of meeting of the Bid Evaluation Committee on 18.6.2010. Accordingly, on 28.9.2010, the Board of Directors of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. upon recommendations of the Bid Evaluation Committee decided to issue LOI in favour of M/s GMR Energy Ltd. for the projects in question and the LOIs were issued on 30<sup>th</sup> September, 2010. The Board of Directors of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. by meeting held on 15.12.2010 approved transfer of 100% shareholding of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. and its two nominees who are the Appellants in Appeal Nos. 171 of 2011 and 181 of 2011 in favour of M/s GMR Energy Ltd. who was the successful bidder. The successful bidder was required in terms of the LOI and RFP to provide contract performance guarantee in favour of Long Term Transmission Customers (LTTCs) who include the distribution companies of Jaipur, Jodhpur and Ajmer, to execute Share Purchase Agreement, to acquire 100% Equity Share holding of the SPV from Rajasthan Rajya Vidyut Prasaran Nigam Ltd. , to execute RFP project document including TSA with the LTTCs, to make application in the name of SPV company to the State Commission for adoption of transmission charges and to apply in the name of SPV company to the State Commission for grant of transmission license. M/s GMR Ltd. complied with all these formalities. The SPA for transfer of SPV-Aravali Transmission Service Company Ltd. (ATSCCL) was signed on 19.1.2001, and the TSA was signed on the very same day. The signatories included Rajasthan Rajya Vidyut Prasaran Nigam Ltd. and LTTCs and ATSCCL and M/s GMR Energy Ltd. Similarly, on 15.2.2011, SPA for transfer of SPC-Marud Transmission Service Company Ltd. (MTSCCL) was signed and the signatories included Rajasthan Rajya Vidyut Prasaran Nigam Ltd. , MTSCCL and GMR

Energy Ltd. On 15.2.2011, TSA was also executed amongst MTSCCL and LTTCs.

5. Having completed all these formalities, the Appellants in the Appeal nos.177 of 2011 and 181 of 2011 filed two separate petitions before the Commission on 25. 04.2011. The Petition no 255 of 2011 was filed by the Maru Transmission Service Company Ltd, while the Petition no.256 /2011 was filed by the Aravali Transmission Service Company Ltd and the prayer was common in both the petitions, which was for adoption of transmission charges in respect of the projects to be developed. On 21.1.2011 the Aravali Transmission Company Limited filed another petition, being no.RERC/243/2011 praying for grant of transmission license under section 14 of the Electricity Act, 2003 and on 18.2.2011 the Maru Transmission Service Company Limited similarly filed an identical but separate petition, being no RERC/249/2011 for grant of transmission license. On 30.9.2011, the Commission passed an order in respect of the petition no 255/2011 and petition no 256 of 2011 filed by the Appellants of the Appeal no 177 of 2011 holding that the processes adopted have not been in accordance with the guidelines of the Central Govt. and, therefore, the proposed tariff could not be adopted under Section 63 of the Electricity Act, 2003 and the prayer for grant of transmission license was consequently rejected by a separate order dated 24.10.2011 in respect of petition of the same Appellants in petition no 243/2011 and 249 /2011 on the basis of the order dated 30.9.2011.

6. These are the facts mentioned in Appeal No.181 of 2011 and the Appeal no 177 of 2011 where there was clear mention of three projects for transmission networks. . The Appeal No. 21 of 2012 has been filed by Rajasthan Rajya Vidyut Prasaran Nigam Ltd. who, of course, was not the petitioner before the State Commission against the order dated 30.9.2011 on the same identical facts.

7 The approach in Appeal No.181 of 2011 is slightly different from the approach made in the Appeal No.177 of 2011 Bid Evaluation Committee because in the former emphasis is put upon denial of grant of license on the Commission's alleged ground in procedural irregularities in the bidding process, while in the latter attack is made on the Commission's findings regarding alleged irregularities in the bidding process although the grounds in both the appeals are substantially the same and common.

8. The grounds of Appeal in all the three appeals are as follows:-

- a) The orders impugned are contrary to the settled legal principles and the scheme of the Act. The Appellants had been selected through a transparent competitive bidding process.
- b) The issue of tariff fixation and that of transmission license are completely separate processes; the rejection of the tariff cannot form the basis of rejection of the Appellants' application for transmission license.
- c) The Appellants had applied for the transmission license in accordance with Clause 2.6 of the RFP document, Clause 3.1.3 of the TSA and the resolution dated 17.4.2006. (Competitive Bidding Guidelines)
- d) The license is independent of tariff process and the Commission ignored the material fact that there was no link between grant of license and fixation of tariff.
- e) The order dated 30.9.2011 is contrary to Section 63 of the Electricity Act. The Commission is bound to accept the tariff determination by competitive bidding process conducted by the Govt. of Rajasthan through Rajasthan Rajya Vidyut Prasaran Nigam Ltd. .
- f) The Commission overlooked the decision of this Tribunal dated 31.3.2010 in Appeal No.106 of 2009 and 107 of 2009 in BRPL vs. DERC & Ors. where it was held that Section 63 is an optional route for procurement of power by distribution licensee and in case the same is followed, the Appropriate Commission is required to adopt the same tariff.
- g) The Ministry of Power in a Circular dated 28.8.2006 has clarified that when tariff is determined in terms of Section 63 and it is finalized the Commission is required to adopt the tariff in accordance with the provisions of the law.
- h) The Competitive Bidding Guidelines have been followed to ensure transparency and competitiveness in the bidding process. M/s GMR Energy Ltd. was selected as a successful bidder after a transparent and competitive bidding process in which as many as 10 bidders participated. On 17.5.2011, the Bid Evaluation Committee certified that work had been carried out and M/s GMR Energy Ltd. had been selected as a successful bidder in conformity with the provisions of the Competitive Bidding Guidelines.
- i) The Commission was not justified in holding that the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. was appointed as Bid Process Co-ordinator by the State Level Empowered Committee in state of by the Govt. of Rajasthan and that Bid Evaluation Committee was constituted by Rajasthan Rajya Vidyut Prasaran Nigam Ltd.



in its capacity as Bid Process Co-ordinator instead of by the State Level Empowered Committee .

