

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APPEAL No. 25 OF 2019
& IA No. 23 of 2019**

Dated: 12th January, 2022

**Coram : Hon`ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon`ble Dr. Ashutosh Karnatak, Technical Member (PNG)**

In the matter of:

**KEI-RSOS Petroleum and Energy Private Limited
Having its office at
C-156, Aishwarya Enclave
Venkateshwar Nagar
Rajahmundary - 500103**

... Appellant(s)

VERSUS

**1. Petroleum and Natural Gas Regulatory Board
Having its office at
First Floor, World Trade Centre
Babar Road, New Delhi – 110 001**

... Respondent

Counsel on record for the Appellant(s): Mr. Ankur Khandelwal

**Counsel on record for the Respondent(s): Mr. Utkarsh Sharma
Ms. Pinki Mehra
Ms. Tanuja Dhoulakhandi
Ms. Shipra Malhotra
Mr. Mohit Budhiraja**

JUDGMENT (ORAL)

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. This matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. By Letter of Intent (LoI) issued on 06.03.2018 by the respondent *Petroleum and Natural Gas Regulatory Board* (for short, "the Board"), the appellant, one of the bidders in the process of 8th round of bidding, had been granted authorisation in respect of *Yanam District Geographical Area (GA)* for development of City Gas Distribution Network. The conditions to the said grant included submission of Performance Bank Guarantee ("PBG") for an amount of Rs. 26.4 crores, within 15 days from the issuance of the said communication, in terms of *Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008* (for short, "Authorisation Regulations"). The appellant concededly failed to furnish the PBG within the stipulated period of 15 days and, upon his request, was granted extension to comply on or before 09.04.2018, as was also allowable under the regulations. The said timeline was also not met. This led eventually to issuance of order dated 18.04.2018 whereby the additional bid bond in the sum of Rs. 6.6 crores, that had been furnished by the appellant at the time of breaking of tie (with another bidder viz. Godavari Gas), was forfeited, and the appellant was barred from participation in such process for a period of three years. The

appellant questioned the said decision communicated on 18.04.2018 by a review, which petition was dismissed on the basis of majority opinion by two members of the Board rendered on 05.11.2018, one of the Members—Member (Legal), being in minority as per his opinion dated 22.10.2018, he having agreed with the request of the appellant that under the amendments to the Authorisation Regulations that had been brought into effect 06.04.2018, the provision being beneficial, the request of the appellant for extension of time deserved to be accepted.

3. Concededly the bar against participation by the appellant in the bidding process as imposed by the impugned decision (dated 18.04.2018) has already run its course, the period of three years having gone by during the pendency of the review proceedings before the Board and the appeal at hand. The concern in that regard, expressed by the appellant, is thus rendered mere academic.

4. The present appeal was filed assailing the original order dated 18.04.2018 as indeed the majority opinion on the review petition rendered on 05.11.2018.

5. At the hearing, it is agreed that the core issue which needs to be addressed by us is as to whether the amendment to the Authorising Regulations brought into force from 06.04.2018 would have retrospective effect in as much as, if such view were to be taken, the appellant would be entitled to an extension of time beyond the period given by the un-amended regulations, wherein the PBG was to be furnished within 15 days, the Board being competent to grant extension “not more than 15

days”. In contrast, under the amended regulations, the initial period has been enlarged to 30 days, though with possibility of extension by another 15 days. It is pointed out that even while the period under the un-amended regulations had not yet elapsed (the extension granted by the Board being valid up to 09.04.2018) the amendment had come into effect from 06.04.2018.

6. An overview of the effect of the amendments brought about, seen in contrast against the pre-amended position of the regulations, is necessary

7. The authorisation was granted by the Board in terms of Regulation 7 of the un-amended regulations, which read thus:

“Regulation 7: Bidding Criteria

(1) The Board, while considering the proposal for authorization, shall tabulate and compare all financial bids meeting the minimum eligibility criteria, as per the bidding criteria given below, namely:-

(a) lowness of the present value of the overall unit network tariff, to be paid by an entity to the entity authorised to operate the CGD network, for usage of the proposed CGD network by all categories of customers of natural gas (including supply of natural gas to online compressor for CNG) over the economic life of the CGD network project (twenty five years from the date of authorization). The entity is required to bid for the tariff charge for each year of the economic life of the project and the variation in unit network tariff between any two consecutive years should not be more than ten per cent. This shall have a weightage of seventy per cent.

