

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO.10 OF 2015

Dated: 6th May, 2015.

**Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson
Hon'ble Shri Rakesh Nath, Technical Member.**

IN THE MATTER OF:

1. Jaipur Vidyut Vitran Nigam Ltd.,)
Vidyut Bhawan, Janpath, Jaipur)
– 302005 through its Managing)
Director.)
 2. Jodhpur Vidyut Vitran Nigam)
Limited, New Power House,)
Industrial Area, Jodhpur –)
342003 (Rajasthan) through its)
Managing Director.)
 3. Ajmer Vidyut Vitran Nigam)
Limited, Vidyut Bhawan,)
Panchsheel Nagar, Makarwali)
Road, Ajmer – 305004 (Rajasthan))
through its Managing Director.))
- Appellant

Versus

1. Rajasthan Electricity Regulatory)
Commission, "Vidyut Vinyamak)
Bhawan", Near State Motor)
Garage, Sahakar Marg, Jaipur –)
302005, through its Secretary.)

2. Rajwest Power Limited, 7th Floor,)
Man Upasana Plaza, C-44, Sardar)
Patel Marg, C-Scheme, Jaipur –)
302 001.)
3. Barmer Lignite Mining Company)
Ltd., 7th Floor, Man Upasana)
Plaza, C-44, Sardar Patel Marg,)
C-Scheme, Jaipur – 302001.)
- Respondents

Counsel for the Appellant(s) ... Mr. P.N. Bhandari

Counsel for the Respondent(s) ... Mr. R.K. Mehta,
Mr. Abhishek Upadhyay
for **R-1.**
Mr. M.G. Ramachandran
for **R-2.**
Mr. Ramji Srinivasan, Sr. Adv.
Mr. Ramanuj Kumar for **R-3.**

JUDGMENT

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON:

1. The Appellants-DISCOMS have challenged Order dated 31/10/2014 passed by the Rajasthan Electricity Regulatory Commission (“**State Commission**”), Respondent No.1 herein, in Petition No.RERC-245 of 2011.

2. The impugned order is passed on an application filed by M/s. Barmer Lignite Mining Company Limited (“**BLMCL**”), Respondent No.3 herein, a mining entity, for approval of tender document to be issued for selection of Mine Developer-cum-Operator (“**MDO**”) for extraction of lignite from Kapurdi and Jalipa lignite mines.

3. In the application, the BLMCL has stated that it had earlier filed a petition for assessment of transfer price of lignite from Kapurdi and Jalipa lignite mines to the 1080 MW (8 x 135 MW) Thermal Power Station of M/s Raj WestPower Limited (“**RWPL**”), Respondent No.2 herein. The said application was filed under Regulation 12(7) of the “Rajasthan Electricity Regulatory Commission (Terms and Conditions of Determination of Tariff) Regulations 2009 (“**the said Regulations**”), and in consonance with the process of determination of transfer price of lignite as outlined in the Implementation Agreement dated 29/05/2006 executed between the Government of Rajasthan and RWPL. The transfer price claimed therein was arrived at after conducting an

International Competitive Bidding (“**ICB**”) for price discovery of the outsourcing cost of mining operations.

4. The State Commission vide its orders dated 17/08/2011 and 05/01/2012 had rejected the entire process of selection of MDO and directed that a fresh ICB be conducted for selection of the MDO. The appeal filed by the BLMCL was rejected by this Tribunal. In compliance with the directions of the State Commission and this Tribunal, the BLMCL is conducting a fresh bidding for selection of the MDO. For this purpose, the Board of Directors of the BLMCL appointed the Engineers India Limited (“**EIL**”), a Government of India enterprise to prepare the draft tender document and constituted a committee to peruse and give its suggestions on the draft tender document submitted by EIL.

5. According to the BLMCL, after incorporating certain modifications based on the recommendations of the committee and its own deliberations, the Board of the BLMCL has decided that the final tender document, be submitted to the State

Commission for its review and approval before calling for bids. The BLMCL submitted a copy of the tender document for ICB for outsourcing of lignite extraction from Kapurdi and Jalipa lignite mines for review and approval of the State Commission.

