

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

Appeal No. 84 of 2009

GAIL Gas Ltd.

2nd Floor, HHEC Building

A-2, Sector-2

NOIDA – 201 301

... **Appellant**

Versus

Petroleum & Natural Gas Regulatory Board

1st Floor, World Trade Center

Babar Lane, Barakhamba Road

New Delhi – 110 001

... **Respondent**

**Present: Hon'ble Mr. Justice M.Karpaga Vinayagam, Chairperson
Hon'ble Mr. Mahesh B.Lal, Technical Member**

Dated: the 16th July, 2009

Counsel for the Appellant(s) : Mr. Parag Tripathi, Sr. Advocate
Mr. Rajiv Tyagi, Advocate
Mr. Ankit Parmar, Advocate
Mr. Raman Kumar, Advocate

Counsel for the Respondent (s) : Ms. Rita Kaul, Advocate
Ms. Divya Roy, Advocate
Mr. Rakesh Dewan, Advocate

JUDGMENT

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

1. Gas Authority of India Ltd. (GAIL) is the Appellant herein. Being aggrieved by the Order dated 24/3/09 passed by the Respondent Petroleum Board declining the request of the Appellant GAIL for modifying its bid, the Appellant has filed this Appeal. The relevant facts required to be considered for the disposal of this Appeal are as follows:

2. The Gas Authority of India Ltd. (GAIL), the Appellant herein is engaged in the supply of natural gas through city and local gas distribution networks (CGDs). The Petroleum Board invited the bids on 3/11/08 for the grant of authorization for laying and building of gas distribution in the geographical area of Mathura, U.P. As per the tender document, the last date of submission of bids was 3/3/09. The Appellant, on 3/3/09, submitted its bid for the grant of authorization in the said area to the Respondent Board. Till 3/3/09, the Appellant was the sole bidder to the said tender and no other entity had submitted its bid to the Board by the said date. Since the Board felt that there must be a competitive environment for the bids, it extended the last date for the submission of bids by one month i.e. up to 2/4/09 through a public notice as per Section 5(9) of the Regulations.

3. Subsequent to the extension of time for submission of bids, the Appellant by its letter dated 6/3/09 wrote to the Board intimating that it was reserving its right to ask for the modification of its own bid as there had been a material change in bid conditions in view of the extension of time and requesting for the same. On 24/3/09, the Respondent Petroleum Board after considering the letter, passed an Order declining the request of the Appellant for revising its bid after its submission, as the same was not permissible under Clause 2.8.3 of the bid document.

4. Thereafter, the Petroleum Board opened its bids on 4/5/09 and declared the result wherein the bid submitted by the other party which submitted its bids during the extended period was accepted as successful bidder. Only at that stage, the Appellant has filed the present Appeal challenging the Order dated 24/3/09 by the Board declining the request of the Appellant for modification of the bid conditions.

5. The Learned Counsel appearing for the Appellant while assailing the impugned Order dated 24/3/09 would make the following submissions:

- i) Admittedly, the Appellant submitted its bids within the stipulated time fixed by the Respondent Board i.e. on 3/3/09. On that date, the Appellant was the sole bidder. The Respondent Board, instead of selecting the Appellant as successful bidder, extended the time for submission for bids by another month. Since the time was extended, the Appellant has got a right to request the Board to modify the bid conditions. This right was denied by rejecting its request without any valid reason.
- ii) The only reason which has been given in the Order for refusing to revise or modify the bid submitted by the Appellant is the existence of Clause 2.8.3 of the bid documents which provides that the bid conditions cannot be changed. The Board cannot invoke Clause

2.8.3 since it is directly contradictory to the statutory provision namely Section 5 of the Indian Contract Act which will prevail over Clause 2.8.3 of the bid conditions. Therefore, the rejection of the request on the basis of Clause 2.8.3 is not legally valid.

- iii) The Board, in order to unduly favour the competitor rejected the request which would greatly prejudice the interest of the Appellant as the Respondent Board aimed at keeping the Appellant out of the bidding process.

6. On the above grounds, the Order dated 24/3/09 is sought to be challenged.

7. In reply to the above points, the Learned Counsel for the Respondent Board would raise the following points:

- i) Clause 2.8.3 which prohibits the change of bid conditions after its submission is just and proper as it is well in line with the objective of the Regulations, as well as the Act, 2006. The reliance on Section 5 of the Indian Contract Act cannot be applied in this case as the Appellant has neither challenged Clause 2.8.3 of the bid document nor the public notice by which the time for submission of bids was extended by one more month for inviting fresh bids in the proper forum at that stage. Tribunal is not proper forum to challenge the

said Clause in the Appeal filed against the Order rejecting its request for revising its bid conditions, particularly when the Appellant submitted its bid document after accepting the Clause 2.8.3.