- j) The observation of the Commission that the prescribed procedure has not been followed is not correct. The Commission should have decided the transmission license applications on their own merits.
- k) The Govt. of Rajasthan on 15.10.2008 constituted State Level Empowered Committee to assist in the Competitive Bidding Process. The State Level Empowered Committee in accordance with the authority vested upon it by the Govt. authorized Rajasthan Rajya Vidyut Prasaran Nigam Ltd. to act as Bid Process Co-ordinator. The appointment of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator is a valid exercise of power and authority delegated by the Govt. of Rajasthan. The appointment of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. is in accordance with Clause 3.3 of the Competitive Bidding Guidelines. Therefore, the entire process including the selection of the Appellants and the tariff determination was strictly in accordance with the Central Govt's. Competitive Bidding Guidelines
- l) There is no illegality in delegating by the Govt. its authority to its officers. The State Level Empowered Committee constituted by the Govt. of Rajasthan can validly exercise the power to appoint Rajasthan Rajya Vidyut Prasaran Nigam Ltd. which is a State Public Sector Undertaking engaged in the business of transmission of electricity. In terms of Clause 9.8 of the Competitive Bidding Guidelines dealing with Constitution of the Bid Evaluation Committee, it was the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. which as part of his functions as Bid Process Co-ordinator was to appoint the Bid Evaluation Committee and accordingly a Committee was constituted by Rajasthan Rajya Vidyut Prasaran Nigam Ltd. on 29.12.2009 as Bid Evaluation Committee.
- m) The Constitution of Bid Evaluation Committee was in compliance with Clause 9.8 of the Competitive Bidding Guidelines and the following persons were comprised in the Committee :-
1. Sh. B.N. Saini, CE(Project Planning and Management), RVPN
  2. Sh.Deepak Srivastava, Chief Controller of Accounts, RVPN
  3. Shri N.M. Agarwal, Dy.CE (Material Management), RVPN
  4. Shri R.K. Kasliwal, Dy.CE (New Power Projects-Regulations), RVPN
  5. Shri B.K. Makhija, Retd. CE (Rajasthan Power Procurement Cell), Project Consultant, RVPN

## 6. Shri Bharat Bhushan Gupta, C.A. Financial Expert

It is contended that Shri Bharat Bhushan Gupta was an independent member having expertise in financial matter. Shri B.K. Makhija was a former Chief Engineer who had headed the RPPC and was associated as Chief Engineer with all PPP Projects undertaken by Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator and was retained as Project Consultant.

- n) The Commission overlooked the fact that the purpose of Section 63 is to increase competition by selecting from a multitude of bidders and fixing tariff through Competitive Bidding Process.
- o) The Commission failed to appreciate that the substantive rights acquired by the Appellant had to be protected and the Appellants complied with all their obligations under the terms of the bid document. The alleged procedural breach could not be factored in denying license.
- p) The impugned order is against the interest of the project Bid Evaluation Committee because it has the effect of setting back the entire process which needs to be restarted. In this connection, reference has been made to the decision in *Raunaq International Ltd. Vs. I.V.R. Construction Ltd. (1999) 1 SCC 492* where the Hon'ble Supreme Court held that unless mala fide is noticed, the court should not intervene under Article 226 in disputes between two rival tenderers.
- q) After execution of the SPA on 19.1.2011 and 15.2.2011, the GMR Energy Ltd. acquired shares of the Appellants and substantial funds were invested towards the project. The rights in the projects had therefore accrued to the Appellants and the balance of convenience was in favour of the Appellants.
- r) Even before the impugned order was passed, the Appellants invested substantial amounts and have carried out various steps towards implementation of the projects.
- s) The Competitive Bidding Guidelines have been strictly followed. Even the Commission was informed of the bidding process by a letter dated 27.2.2009 and 13.3.2009. Notice inviting bids was widely circulated and the single stage two envelope bidding process was adopted for the projects.

- t) The RFQ, RFP and TSA based on the standard bidding documents issued by the Ministry of Power were issued and a total of 10 bids were received.
- u) The Chairman of the Commission who gave a casting vote was wrong in holding that Bid Process Co-Ordinator was constituted by State Level Empowered Committee instead of being appointed by the Govt. of Rajasthan and the Bid Evaluation Committee was wrongly constituted by Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator instead of being constituted by State Level Empowered Committee but the appointment of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator is a valid exercise of power and Authority delegated by the Govt. of Rajasthan and the appointment of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. was in accordance with Clause 3.3 of the Competitive Bidding Guidelines. The Empowered Committee constituted by the Govt. of Rajasthan could validly exercise the power to appoint Rajasthan Rajya Vidyut Prasaran Nigam Ltd. which is a State Public Sector Undertaking engaged in the business of transmission of electricity as Bid Process Co-ordinator.
- v) In terms of Clause 9.8 of the Competitive Bidding Guidelines, Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as part of its function as Bid Process Co-ordinator was required to appoint the Bid Evaluation Committee and accordingly Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator appointed Bid Evaluation Committee.
- w) The Chairman of the Commission ignored the letter and spirit of Section 63 of the Guidelines.
- x) With reference to a decision of this Tribunal in Appeal No.109 of 2009, it has been contended that while the bidding guidelines allow the role of the Commission to be the ministerial for the adoption of tariff where there is more than one bidder, there is specific reference to the consent of single bid. Reference is also made in this respect to the decision of the CERC dated. 19.9.2007 in Petition No.18 of 2007.
- y) Even if it is assumed, though not admitted, that there was a deviation from the procedural provision of the Competitive

Bidding Guidelines in constituting the Bid Process Co-ordinator and Bid Evaluation Committee, it would be only a minor immaterial deviation which does not impact upon the fairness of the procedure.