6. The Appellants opposed the said application. We must reproduce the submissions of the Appellants which are recorded by the State Commission. The submissions are as under:

- (i) Presently only Kapurdi mine is operational and various permissions required for Jalipa have not yet been issued. Therefore addition of Jalipa in bid document would not only be premature but would also add to the cost.
- (ii) Mining component is the biggest component in the entire project. Therefore, Discoms have high stakes in this cost plus project and the State Commission would be equally keen that exaggerated claims regarding transfer price are

- not made on the basis of high rates discovered through such bidding.
- (iii) If the State Commission has quashed the earlier ICB then a higher responsibility devolves upon the State Commission to ensure that the serious irregularities of the past are not repeated. It would be anti-climax to hold that the State Commission is not concerned with the tender document of ICB. That would negate the very purpose of quashing the earlier ICB.
- (iv) At clause 2.0 of the draft bid document, under the title “Contract Period”, BLMCL increases the contract period from an earlier period of 15 years to 30 years which is totally unjustified and it reflects mala-fide intention of the BLMCL. Unfortunately there is a repeated and consistent attempt to ignore the directions of the State Commission.

- (v) It is strange that the BLMCL is trying to fix a 30 year period when in fact the sub-contractor engaged by the BLMCL has been awarded the contract for a 7 year period only.

- (vi) It is well established that as per the standard business practices, such mining contracts are normally given for a period of around 7 years. The rates for longer contract period are likely to be much higher. Since it is a cost plus project, this would be a direct burden upon the Discoms and ultimately, the consumers.

- (vii) At clause 5.1 of the draft bid document, under the title “Technical Qualifying Requirements”, BLMCL increases the minimum experience of operating open cast coal/lignite mine by more than 100% in the present draft by raising it to 33 million BCM per annum. Similarly the production of coal/lignite which was supposed to be 2 million per tonne per annum in the last ICB has been raised to 10 million BCM, which is a jump of 500%. It is obvious that all these

- tailor-made changes have been proposed to make the technical qualifications more difficult for reducing competition.
- (viii) At clause 5.1 of the draft bid document, the financial parameters have been substantially changed. The average turnover in the present document has been kept 15000 million (INR) which was only 1500 million (INR) in the last ICB, which means a jump by ten times without any justification.
- (ix) At clause 6.0, the BLMCL has introduced another element of upfront payment to further eliminate any competition by adding conditions which are totally arbitrary, illegal and unfair. No such provision was there in the past. There is not an iota of justification for such a provision. No contractor would like to participate in a bid if he has to pay over Rs.330 crores as upfront payment without any rhyme or reason.

- (x) It is a simple case of replacement of the present mining contractor by another mining contractor through transparent bidding. As per the agreement signed between BLMCL and present mining contractor, even if the contract is to be terminated prematurely, without assigning any reason, no compensation is required to be made by the new contractor.
- (xi) At clause 8.1, BLMCL proposed that “BLMCL reserves the right to assess bidder’s capability to execute the work using in-house information and by taking into account various aspects such as concurrent commitments and performance during evaluation of bids.” Whereas in a transparent competitive bidding, once the parties are pre-qualified then there cannot be any further clause to debar any party. In the last ICB, shielding behind nomination clause, RWPL ignored the bids of the qualified bidders and awarded the contract to a mining contractor who was neither technically

qualified nor financially qualified nor who had even participated in the bid. Perhaps on the same pattern, the BLMCL is planning to torpedo the successful bidder by invoking this clause. At the pre-qualification stage, there is enough scope for evaluating the capability of a party but after the parties have been prequalified, it would not be proper to allow such a Sword of Damocles to hang over the heads of bidders.

(xii) The performance guarantee was merely for INR 500 million in the last ICB but at clause 44.1 of the present draft, it has been increased by 20 times. The malafide intention of introducing unusually stringent conditions and to knock out the competition is so obvious. There cannot be any justification for such a jump in the performance guarantee provisions.

(xiii) At clause 44.7, the corporate guarantee which was INR 1000 million in earlier ICB has been raised to INR 10000

million. This is once again a jump of 10 times. There is no earthly justification for such a jump, except the deep design to frustrate the fresh bidding, which the BLMCL has consistently opposed.

- (xiv) BLMCL in Escalation formula has introduced a new component of Explosives WPI. It is well known fact that the Lignite mining, specially in Barmer does not require any blasting at any stage. Inclusion of WPI of Explosives etc. in escalation formula only shows the mala fide intentions of the BLMCL. Further, the fixed cost component has been removed which is absolutely without any justification. The removal of fixed cost has unnecessarily increased weight of other component.