- ii) In the impugned Order dated 24/3/09 itself, it has been clarified by the Board that mere extension of time would not amount to any material change with regard to the conditions of bid as the bid period has been extended by the Board as empowered under Section 5(9) of the Regulations 2008 so as to ensure a competitive environment through the public notice. It cannot be said that this has prejudiced the right of the Appellant as the public notice which was issued earlier was also not challenged either before the Board or before any forum.

- iii) The impugned Order was admittedly passed on 24/3/09 and it was intimated to the Appellant without any delay. The Appellant, for the best reasons known to it, has not chosen to challenge the said Order before the appropriate forum immediately. On the other hand, the Appellant waited till it got the result of the tender after opening of the bid. The opening of the bid was done only on 4/5/09 and only after knowing that the Appellant was not selected, it has chosen to file this Appeal along with the Application to condone the delay without giving any reason whatsoever for the delay between

24/3/09 and 4/5/09. The accusation as against the Board that it has shown undue favour to the other bidder is without any basis. Therefore, both the Appeal as well as the Application to condone the delay are liable to be dismissed as being devoid of merits.

8. We have carefully considered the rival contentions urged by the Counsel for the parties and have given our thoughtful consideration to the same.

9. The main point urged by the Learned Counsel for the Appellant is that the impugned letter dated 24/3/09 declining the request made by the Appellant for revising its bid on the strength of Clause 2.8.3 of the bid document is not legally valid, since the said Clause 2.8.3 is against the mandate of Section 5 of the Indian Contract Act. In elaborating this point, it has been submitted by the Learned Counsel for the Appellant that when there is a conflict between the contractual provision and the statutory provision, the contractual provision namely Clause 2.8.3 must give way to the statutory provision, namely Section 5 of the Indian Contract Act. While dealing with this point, it would be necessary to refer to the relevant facts in this matter.

10. On 23/10/08, the Petroleum Board invited applications-cum-bids for various cities including Mathura in U.P. The last date for submission of bids was 3/3/09. On 3/3/09, the Appellant GAIL submitted its bids

for Geographical Area of Mathura. On 3/3/09, the Board found that there was only one application-cum-bid received, which was from the Appellant. The Board thought it fit to extend the time for fresh bid submission and issued public notice on 4/3/09 extending the due date by one month i.e. up to 2/4/09.

11. Thereafter, on 6/3/09, the Appellant sent a letter to the Board that it reserves its right to modify and resubmit its bid at a later date within the extended period and requested for the same. On 24/3/09, the Board rejected the request of the Appellant for revision of the bid submitted earlier by it as the same cannot be allowed as per Clause 2.8.3 of the bid document which has already been accepted by the Appellant. This was intimated to the Appellant. The Appellant did not take any steps to challenge this Order dated 24/3/09. On the other hand, the Appellant waited till the date of bid opening. In the meantime, one other party submitted its bid document within the due date.

12. Firstly, as correctly pointed out by the Learned Counsel for the Board, this bid document containing the conditions including Clause 2.8.3 has been accepted by the Appellant and only on the acceptance of this Clause, the Appellant submitted its bid document on 3/3/09.

13. On 4/5/09, the received bids were opened and it was found that the other bidder M/s. DSM Infratech emerged as the successful bidder.

Accordingly the result was announced. In pursuance of this result, the Respondent Board issued the letter of intent (LOI) in favour of the successful bidder. At this stage, the Appellant filed this Appeal challenging the letter issued by the Board dated 24/3/09 intimating the Appellant that the request for the revision of the bid conditions of the bid document after its submission accepting the bid conditions is rejected in view of Clause 2.8.3 of the bid. In this context, we have to bear in mind three aspects:

- (i) In the application-cum-bid submitted by the Appellant before the Board on 3/3/09 after accepting all the bid conditions while filing the same before the Board. In Clause 2.8.3, it is specifically stated that the bidder cannot seek for the modification of the bid conditions after its submission.

We quote Clause 2.8.3 of the bid document which provides as follows:

“The bidder shall not be allowed to modify the bid after its submission.”

- (ii) As per Regulation 5(9) of the PNGRB Regulations 2008, the Board is empowered to extend the period by one month if there was only single bidder so as to ensure a competitive environment for the bids. The Regulations 5(9) provides as follows:

“The Board may extend the date of submission of bids up to a period of one month, through an advertisement in the same

manner as specified under Sub-Regulation (5), including in a situation where only a single application-cum-bid is received in response to the original advertisement.”