- z) The Appellants could not be deprived of their accrued rights.
  - aa) The impugned order is against the interest of the project.
  - bb) Substantial amount has been invested by the Appellants in the matter of the implementation of the projects.
  - cc) The Member of the Commission was justified in deciding in favour of the Appellants.
9. In Appeal No.21 of 2012, the following points have been urged:-
- a) The Appellant, Rajasthan Rajya Vidyut Prasaran Nigam Ltd. has been assigned the functions of Bid Process Co-ordinator with the consent of the Government.
  - b) Competitive Bidding Guidelines have been followed.
  - c) The Commission did not find that there was any lack of transparency.
  - d) The appointment of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-Ordinator was rightly done and that too with the consent and authority of the State Govt.
  - e) The constitution of Bid Evaluation Committee by Bid Process Co-ordinator is in accordance with the guidelines.
  - f) The price was determined in the transparent manner and was reasonable.
  - g) There was no allegation of mala fide or illegality on the part of the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. while functioning as Bid Process Co-ordinator.

- h) There was no allegation of mala fide or illegality against Rajasthan Rajya Vidyut Prasaran Nigam Ltd. in so far as appointment of Bid Evaluation Committee is concerned in its capacity as Bid Process Co-ordinator.

10. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. was one of the Respondents in Appeal No.177 of 2011 and Appeal No.181 of 2011. In these two appeals, the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. filed a counter affidavit but the contentions of their affidavit are merely reproductions of the contentions raised in the Memorandum of Appeal in Appeal No. 21 of 2012. Therefore, for the sake of brevity and precision we refrain from reproducing the contentions raised under counter affidavit to the Appeal No.177 of 2011 and Appeal No.181 of 2011. In fact, it is the State Commission who Bid Evaluation Committee becomes the contesting respondent in all the Appeals and it has filed counter affidavit in the Appeals. It is contended by the Commission as follows:-

- a) Since the Commission is not required to scrutinize the tariff in case tariff is determined according to bidding process, it is imperative in the larger consumer & public interest that the guidelines issued by the Central Govt. should be strictly and meticulously adhered to.
- b) Not only the transparent bidding process has to be followed, but also determination of tariff has to be in accordance with the guidelines issued by the Central Government.
- c) Appointment of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator was not legal.
- d) Constitution of the Bid Evaluation Committee by the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. in his capacity as Bid Process Co-ordinator was also not legal.
- e) Clause 3.3 of the guidelines provides that it is the appropriate State Govt. that may notify any organization / State Public Sector Undertaking especially engaged for this purpose by the State Govt. or Bid Process Co-ordinator notified by the Central Govt. to be the Bid Process Co-ordinator for the State.

- f) In its order dated 15.10.2008, the State Govt. specifically provided that the Empowered Committee will also take care of the functions of the Bid Process Co-ordinator till a Bid Process Co-ordinator is set up.
- g) Only the Secretarial services were to be provided by Rajasthan Rajya Vidyut Prasaran Nigam Ltd. and it was not the intention of the State Govt. that Rajasthan Rajya Vidyut Prasaran Nigam Ltd. would act as Bid Process Co-ordinator. The State Level Empowered Committee, in its meeting dated 16.1.2009 recorded that STU Rajasthan Rajya Vidyut Prasaran Nigam Ltd. shall be a nodal agency on behalf of the State Level Empowered Committee to act as Bid Process Co-ordinator for procurement of required transmission services as per guidelines till a separate Bid Process Co-ordinator is constituted by the Govt. of Rajasthan.
- h) The Bid Process Co-ordinator could be appointed only by the State Govt. as per the guidelines of the Central Govt. and the State Level Empowered Committee having been so appointed by the State Govt. could not on its own delegate the functions of Bid Process Co-ordinator to Rajasthan Rajya Vidyut Prasaran Nigam Ltd. .
- i) In terms of the guidelines, it was the State Level Empowered Committee that was required to constitute a Committee for evaluation of the bids with at least one representative from the CEA and not less than two representatives from the concerned Regional Power Committees with at least one representative from every concerned Regional Power Committee and one independent Member.
- j) In the present case, the Constitution of the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. is contrary to the guidelines of the Govt. of India as such a function was required to be performed by the State Level Empowered Committee .
- k) Thus, Bid Process Co-ordinator and Bid Evaluation Committee had been constituted in violation of the guidelines of the Govt. of India and these two violations lead to deviations in the

process which cannot be said to be minor. Therefore, the bidding process had not been carried out in accordance with the guidelines of the Central Govt. Thus, the so-called Bid Evaluation Committee cannot be regarded as proper Bid Evaluation Committee and certificate issued by the Bid Evaluation Committee was of no consequence since the Bid Evaluation Committee itself was not validly constituted. Even the said certificate was not signed by independent member of the Bid Evaluation Committee as well as another Member.

11. On the basis of the pleading of the parties, the following points arise for consideration:-

- a) Whether the guidelines of the Central Government containing the Competitive Bidding Process have been followed?
- b) Whether transparency and competitiveness were strictly maintained.
- c) Whether the impugned orders are legally sustainable?
- d) Whether tariff has been determined on the basis of competitive bidding guidelines?

12. All the issues are taken up together for a comprehensive treatment. It is noticeable that the Rajasthan Electricity Regulatory Commission that passed one impugned order on 30<sup>th</sup> September, 2011 consisted of two members including the Chairman. The Chairman and the Member could not agree between themselves and they wrote two separate orders. The Member was of the view that the Guidelines issued by the Central Govt. were substantially followed and transparency and competitiveness were adequately maintained, while the Chairman was of the view that Bid Evaluation Committee because of deviation from the guidelines of the Central Govt. in the appointment of the Bid Process Co-ordinator and constitution of the Bid Evaluation Committee, the entire process has been vitiated and accordingly he was unable to approve of and adopt the tariff determined through the bidding process. The Member, however, was not unmindful of two alleged minor variations or deviations but came to the opinion that despite such variations, transparency and competitiveness were not sacrificed. It is by virtue of the power of casting vote of the Chairman that the Chairman's view Bid Evaluation Committee became the view of the Commission. It is, therefore, necessary to record the views of both the Member and the Chairperson and to examine all the

documents and materials so far produced before the Commission in order to arrive at a finding as to whether transparency and competitiveness which are the hallmarks of a bidding process in determination of transmission of tariff under section 63 of the Act, 2003 in the light of the guidelines of the Central Govt. have been adhered to.