(b) lowness of the present value of the compression charge for CNG, to be paid by an entity to the entity authorised to operate the CGD network, for dispensing in the CNG stations in the proposed CGD network over the economic life of the project. The entity is required to bid for the compression charge for each year of the economic life of the project and the variation in compression charge for CNG between any two consecutive years should not be more than ten per cent. This shall have a weightage of thirty per cent.

(c) Minimum Work Programme for infrastructure for PNG domestic connections and inch-kilometer of pipeline to be laid by the successful bidder

Infrastructure for PNG domestic connections– The Board shall work out the target for infrastructure for PNG domestic connections as five per cent of the households of the respective geographical area to be achieved by the successful bidder during the first five years from the date of grant of authorisation in Schedule D as under, namely:---

- (i) the successful bidder shall achieve fifteen per cent, fifty per cent, seventy per cent. and one hundred per cent of this target by the end of second year, third year, fourth year and fifth year respectively; and*
- (ii) the Board may consider carry forward of the target from one year to another within the period of five years.*

Inch-kilometer of pipeline– The Board shall work out the target for inch kilometer of pipeline, for which both steel pipeline and MDPE pipeline shall be considered, as per the following, namely:-

- (i) for geographical areas having an area of less than or equal to 1,000 square kilometers, product of 0.65 and the area in square kilometers of the respective geographical area;*
- (ii) for geographical areas having an area of more than 1,000 square kilometers and less than or equal to 5,000 square kilometres, product of 0.36 and the area in square kilometres of the respective geographical area subject to a minimum of 650 inch-kilometer of pipeline;*
- (iii) for geographical areas having an area of more than 5,000 square kilometres, product of 0.07 and the area in square kilometres of the respective geographical area subject to a minimum of 1,800 inch kilometer of pipeline.*

The target for inch-kilometer of pipeline worked out as per the above shall be achieved by the successful bidder during the first five years from

the date of grant of authorisation in Schedule D as under, namely:-

- (i) the successful bidder shall achieve twenty per cent., fifty per cent, eighty per cent, ninety per cent and one hundred per cent of this target by the end of first year, second year, third year, fourth year and fifth year respectively covering all the charge areas; and*
- (ii) the Board may consider carry forward of the target from one year to another within the period of five years.*

(2) The present value in the criteria at clauses (a) to (b) of sub-regulation (1) shall be calculated by the entity using a discount rate equal to fourteen percent.

(3) Entity with the highest composite score considering the criteria under clauses (a) to (b) of sub-regulation (1) and as illustrated in Schedule C (1) shall be declared as successful in the bid. In case of a tie in the highest composite score between the bidding entities, the entity which has quoted the highest additional bid bond in the bid submitted shall be declared as successful bidder. The entity on being declared successful, through a written communication, shall submit the quoted additional bid bond within 21 working days from the issuance of the said communication, failing which the entire bid bond submitted by the entity shall be encashed or forfeited and in such a case, an opportunity to submit the additional bid bond shall be offered to the entity whose quote for the additional bid bond was next highest and such an entity shall submit the quoted additional bid bond, within 21 working days of such intimation in writing from the Board, failing which the entire bid bond submitted by that entity shall be encashed or forfeited. The above process shall be repeated till additional bid bond is either received or no entity in a tie is left out: Provided that in such a case where an entity does not submit the additional bid bond upon receiving intimation to do so from the Board such entity shall be considered at default and shall be barred for a minimum period of three years from bidding.”