Admittedly, in this case, up to 3/3/09 which was the last date of bidding, there was only a single application-cum-bid received against the tender for CGD in Mathura, U.P. Therefore, the Board decided in terms of the above Regulation i.e. 5(9) of the PNGRB Regulations 2008 to extend the last date of submission of bid in respect of the said tender by one more month in order to ensure a competitive environment for the bids. Accordingly, a public notice was issued by the Board inviting submission of bids for the establishment of CGD network in the geographical area of Mathura, intimating the extension of time up to 2/4/09. Only thereafter the Appellant sent a request to modify its bid conditions during the extended period.

- (iii) In this Appeal, the Appellant has chosen to challenge only the letter issued by the Respondent Board on 24/3/09 declining the request. Admittedly, this Appeal has been filed not immediately after letter of rejection of request is received, but only after announcement of the result of the Board disqualifying the Appellant's application and announcing the result of the tender in favour of the other bidder.

14. The above three factors would make it clear that the Appellant accepted the bid conditions and submitted the same in time and thought it fit to approach this Tribunal challenging the letter dated 24/3/09 only after knowing the result of the tender process in which it was announced on 4/5/09 that the other bidder was a successful bidder and not before that. As referred to above, the only point urged by the Counsel for the Appellant is that Clause 2.8.3 of the Regulations putting restrictions on the Appellant for revising its bid is not in consonance with Section 5 of the Indian Contract Act.

15. Firstly, as admitted by the parties, the Appellant submitted the bid documents containing various bid conditions including Clause 2.8.3 on the last date i.e. on 3/3/09 only after accepting the said conditions. Having accepted the same, it would not be proper for the Appellant to seek for permission to revise its own bid contrary to the conditions. If the Appellant has any objection with reference to the said bid condition, it should not have submitted the bid document accepting those conditions or else it should have raised the objection before the Board or should have challenged the said Clause in the appropriate forum. But the same was not done by the Appellant herein.

16. Secondly, the Board decided on 4/3/09 to extend the bid period by about one more month as provided in Clause 5(9) of the Regulations and the same was issued through a public notice on 4/3/09. The Appellant

has not chosen to challenge this public notice also, to the extension of last date. After having kept silent over all of the above, the Appellant merely chose to write a letter on 6/3/09 expressing its intent to reserve its right for revising the bid. Even in the said letter, he did not raise any objection with regard to Clause 2.8.3 or the public notice. In that context, the Board has issued a letter dated 24/3/09 quoting the bid conditions. Let us refer to the gist of the said letter declining the request made by the Appellant.

- (i) The bid period has been extended in terms of the provisions of Regulations 5(9) of the PNGRB Regulations 2008 so as to ensure a competitive environment for regulation of bids. As such there is no change of bid conditions. Excepting the time extension, all the terms and conditions of the bidding process as laid down in the bidding process remained unaltered.
- (ii) As per Clause 2.8.3 of the application-cum-bid document, the bidder shall not be allowed to modify the bid after it is submitted. This condition has been accepted by the Appellant GAIL at the time of filing of the bid. If the request of the Appellant for revising the bid is entertained, it would amount to altering the main conditions, thereby vitiating the sanctity of the bid process.

- (iii) If opportunity is given to modify the bid, the single bidder could place a bid which would be disadvantageous to the consumers and the Board has to ensure that the interest of the consumers is not affected or compromised.

17. On these three reasonings, the request of the Appellant was declined. There is no reason to hold that these reasonings are unjustified. Further this Order has been passed on 24/3/09 and the same was intimated to the Appellant without any delay. If the Appellant is really aggrieved over this, it should have approached the appropriate forum immediately, but it kept quiet. On the other hand, the Appellant chose to wait till the opening of the bids and the announcement of the result of the bid process. Only on 4/5/09, bid was opened and result was announced declaring that the other bidder was successful bidder.

18. Only then the Appellant herein chose to file this Appeal as against the letter dated 24/3/09 by the Board and not against the result of the bid announced by the Board in favour of the other competitor even though he was really aggrieved over the result of the bid process only.

19. It is now pointed out by the learned Counsel for the Board that due to the announcement of the result of the bid process, the Appeal itself becomes infructuous. This submission merits consideration. As a matter of fact, the Appellant himself mentioned in the affidavit filed along with

the Appeal seeking for stay of the bid process that if the result of the bid is announced after the bid opening, the prayer in the Appeal will become infructuous.

20. The following is the extracts of para 6 of the Appeal papers:

“That the Applicant states that PNGRB shall be opening the bids for the geographical area of Mathura on 4/5/09 and thereafter, the relief sought in the accompanying appeal shall be rendered infructuous.”