13. Before we proceed to consider whether the entire process conducted by the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. has been in accordance with the law, it is necessary to study the guidelines issued by the Central Govt. It is necessary to note that the guidelines were first issued under Resolution published on 17<sup>th</sup>. April, 2006 and then in July, 2007 some amendments were effected. So far as it is necessary for us we reproduce the relevant guidelines as amended.

## **1. Preamble**

*Promotion of competition in the electricity industry in India is one of the key objectives of the Electricity Act, 2003 (the Act). Development of Transmission system is essential to bring in market condition and competition in electricity trading. Competitive participation in providing transmission services and tariff determination through process of bidding would facilitate development of transmission system with competitive transmission tariffs.*

*Section 61 & 62 of the Act provide for tariff regulation and determination of tariff of generation, transmission, wheeling and retail sale of electricity by the Appropriate Commission. Section 63 of the Act states that –*

*“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.”*

*Tariff based Competitive Bidding Guidelines for Transmission Service and Guidelines of Encouraging Competition in Development of Transmission Projects have been framed under the above provisions of section 63 of the Act. The specific objectives of these guidelines are as follows:*



- *Promote competitive procurement of transmission services of electricity so as to have competitive tariffs.*
- *Encourage private investment in transmission lines.*
- *Facilitate transparency and fairness in procurement processes;*
- *Facilitate reduction of information asymmetries for various bidders;*
- *Protect consumer interests by facilitating competitive conditions in procurement of transmission services of electricity;*
- *Enhance standardization and reduce ambiguity and hence time for materialization of projects;*
- *Provide flexibility to providers of transmission services on internal operations while ensuring certainty on availability of the transmission services.*

### **3. Bid Process Coordinator**

3.1. *The Bid Process Coordinator, herein after referred to as Bid Process Co-ordinator, would be responsible for coordinating the bid process for procurement of required transmission services for each inter-State Transmission Project to be implemented under tariff-based competitive bidding in accordance with these guidelines.*

3.3. *Government shall notify any Central Govt. Organisation / Central Public Sector Undertaking or its wholly owned subsidiary (SPV) to be the Bid Process Co-ordinator. It will be open for MoP to review the nomination of Bid Process co-ordinator at any time. For immediate implementation of these guidelines the Empowered Committee constituted as per provisions of the Guidelines for encouraging competition in development of Transmission Projects will be the Bid Process Co-ordinator till any other organisation is nomination as Bid Process Co-ordinator by the Ministry/GoR.*

3.4 *For procurement of transmission services, required for any inter-state transmission project the Central Government shall notify any Central Government Organization/ Central Public Sector Undertaking or its wholly owned subsidiary (Special Purpose Vehicle) or committee or a consultant, especially engaged for this purpose by Ministry of Power, to be the Bid Process Co-ordinator.*

*The Bid Process Co-ordinator will be notified by the Ministry of Power and nomination of Bid Process Co-ordinator will be for a period of three years at a time. It will be open for Ministry of Power to review the nomination of Bid Process Co-ordinator at any time. For immediate implementation of these guidelines the Empowered Committee constituted as per the provisions of the “Policy Guidelines for Private Investment in Transmission” will be the Bid Process Co-ordinator till any other organization is nominated as Bid Process Co-ordinator by the Ministry of Power.*

#### **4 Preparation for inviting bids**

- 4.1. The Bid Process Co-ordinator shall prepare the bid documentation in accordance with these guidelines and obtain approval of the appropriate Commission . If standard bid documents notified by the Ministry are used then approval of the appropriate Commission is not required.*
- 4.2. Intimation shall be sent by the Bid Process Co-ordinator to the appropriate Commission about initiation of the bidding process.*
- 4.3. For location specific substations, switching stations or HVDC terminal stations (Case 2) the Bid Process Co-ordinator or its authorized representative should initiate the process of acquisition of land*

#### **9. Bidding Process**

- 9.1. For the procurement of transmission services under these guidelines, Bid Process Co-ordinator may at its option either adopt a two-stage process featuring separate Request for Qualification (RFQ) and Request for Proposal (RFP) or adopt a single stage two envelope tender process combining the RFP and RFQ processes. The bid documents shall be prepared in accordance with Para 4.1 of these guidelines.*
- 9.2. RFQ or combined RFQ and RFP notice should be published in at least two national newspapers, website of the Bid Process Co-ordinator and the appropriate Government and preferably in trade magazines also, so as to accord it wide publicity. The bidding shall*

*necessarily be by way of International Competitive Bidding (ICB). For the purpose of issue of RFQ minimum conditions to be met by the bidder shall be specified in the RFQ notice.*

9.3. *Bid Process Co-ordinator shall provide only written interpretation of the tender document to any bidder / participant and the same shall be made available to all other bidders. All parties shall rely solely on the written communication and acceptances from the bidders.*

9.4. *Standard documentation to be provided in the RFQ shall include,*

*9.4.1. Definition of requirements, including:*

- Brief description of the Project;*
- Commissioning milestones to be achieved by the bidders;*
- Qualification requirements to be met by bides including minimum net-worth, internal resource generation, etc with necessary proof of the same, as outlined in the bid documents;*

9.5 *RFP shall be issued to all bidders who have qualified at the RFQ stage. Bid Process Co-ordinator ay call a pre bid conference with all the developers who have sought documents for RFP stage. In case the bidders seek any deviations and Bid Process Co-ordinator finds those deviations are reasonable, the BOC may agree to such deviations. The clarification/revised-bidding document shall be given to all who had sought the RFP document informing about the deviations an clarifications. Wherever revised bidding documents are issued, the Bid Process Co-ordinator shall provide bidders at least two months after issue of such documents for submission of bids.*

9.8. *Bid evaluation committee*

*The Empowered Committee shall constitute a committee for evaluation of the bids with at least one representative from CEA and not less than two representatives from the concerned Regional Power Committees with at least one representative from every concerned RPC and one independent member. The independent member shall have expertise in financial matter/bid evaluation.*