- (xv) At clause 50.3.1, BLMCL has proposed that “In case BLMCL fails to take delivery of Lignite due to some problem in power plant for a period not less than 60 days, the MDO shall provide a notice to BLMCL to cure the event of default.

In case of BLMCL's inability to cure the event of default to the satisfaction of the MDO within a period of 60 days from such notice, the MDO shall subject to applicable Laws, have right to enforce its lien and sell the lignite to recover its dues towards the fee for such undelivered lignite under the contract." It is submitted that no one has the right to sell lignite for recovery of dues. The lease for lignite extraction is for generation of power only but the extracted lignite cannot be allowed to be sold by any one for any purpose.

- (xvi) At clause 37.3, BLMCL proposes that the MDO shall ensure that all applicable tax exemptions or concessions or necessary set off are available to BLMCL during period of contract. The above provision is totally illogical and irrational. The BLMCL is already in existence while the MDO would be inducted after the completion of the ICB. Therefore, whatever tax exemptions have to be obtained, it is the sole responsibility of the BLMCL. The MDO who comes on the scene after the completion of the ICB cannot

be saddled with the liability of obtaining exemptions etc. for BLMCL. This additional liability on the MDO will further discourage the bidders.

(xvii) Therefore, it is prayed that unless there is a specific logical reason, the terms and conditions of the previous ICB should not be changed and it would be desirable for the sake of greater transparency that a list of changes from the previous bidding document should be indicated by the BLMCL upfront and reasons for such changes should be explained, before the State Commission further proceeds in the matter.

6. In the impugned order, the State Commission has observed that since the submissions of the Appellants were based on its order dated 17/8/2011, it was necessary to have a look at the summary and conclusions recorded in that order. The State Commission has quoted paragraph 24 of the said order, which reads as under:

“24. Decision of the Commission on various issues are summarised as under:

(1) The petition for lignite transfer price of BLMCL is maintainable.

(2) The petition for scrutiny of PPA needs to be filed by the licensee and it should be done at the earliest.

(3) There is a ceiling on first year tariff and for adjudicating upon the dispute there on, a petition under Sec. 86(1)(f) would have to be filed.

(4) The bidding undertaken for outsourcing of lignite extraction is not in accordance with earlier order dated 19.10.2006. Therefore, the variable cost of lignite transfer price endorsed by the independent person cannot be accepted and as a result, lignite transfer price is not determinable.

(5) Interim tariff, therefore, also cannot be worked out for want of fuel cost.

(6) A fresh bidding for outsourcing would need to be undertaken as per directions given in 2006 order.

(7) The outsourcing bidding may be undertaken only for Kapurdi, as Jalipa mines would become operational not earlier than FY 13-14, as indicated in the petition.

(8) For bidding, BLMCL is advised to give due consideration to short term bidding in case such a tender is likely to lead to lower cost, as discussed earlier. A supplementary petition would need to be filed after completion of the said bidding for determination of lignite transfer price.

(9) The petitioner BLMCL could work out the lignite extraction cost based on lignite mines being operated by RSMML with due adjustment in respect of stripping ratio, depth of mine and variation in other relevant parameters and furnish that to the Commission for working out lignite transfer price for the interim period till the rate, based on transparent bidding for outsourcing, gets finalised.

(10) Further hearing in the matter would be fixed based on option as emerges in respect of lignite transfer price or as deemed appropriate.”

7. Being mindful of serious opposition of the Appellants and the contents of the order dated 17/8/2011, crucial portion of which we have quoted hereinabove, the State Commission has observed that while finding fault with bidding process adopted, it had made several observations on the terms of bid included in the bidding document but it did not contemplate that the BLMCL should before going for a fresh bid, get the bidding document approved by it. The State Commission observed that it had only observed how the bidding shall be conducted to maintain transparency and bring in competitiveness. The State Commission relied on the judgment of the Supreme Court in **Air**

India Ltd. v. Cocin International Airport Ltd.¹ The relevant observations of the Supreme Court are as under:

“-----the award of a contracts whether it is by a private party or by a public body or the state is essentially a commercial transactions. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitations to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. It is free to grant any relaxations, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. The State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily-----.”

8. The State Commission has in light of the above observations of the Supreme Court held that the BLMCL is also a Government Company, governed by Board of Directors consisting of senior officials of the State Government. The State Commission has noted that the Committee constituted by the State comprising responsible officers has scrutinized the bid document. The members of the Committee deliberated upon the bid document.