21. The above wordings contained in para 6 of the Affidavit filed by the Applicant seeking for stay of bid process would show as if the bids were not opened. But actually, this Appeal has been filed along with this Affidavit only after the bid was opened and the result has been announced. But this was not mentioned in the Appeal grounds or in its affidavit for the best reasons known to the Appellant. Since the bids were opened in respect of the Mathura area on 4/5/09 itself and the result of the bid process was already announced in favour of the other bidder on the same day, it has to be held that the relief sought for by the Appellant in this Appeal becomes infructuous as admitted by the Appellant in its affidavit.

22. The Learned Counsel for the Appellant would cite several authorities viz. 1971 Madras 28; 1988 Delhi 224; 2003 SC 2434 relating

to the right of the bidder to withdraw its bid citing Section 5 of the Indian Contract Act. That decision would not apply to the present facts of this case as the issue in this case is different. As referred to above, in this Appeal, the validity of Clause 2.8.3 has not been challenged and the same also cannot be challenged before this Tribunal because the said clause has been introduced in the bid condition in pursuance of the Regulations. Similarly, the public notice extending the time of submission of the bid by one month has not been challenged and it cannot also be challenged before this Tribunal as the same has been issued under Regulation 5(9) of the Petroleum Board Regulations as laid down in various authorities.

23. In the absence of challenge to the above bid documents and the public notice issued under the Petroleum Board Regulations before the appropriate forum, this Tribunal cannot decide about the validity of Clause 2.8.3, especially when the Appellant has already accepted this bid condition and submitted the same before the Board that too in the Appeal challenging the letter dated 24/3/09 issued by the Board.

24. Besides the above reasons, there are other reasons to hold that the submissions made by the Counsel for the Appellant does not deserve acceptance.

25. In the bid document, there is Clause 5 which provides for zero deviation. Under this Clause, the bidders were advised to strictly conform to the conditions of the bid documents and not to contemplate any deviation or modification. Only in pursuance of the said conditions did the Appellant submit a zero deviation letter to the Respondent Petroleum Board in adherence to the above-said clause. Having done so, the Appellant cannot now demand for any modification or deviation from any of the terms and conditions of the bid document as a matter of right.

26. As correctly pointed out by the Counsel for the Respondent Board, a conjoint reading of Clause 5 and Clause 2.8.3 of the bid document as well as Clause 5.9 of the Petroleum Board Regulations would clearly stipulate the condition that after the submission of bid documents and zero deviation letter, the Applicant/Petitioner does not have any right to ask for any deviation/modification of the bid conditions. Further, it is noticed that the said Clause, namely Clause 2.8.3, which was introduced in line with the objectives of the Regulations as well as the objectives of the Act, 2006 and in larger public interest cannot be said to be discriminatory as it has been uniformly made applicable to all the bidders.

27. In any case, as mentioned earlier, the Appellant cannot challenge either Clause 2.8.3 of the bid document or the public notice by which the last date of submission of bids was extended by one month, under the

garb of an Appeal challenging the letter dated 24/3/09 issued by the Respondent Petroleum Board rejecting the request of the Appellant to revise its bid condition. Further, as pointed out earlier, even though the letter of rejection was issued on 24/3/09, the Appellant has not chosen to challenge the said letter immediately, nor made any representation on this letter and only after the opening of bids, wherein the announcement was made regarding the successful bid disqualifying the Appellant, the Appellant has chosen to file this Appeal that too belatedly after the period of limitation has expired.

28. Even though the Appellant has filed an Application for condonation of delay, there is no reason given in the said Application for the said delay. As a matter of fact, prima-facie, it appears that the Appellant was only waiting for the opening of bids and to know the result of the tender. This clearly shows that the Appellant is only aggrieved by its disqualification and not really against the bid condition or rejection of its request for modification of bid.

29. For the reasons mentioned above, this Tribunal is constrained to come to the conclusion that the ground urged by the Counsel for the Appellant challenging the letter issued by the Board dated 24/3/09 are not valid in law, besides the fact that the Application to condone the delay filed along with Appeal does not show the sufficient cause to condone the delay.

30. Under these circumstances, both the Appeal as well as the Application for condonation of delay are liable to be dismissed and accordingly dismissed.

31. Though this is the fit case wherein heavy costs may be imposed on the Appellant, we restrain ourselves from doing so as we feel that it is enough to express our displeasure over the conduct of the Appellant. The same is accordingly recorded.

(Mahesh B.Lal)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Dated: 16th July, 2009

REPORTABLE / NON-REPORTABLE