14. Now, the salient features of the bidding processes as laid down in the guidelines when we summarize them on a thorough reading of the guidelines as amended stand as follows:-

- a) The Guidelines are applicable for procurement of transmission services for transmission of electricity through tariff based competitive bidding and for selection of transmission service provider.
- b) The Bid Process Co-ordinator would be responsible for co-ordinating the bid process for procurement of required transmission services.
- c) It is the State Govt. that has to notify any organization / State Public Sector Undertaking especially engaged for this purpose by the State Govt. or Bid Process Co-ordinator notified by the Central Govt. to be the Bid Process Co-ordinator for the State.
- d) It is the function of the Bid Process Co-ordinator to prepare bid documentation in accordance with the guidelines with the approval of the Commission or in the alternative that Bid Process Co-ordinator may use the standard bid documents notified by the Ministry of Power.
- e) It is the liberty of the Bid Process Co-ordinator either to adopt a two-stage process featuring separate RFQ and RFP or adopt a single stage two envelope tender process combining both RFQ and RFP processes.
- f) RFQ & RFP or combination of the same shall be issued in at least two National Newspapers, website of the Bid Process Co-ordinator and in the trade magazines.
- g) Standard documentation to be provided in the RFQ stage shall include definitions of requirement including the details of location and technical qualifications for each component of the transmission lines, construction milestones and financial requirements to be met by the bidders, proposed TSA, period of validity of offer of bidder, condition as specified by the Commission for being eligible to obtain a transmission license.
- h) The standard documentations to be provided by the Bid Process Co-ordinator shall include specified target debts for commissioning commercial operations and start of providing transmission services.
- i) Importantly, to ensure competitiveness, the minimum number of qualified bidders will be two. The Empowered Committee shall constitute a Bid Evaluation Committee with at least a Member from the CEA and not less than two representatives from the concerned Regional Power Committees with at least one representative from every concerned RPC and one independent

member. The bids shall be opened in public and the representative of the bidder shall be allowed to remain present. The technical bids shall be scored to ensure that the bids meet the minimum technical required criteria set out in the RFQ and the said bids shall be considered for further evaluation on the transmission charge bids. The transmission charge bid is liable to rejection in case of deviation from the tender conditions. It is the bidder who has quoted the lowest levelised transmission charges as per the evaluation procedure shall be considered for the award.

- j) There is a timetable given in the guidelines for two-stage bid process and single stage two envelope bid process.
- k) After the LOI is issued by the Bid Process Co-ordinator, the successful bidder shall acquire SPV created for the project to Bid Evaluation Committee to become TSP and execute TSA.
- l) The Bid Process Co-ordinator shall make the final result of evaluation of all public bids. The final TSA along with the certification of Bid Evaluation Committee shall be forwarded to the Appropriate Commission for adoption of tariff in terms of Section 63.

15. The above is the summary of the guidelines reproduced in Paragraph 14 of this Judgment. Looking back at the facts, we find that the Govt. of Rajasthan in its Energy Department passed an Order on 15.10.2008 constituting a State Level Empowered Committee, the details of which have been reproduced in Paragraph 2 above. On 16.1.2009, the first meeting of the State Level Empowered Committee took place and the Minutes of the Meeting show the details of the scheme to be implemented and the concluding paragraph of the Minutes of the Meeting was that “*the STU (RVPN) shall be a nodal agency on behalf of the Committee to act as Bid Process Coordinator (Bid Process Co-ordinator) for procurement of required transmission services as per GoI Guidelines till a separate Bid Process Co-ordinator is constituted by the GoR*”. The second meeting of the State Level Empowered Committee took place on 26.2.2009. In this meeting, there was held a detailed discussion with respect to bidding documents and then following resolutions were taken:-

- a) *Bidding documents approved by MoP, GoI be adopted and RVPN may go ahead with publication of RFP in newspapers taking 01.03.2009 as zero date.*
- b) *For speedy completion of the bidding process, single stage two envelope bid process be adopted.*

- c) *Cost of the document be fixed as Rs.10,000 / US\$200 and*
- d) *Bids be invited on Build, Own and Operate basis.*

16. The single stage two envelope RFP & RFQ are voluminous documents covering more than 300 pages and all necessary information in terms of the guidelines, as noticed above have been incorporated in these documents. On 1.3.2009, RFQ, RFP and TSA based on the guidelines of the Ministry of Power, Govt. of India were issued for selection of TSP through Competitive Bidding Process on “Build Own, Operate and Maintenance Basis”. In terms of the guidelines, pre-bid conference was held on 31.3.2009. There was a long gap for receipt of the RFP and RFQ and the last date of receipt was 4.11.2009. Unquestionably, the bid invitation was circulated in two State Level newspapers, two National Level Newspapers, One trade magazine and in the Financial Times of London for wide publicity. On 29.12.2009, in terms of Clause-9.8 of the Central Govt. Guidelines, a Committee was constituted for evaluation / short listing of bidders / TSP by the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. and this Committee was later reconstituted on 8.1.2010, details of which have been noted in Paragraph- 7 above. The Bid Evaluation Committee held its meeting on 18.2.2010 wherein as many as 9 persons were present including Members of the Sub-Committee and in the Minutes of the Meeting, charts have been provided separately, technical and financial showing participation of as many as 10 bidders. It was decided to open the bids. On 23.2.2010, the Bid Evaluation Committee recommended opening of non-financial and financial bids. On 26.4.2010, the Board of Directors approved the recommendation of the Bid Evaluation Committee regarding non-financial part of RFP bids of transmission projects. Another meeting of the Bid Evaluation Committee took place on 22.4.2010, wherein it was decided that the sub-committee may evaluate the clarifications, if furnished by M/s ABL-AMR-SREI-ITL Consortium and get it approved from the Chief Engineer (NPP-R), RVPN, Jaipur. In the minutes of the meeting held on 18.6.2010, the Bid Evaluation Committee recommended M/s GMR Energy Ltd., as being the lowest bidder in respect of two projects and did not recommend any bidder in respect of third project. The recommendation is as follows:-

1. **Project Raj/PPP-1 : 400 kV S/C Bikaner –Deedwana-Ajmer Line with 400 kV/220 kV GSS At Deedwana and Associated Schemes/Work** : To recommend M/s GMR Energy Ltd. for placing LoI, the lowest bidder (L-1), as the

quoted levelised transmission charges appears to be reasonable.