¹ (2002) 2 SCC 617

Certain changes were made in the bid document. A sub-committee is constituted to monitor the tendering process. The State Commission has expressed that BLMCL should look into each of the conditions to ensure that they bring in more competitive rates so that it will sub-serve the State's interest in general and consumers' interest in particular. The State Commission has expressed a desire that the BLMCL sets proper conditions to get the best response and competitive rates so that the consumers are not overburdened in the form of tariff and it is for the BLMCL to specify the conditions of bid document keeping in view the observations of the Supreme Court in ***Air India Ltd.*** While disposing of the petition, the State Commission has observed that while conducting the bidding, the BLMCL shall bear in mind that the bidding process shall be transparent and fair. It shall also bear in mind the interest of the consumers of the state who ultimately bear the cost through tariff. The State Commission has observed that the BLMCL being a Government company will follow principles of fair play and reasonableness and will hold the bidding process in a transparent manner and

obtain the price and submit the same to the State Commission. Thereafter the State Commission will consider all aspects before taking a final decision. We may quote the relevant paragraph.

“17. However we observe that while conducting the bidding, petitioner shall bear in mind that the bidding process shall be transparent and fair. It shall also bear in mind the interest of the consumers of the state who ultimately bear the cost through tariff. We are sure that the petitioner being a Government company will follow principles of fair play and reasonableness and will hold the bidding process in a transparent manner and obtain the price and submit the same to the Commission. Thereafter Commission will consider all aspects before taking a final decision.”

9. Mr. Bhandari, learned counsel for the Appellants strenuously contended that the impugned order deserves to be set aside. He submitted that the State Commission has vide its order dated 17/8/2011 after finding serious irregularities in the ICB organized by RWPL, ordered for fresh bidding. The State Commission should have seen that in the fresh bid, some of the parameters have been raised by 100% or even 500% compared to the earlier ICB document. The State Commission failed to notice

basic difference between a tariff based project and a cost plus project. The present project is a cost plus project and the State Commission should have seen that in a cost plus project, the burden is passed onto the Appellants as procurers of electricity. The State Commission in the facts of this case should have exercised greater vigilance. The State Commission wrongly observed that the Electricity Act, 2003 does not provide for State Commission's approval to bidding documents prepared for grant of MDOs. In **Cellular Operators Association v. Union of India**², the Supreme Court observed as under:

“The Regulatory Bodies exercise wide jurisdiction. They lay down the law. They may prosecute. They may punish. Intrinsically, they act like an internal audit. They may fix the price, they may fix the area of operation and so on and so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees.”

10. Thus, it is clear that an Electricity Regulator has to play an active role in matters connected with determination of tariff. A cleverly crafted and flawed bidding document can never achieve

² AIR 2003 SC 899

transparent bidding and, therefore, it was incumbent upon the State Commission to scrutinize the bidding document. Counsel has submitted two compilations basically repeating the submissions made before the State Commission. We have already quoted them *in-extenso* hereinabove. Therefore, it is not necessary to give gist thereof again. Counsel submitted that this is a case where since there is no dispute about earlier bidding document, the same should be continued for fresh bidding minus the nomination clause. If that is done, there is no need for scrutiny of bid document by the State Commission. Counsel further stated that if the Appellants and RWPL want any incidental changes in the bidding documents, they may jointly file appropriate application which should be considered by the State Commission.

11. We have also heard Mr. Srinivasan, learned senior counsel appearing for Respondent No.3 – BLMCL. Written submissions have been filed on behalf of Respondent No.3. Gist of the submissions is as under:

- (a) The Appellants have not cited a single provision of any law, rule or regulation which empowers the State Commission to review and approve the draft tender documents. The State Commission's role is limited to determining the transfer price of lignite.
- (b) There is no legal basis or reason cited by the Appellants which would require BLMCL to adopt the previous bid documents prepared at the instance of RWPL. The previous bidding process was undertaken by RWPL in 2008 for the purpose of price discovery for appointment of their own nominee as the MDO stands invalidated by virtue of the State Commission's order dated 17/8/2011 and this Tribunal's order dated 8/4/2013. The Appellants themselves have asserted repeatedly that a number of flaws were found in the bidding conducted by RWPL and it is now completely arbitrary and whimsical on the part of the

- Appellants to suggest that previous bid documents prepared by RWPL be used for fresh bidding.
- (c) BLMCL had to undertake fresh bidding to comply with the order of the State Commission dated 17/8/2011 which was upheld by this Tribunal. By simply adopting earlier bid documents without undertaking its own independent analysis and evaluation, BLMCL would be abdicating its responsibilities as a Government Company and the Board of BLMCL would be failing in its fiduciary duties to act in the best interests of the company.
- (d) The Appellants' allegation that RWPL and BLMCL are the same is wrong, unsubstantiated and misleading.
- (e) BLMCL has undertaken several steps to ensure that the current bidding for selection of MDO is transparent and competitive.