2. **Project Raj/PPP-2 : 400 kV S/C Hindaun – Alwar Line 400 kV/220 kV GSS at Alwar and Associated Schemes /Work** : To recommend M/s GMR Energy Ltd. for placing LoI, the lowest bidder (L-1), as the quoted levelised transmission charges appears to be reasonable.
3. **Project Raj/PPP-3 : 220 kV S/C Sikar (400 kV)- Nawalgarh-Jhunjhunu Line with 220/132 kV GSS at Nawalgarh and Associated Schemes/Work** : Not to recommend any bidder as the Levelised transmission charges of lowest bidder (L-1) M/s. Emco Ltd. is higher than that arrived at as per RERC Regulations, 2009.

On 28.9.2010, the Board of Directors of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. decided to issue LoI in respect of two projects to the exclusion of the third one in favour of M/s GMR Energy Ltd. and on 30.9.2010, LoI was issued in favour of M/s GMR Energy Ltd. at Bangalore. On 15.12.2010, the Board of Directors approved 100% transfer of shareholding of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. and its two nominees namely ATSCCL & MTSCCL, in favour of M/s GMR Energy Ltd.. On 17.5.2011, the Bid Evaluation Committee certified that the work had been carried out and the GMR has been selected as successful bidder. On 20.10.2010, M/s GMR Energy Ltd. furnished the performance bank guarantee to each of the long term transmission customers. On 19.1.2011, SPA and TSA were executed by all concerned.

17. The submission of the Learned Advocate for the Commission is in fact justification of reasoning assigned by the Chairman of the Commission whose finding prevailed by virtue of his casting vote. The Learned Advocate for the Commission referred to the decision of this Tribunal rendered in Appeal No.109 of 2009 in support of the argument that the entire bidding exercise was faulty Bid Evaluation Committee because firstly the Bid Process Co-ordinator was appointed by the State Level Empowered Committee instead of being by the Govt. of Rajasthan and secondly the Constitution of the Bid Evaluation Committee has not been made by the State Level Empowered Committee but by the Bid Process Co-ordinator which is in this case Rajasthan Rajya Vidyut Prasaran Nigam Ltd. and Bid Evaluation Committee because of two apparent irregularities or illegalities, the Commission stuck to the view that license could not be issued as the bidding procedure suffered from

illegality. In this connection, it is necessary to see the finding of this Tribunal in Appeal No.109 of 2009.

*“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 fulfilment of the second requirement, namely, bidding process in accordance with the Guidelines, the Commission cannot straightaway adopt the price merely Bid Evaluation Committee 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”.*

18. It is argued by the Commission that it is of absolute necessity on the part of the Commission that that the guidelines issued by the Central Government should be strictly followed, and tariff must be competitive, reasonable and subservient to the public interest. Thus, the argument runs that not only the transparent bidding process has to be followed and adhered to but the determination of tariff has to be in accordance with the guidelines issued by the Central Government. It is argued in line with the reasoning of the Chairman that the appointment of Bid Process Co-ordinator and constitution of the Bid Evaluation Committee were both illegal. It was the State Government whose duty it was to notify any organisation / State Public Sector Undertaking especially engaged for this



purpose by the State Government for procurement of transmission services and in the constitution of the State Level Empowered Committee it was provided that that the said State Level Empowered Committee will take care of the functions of the Bid Process Co-ordinator and it was not the intention of the State Government to appoint Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator. Similarly, constitution of Bid Evaluation Committee by Rajasthan Rajya Vidyut Prasaran Nigam Ltd. in its capacity as Bid Process Co-ordinator was not lawful Bid Evaluation Committee because such function was to be performed either by the State Government or by the State Level Empowered Committee .

19. The arguments advanced by the appellants in all the three appeals are, on the contrary, in support of the reasoning of the Member of the Commission. It is argued as follows:-

a) The guidelines framed by the Central Government have been substantially followed and the so-called minor deviations being now magnified by the Commission does not sub-serve the public interest.

b) The decision of this Tribunal dtd.31.3.2010 in BRPL Vs. DERC & Ors. and the Circular of the Ministry of Power dated 28.8.2006 have not been followed by the Commission.

c) Transparency and competitiveness were strictly maintained.

d) In a subsequent order dated 14.12.2001, the Commission, itself approved of the appointment and actions of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as the Bid Process Co-ordinator.

e) The view of the Chairman of the Commission which prevailed by virtue of casting Vote has a negative impact on private sector investment in the generation of power.

20. Having heard the Learned Counsels for the parties and having perused all the materials and documents, it appears that the bone of contention raised by the Commission consists in the alleged irregularity or illegality in the formation of the Bid Process Co-ordinator and bid Evaluation Committee. Sans the constitution of the Bid Process Co-ordinator and that of the Bid Evaluation Committee, no other reason could be discovered in the finding of the Commission, nay the view of the learned Chairman, behind rejection of the Petitions of the Appellants.

Reading between the lines of the impugned order dated 30.9.2011 in its entirety it is apparent that the Commission deciphered the only twofold grounds behind rejection of the petition of the two appellants. The argument of the Commission's learned Counsel was modelled in a fashion as if transparency and competitiveness are one thing, while the guidelines of the Central Govt. are something more. It must not be lost sight of the fact that the guidelines were framed not for the sake of guidelines themselves but for preservation and attainment of transparency and competitiveness. Thus, transparency and competitiveness are to be achieved in accordance with the guidelines, and once transparency and competitiveness are found to be beyond reproach, then the Commission shall adopt the tariff arrived at through Competitive Bidding Process. Adoption Bid Evaluation Committee becomes a routine one when the Commission is satisfied on objective foundation of facts that transparency and competitiveness have been achieved. Thus, the guidelines which have been much talked of in the order impugned dated 30.9. 2011 are not end in themselves, but are means to achieve the end which in the instant case are attainment of transparency and competitiveness. In terms of Clause-3.3of the Guidelines, it is the State Public Sector Undertaking / Organization specially engaged for this purpose that can be notified to be the Bid Process Co-ordinator in the matter of procurement of transmission services for intra-state transmission. The State Level Empowered Committee , whose functions we have noticed in the Govt. order dated 15.10.2008, was formed by the Govt. Secondly, the said Committee consisted of a Member of the State Commission as Chairman, two Secretaries of the Govt. of Rajasthan as Members, Chairman of a Distribution Company as Member and a Director of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Member-Secretary. All important functions connected with bidding process were assigned with this Committee which is the Committee of the Govt. In the order dated 15.10.2008, it was mentioned that the State Level Empowered Committee will also take care of the functions of the Bid Process Co-ordinator till a Bid Process Co-ordinator is set up. In terms of the bid document / guidelines, a SPV was to be constituted and it would perform the role envisaged for transmission service provider. Ultimately, the successful bidder would take over from the Bid Process Co-ordinator. Now, in the meeting held on 16.1.2009, it was the State Level Empowered Committee which constituted the Bid Process Co-ordinator and herein lies the alleged deviation from the guidelines of the Central Govt. but the matter of the fact is that Rajasthan Rajya Vidyut Prasaran Nigam Ltd. is a State Public Sector Undertaking engaged in the business of transmission of electricity and this Rajasthan Rajya Vidyut Prasaran Nigam Ltd. has been appointed to be the Bid Process Co-ordinator by

the State Level Empowered Committee which is the creation of the Govt. of Rajasthan and this State Level Empowered Committee consisted of the persons appointed by the Govt. itself. In such circumstances, if transparency and competitiveness which are the corner stone of the bidding process are not sacrificed, then the minor deviation from the guideline carries no significance in the eye of law. Throughout the length and breadth of the order of the Commission it could not be deciphered that any single factor has been located or identified touching upon transparency and competitiveness. Notice inviting bids was published with wide circulation strictly in terms of the guidelines. Clause 9.1, Clause 9.2, Clause 9.5 were all followed in toto. The standard documents notified by the Ministry of Power, Govt. of India were adopted in terms of Clause 4.1. Pre-bid Conference was held and the Commission was intimated by the Bid Process Co-ordinator about initiation of the bidding process. The other argument that the Bid Evaluation Committee was not constituted by the State Level Empowered Committee or by the Govt. is too a formal one and this alleged variation or deviation does not vitiate the process. The constitution of the Bid Evaluation committee by the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. in its capacity as Bid Process Co-ordinator does not Bid Evaluation Committee become absolutely illegal in view of the clause 9.8 of the guidelines. The learned Member was not unjustified in observing that the details of the members of the Bid Evaluation Committee have similarity with the details given in the guidelines. What is noticed is that the spirit of the guidelines has been followed and not an iota of material has been produced to show objectively that the exercise has been so undertaken that fairness and competitiveness were missed at the beginning, or in the transit ,or at the end. Therefore, mechanical application of the guidelines is not warranted and called for. It is not the finding of the Commission at all that the bidding was not done through transparent process or that a lone bidder or two bidders were procured and selection was made out of them. It was a global bid and 10 bidders participated. Voluminous information was furnished in the bid notice and all the paraphernalia were observed meticulously. Not a single unsuccessful bidder has raised any grievance against the bidding process. Nor is it the finding of the Commission that the tariff arrived at through the Competitive Bidding Process was not fair and reasonable. The argument of the learned Counsel for the Appellants that the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. having been designated as Bid Process Co-ordinator by the State Level Empowered Committee constituted by the Govt. of Rajasthan had to carry out the function of the Bid Process Co-ordinator as per Clause 3.1 of the Guidelines cannot be rejected. This argument then followed the further argument that the Bid Evaluation Committee was required to be formed

by Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator as per clause 9.8 of the Tariff based Competitive Bidding Guidelines for transmission services. The Bid Evaluation Committee was in such circumstance formed by the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator. It was an intra state transmission project. The Committee was formed taking into consideration the provisions of Clause 9.8 and those of Clause 1 & 3.3. In such circumstances, adoption of a too technical approach does not legally serve any purpose.

21. A conceptual analysis of what is called guidelines may not be out of context. The dictionary meaning of the guidelines connotes 'instructions' which are advisory in nature. The guidelines may be called a 'broader outline', a 'dimension', some 'parameters', some 'standards', some 'bottle lines' and some 'yardsticks' which require to be followed in the attainment of a purpose. In other words, a guideline is a statement by which to determine a course of action. By definition, a guideline is never mandatory and is not enforceable in law. In this connection, our attention has been invited to the decision of the Hon'ble Supreme Court in *Narendra Kumar Maheshwari Vs. Union of India 1990 Supp SCC 440* where the following observation has been made:-

***“However, it has to be borne in mind that the guidelines on which the petitioners have relied are not statutory in character. These guidelines are not judicially enforceable. The competent authority might depart from these guidelines where the proper exercise of his discretion so warrants. In the present case, the statute provided that rules can be made by the Central Government only.”***

The decision in *Transmission Corporation of Andhra Pradesh Limited & Another Vs. Sai Renewable Power Private Limited and Others reported in (2011) 11 SCC 34* is also relevant. The Honourable Supreme Court observed as follows:

***“At this stage, we may notice that these guidelines are general guidelines and every State was required to act as per its own needs, convenience and by taking a general view, as to which are the most practical and affordable projects and how they should be carried on by the State. To give meaning to the guidelines that they were “absolutely mandatory”, will not be in conformity with the law relating to interpretation of documents as well as according to the canons of exercise of executive and administrative powers. These guidelines were***

***certainly required to be moulded by the State to meet their requirements depending on various factors prevailing in the State”.***