- (f) The Appellants have offered no explanation or justification as to why they consider the bidding criteria to be harsh and unreasonable, except offering a comparison against the previous bid documents prepared by RWPL. The Appellants have also not offered any alternative criteria which they consider to be reasonable.
- (g) BLMCL has provided a detailed explanation/justification for each of the tender criteria, which has been objected to by the Appellants, by reference to other MDO tenders floated by various public sector entities, which establish beyond any doubt that the criteria stipulated in the draft tender documents are not only reasonable but also more liberal in certain respects than the criteria contained in other MDO tenders for similar mining capacity. In the circumstances, there is no substance in the appeal. The appeal, therefore, be dismissed.

12. Mr. R.K. Mehta learned counsel for Respondent No.1 has supported the impugned order.

13. We have taken note of the apprehensions of the Appellants expressed in the submissions and also the submissions of BLMCL *inter alia*, that having asserted that the State Commission found large-scale irregularities in the ICB organized by RWPL and, therefore, the State Commission quashed the earlier ICB, it is strange that the Appellants should now ask for the same ICB document to be used by BLMCL to conduct fresh bidding exercise and that there is no provision in law which empowers the State Commission to review and approve draft tender document and its role is limited to determining the transfer price of lignite. We are, however, of the opinion that at this stage it is not necessary to interfere with the bidding process. We are mindful of the fact that in the earlier order, the State Commission has severely commented upon the serious irregularities in the earlier bidding process and had quashed earlier ICB. The State Commission will have to be, therefore,

very careful. Final decision should be taken by the State Commission after hearing all concerned and after applying its mind to all relevant aspects of the matter. We have noted that paragraph 17 of the impugned order, which we have quoted hereinabove, the State Commission has cautioned BLMCL that the bidding process has to be fair and transparent. It is also observed that interest of consumers of the State, who ultimately bear the cost through tariff must always be kept in mind. The State Commission has expressed hope that BLMCL being a Government company will follow principles of fair play and reasonableness and will hold the bidding process in a transparent manner and obtain the price and submit the same to the State Commission. The State Commission has observed that thereafter it will consider all aspects before taking a final decision.

14. We are sure that what the State Commission has expressed in paragraph 17 of the impugned order will be followed by it and the BLMCL in letter and spirit. We have no reason to express

any apprehension that the State Commission will not do so because the State Commission had quashed the earlier bidding because of serious irregularities. The State Commission was, therefore, conscious of its duties and behaved like a protector of consumer interest. It would be, therefore, wrong to presume that the State Commission will not act in accordance with what it has expressed in the impugned order. The State Commission will have the opportunity to determine/approve the transfer price of lignite after BLMCL approaches the State Commission with the lignite mining extraction cost which is finalized as part of the bidding process. At that stage, it will be open to the State Commission to consider all relevant aspects before approving the transfer price in accordance with law. We are informed that at this stage, public notice is issued and all concerned are heard. Needless to say that the Appellants would also be heard. We hope and trust that the State Commission will take a final decision having regard to the background of the case and the apprehension expressed by the Appellants, which we have quoted *in extenso* in this order with a purpose and keeping in mind

interest of the consumers and the case of BLMCL. The State Commission must adopt a balanced approach. In case the Appellants are aggrieved by the final decision taken by the State Commission, they can always take recourse to necessary remedy in accordance with law to redress their grievance. With the above observations, we dispose of the appeal. We make it clear however that nothing said by us in this order should be treated as expression of our opinion on the merits of either the Appellants' case or the Respondents' case.

15. Pronounced in the Open Court on this 6th day of May, 2015.

(Rakesh Nath)
Technical Member

(Justice Ranjana P. Desai)
Chairperson

✓ **REPORTABLE / ~~NON-REPORTABLE~~**