Our attention has also been invited to the decision in *Poddar Steel Corpn. Vs. Ganesh Engineering Works (1991) 3 SCC 273* and *G.J. Fernandez Vs. State of Karnataka (1990) 2 SCC 488* where it has been held unless fairness of the process is questionable or where the process benefits a particular party over others, minor procedural deviations which are in this case are certain guidelines and which are not statutory in character cannot be magnified to the detriment of the interest of the party in whose favour a right has been accrued. If at this stage, the whole bidding and selection process are negated then, as it has been rightly argued, there would be substantial increase in the project cost leading to sacrificing public interest. In this connection, reference is made to the decision in *Raunaq International Ltd. (ibid)* where it has been held that

***“It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far ore than any; saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer”.***

The learned Advocate for the Commission refers to the decisions in *Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and Another of (2007) 8 Supreme Court Cases 254*, *Meera Sahni Vs. Lieutenant Governor of Delhi and Others of (2008) 9 Supreme Court Cases 177*, *Chandra Kishore Jha Vs. Maha Vir Prasad and Others (1999) 8 Supreme Court Cases 266*, *Orissa State Warehousing Corporation Vs. Commissioner of Income Tax (1999) 4 Supreme Court Cases 197* and *Holani Auto Links Private Limited Vs. State of Madhya Pradesh of (2008) 13 Supreme Court Cases 185*. All these decisions are based on facts and circumstances of each individual case and the ratio of the decisions cannot be made applicable to the facts of the appeals in question. In fact, it is argued by the learned Advocate for the Appellants that the Commission itself by a subsequent order dated 14.12.2011 approved of appointment of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator and all the actions taken by it in respect of Bid Evaluation Committee.

21. Thus the constitution of Bid Process Co-ordinator by the State Level Empowered Committee instead of by the State Govt. is more technical than substantial. It is not in the order of a Commission that the appointment of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator was itself illegal. That is not the observation or finding of a Commission. The Rajasthan Rajya Vidyut Prasaran

Nigam Ltd. which is said to be a Government Company is a State Transmission Utility and by the order of the Govt. of Rajasthan, it is designed for that purpose. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. is the most competent Govt. organization that could be rightly associated with the purpose of processing the bid documents. Our attention has been invited to an order dated 14.12.2011 wherefrom it appears that the Commission approved Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator for selection of successful bidder in respect of certain other transmission project. It is argued by the learned Advocate for the Appellant that if the Commission could approve of the function of Rajasthan Rajya vidyut Prasaran Nigam Ltd. as Bid process Co-ordinator in connection with a different project then there is no point in raising objection to the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. acting as Bid Process Co-ordinator on the appointment by the State Level Empowered Committee . Mr. Mehta learned Counsel appearing for the Commission submitted that in connection with a different project, the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. was no doubt appointed as Bid Process Co-ordinator but that appointment was made by the Government. Now, it appears from the order dated 14.12.2011 that it was the State Level Empowered Committee which was formed by the Govt. in connection with a different transmission project that recommended to the Government that Rajasthan Rajya Vidyut Prasaran Nigam Ltd. should be appointed as Bid Process Co-ordinator, and acting on such recommendation, the Govt. made a formal order appointing Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator. It cannot be said that Rajasthan Rajya Vidyut Prasaran Nigam Ltd. acting as Bid Process Co-ordinator on being appointed by the State Level Empowered Committee which is a creature of the Government instead of being by the Government was an utter illegality. The Rajasthan Rajya Vidyut Prasaran Nigam Ltd. acting as Bid Process Co-ordinator on being appointed by the Government on the recommendation of the State Level Empowered Committee in one intra-state transmission project and the Rajasthan Rajya Vidyut Prasaran Nigam Ltd. acting as Bid Process Co-ordinator on being appointed by the State Level Empowered Committee which itself is a creature of the Government in another project of like nature do not qualitatively differ. On similar ground, the appointment of Bid Evaluation Committee by the Bid Process Co-ordinator instead of by the State Level Empowered Committee is a too technical approach, far less a substantial one. Noticeably, it is not the finding of the Commission that the persons who were made the personnel of the Bid Evaluation Committee were not qualified for the purpose or any action done by the Bid Evaluation Committee was not lawful.

Therefore, simply because the Bid Evaluation Committee was not constituted by the State Level Empowered Committee it cannot be argued that transparency was lost. The Commission could not locate or identify that certain actions in particular done by the Bid Process Co-ordinator or the Bid Evaluation Committee were not in accordance with the guidelines or were unlawful. In a word, all the guidelines have been in essence followed and the entire exercise does not smack of unfairness, non-competitiveness, arbitrariness and unreasonableness. Thus, we find that appointment of Rajasthan Rajya Vidyut Prasaran Nigam Ltd. as Bid Process Co-ordinator by the State Level Empowered Committee was not made on any extra- legal considerations, and we have found above that it was the most competent body that could be appointed as such. Again, the persons comprising whom the Bid Evaluation Committee was constituted are very nearly the persons who could be appointed as such in terms of the guidelines of the Central Govt. and, as we have noticed earlier, this being intra state transmission project, the Committee was formed in accordance with the spirit of Clause-9.8 as also Clauses-1 & 3.3 of the guidelines. It has not been found by the Commission that the personnel of the Bid Evaluation Committee were not qualified or were inappropriate for the purpose. The guidelines have been substantially complied with in order to achieve transparency and competitiveness and the guidelines having no mandatory force of law can hardly be taken resort to when transparency and competitiveness are beyond reproach and could not be the real assailable issues. The preamble which contains the philosophy of the guidelines and spells out the object to be achieved has not been honoured in breaches.

22. Thus, having regard to the facts and circumstances of the case, we are of the opinion that the Commission speaking through the Chairman was not justified in rejecting the petitions filed with the Appellants purely on two technical grounds that do not touch upon the transparency and competitiveness. Accordingly, we, while allowing the appeals but without costs, set aside the two orders impugned and remit the matter back to the Commission for consequential appropriate orders in respect of all the petitions filed before it by the Appellants in the Appeal nos.177 of 2011 and 181 of 2011 in the light of the decision rendered herein.

**(V.J. Talwar)**  
**Technical Member**

**(P.S. Datta)**  
**Judicial Member**

## **Reportable/ Non- Reportable**

**pr**