8. The corresponding clause in the amended Regulations is as under:

“Regulation 7: Bidding Criteria

(1) The Board, while considering the proposal for authorization, shall tabulate and compare all financial bids meeting the minimum eligibility criteria, as per the bidding criteria given below, namely:-

1(a) The Board, while considering the proposal for authorisation, shall tabulate and compare all financial bids meeting the minimum eligibility criteria, as per the bidding criteria specified below, namely:-

S.No.	Bidding Criteria	Weightage	Explanation
1.	Lowness of transportation rate for CGD – in rupees per million British ThermalUnit(Rs./MMBTU)	10	Bidder is required to quote transportation rate for CGD only for the first contract year which shall not be less than Rs. 30/MMBTU. Rates for the Subsequent contract years shall be Derived

			considering the quoted rate and escalation as per Note.
2.	Lowness of transportation rate for CNG-in rupees per kilo gram (Rs. / kg)	20	-
3.	Highness of number of natural gas Stations (online and daughter booster stations) to be installed within 8 contract years from the date of authorisation	20	-
4.	Highness of number of domestic piped natural gas connections to be achieved within 8 contract years from the date of authorisation	50	-
5.	Highness of inch-kilometer of steel pipeline (including sub-transmission steel pipelines) to be laid within 8 contract years from the date of authorisation	10	-

1(b) Successful bidder shall be required to achieve the year-wise work programme within 8 contract years as per details given below, namely:-

PNG Connections (cumulative)		Natural Gas Stations (cumulative)		Inch-km of steel pipeline (cumulative)	
By the end of contract year	% of work programme	By the end of contract year	% of work programme	By the end of contract year	% of work programme
1 st	Nil	1 st	Nil	1 st	5
2 nd	10	2 nd	15	2 nd	20
3 rd	20	3 rd	30	3 rd	40

4 th	30	4 th	45	4 th	60
5 th	40	5 th	60	5 th	70
6 th	60	6 th	75	6 th	80
7 th	80	7 th	90	7 th	90
8 th	100	8 th	100	8 th	100
<p><i>Note - In case derived numbers are in fraction, the same shall be rounded off to the nearest whole number and fraction 0.5 shall be rounded off to next higher whole number.</i></p>					

(3) Bidder entity with the highest composite score, considering the criteria under subregulation (1) and as illustrated in Schedule C (1), shall be declared as successful bidder.

Provided that in case of tie in the evaluated composite score, the successful bidder shall be decided based on the highness of numbers of PNG connections among the tied bidding entities. In case there is tie on number of PNG connections also, highness of inch-kilometer steel pipeline shall be considered and thereafter in case of tie in inch kilometer as well, highness of numbers of natural gas stations shall be considered.”

9. The Regulations provide for requirement of Performance Bond to be furnished, the Clause 9 reading thus before amendment:

“9. Performance Bond

(1) Grant of authorization shall be issued to the selected entity after it furnishes the performance bond in the form of demand draft or pay order or bank guarantee from any scheduled bank for the amount equal to four times the amount of bid bond and the bank guarantee shall be valid initially for the period of five years and thereafter for the period of grant of authorization by the Board.

(2) The amount of the bid bond and performance bond shall be rounded off to the nearest multiple of lakh rupees and for the purpose any part of a rupee consisting of paise shall be ignored and thereafter if such amount is not a multiple of lakh, then, if the last figure in that amount is fifty thousand or more, the amount shall be increased to the next higher amount which is a multiple of lakh and if the last figure in that amount is less than fifty thousand, the amount shall be reduced to the next lower amount which is a multiple of lakh.

(3) *The performance bond has been prescribed for guaranteeing the timely commissioning of the proposed CGD network as per the prescribed targets and also for meeting the service obligations by the selected entity during the operating phase of the project.”*

10. After the amendment the clause reads thus:

“9. Performance Bond

(1) Grant of authorisation shall be issued to the successful entity after it furnishes the performance bond in the form of demand draft or pay order or bank guarantee from any scheduled bank for the amount as per details given below, namely:-

S.No.	Population in the Geographical Area, as per 2011 Census of India	Amount of Performance Bond (Rupees)
1	5 million or more	500 Million
2	2 million or more but less than 5million	330 Million
3	1 million or more but less than 2 million	250 Million
4	0.5 million or more but less than 1 million	150 million
5	0.25 million or more but less than 0.50 million	80 Million
6	0.1 million or more but less than 0.25 million	30 Million
7	Less than 0.1 million	15 Million

In case the performance bond is submitted through bank guarantee, the performance bond guarantee (PBG) shall be valid initially for a period of three years and thereafter shall be renewed, at least three months before expiry of the same, for next three years and so on until the period of authorisation. It is the responsibility of the entity to timely renew the PBG and in case the PBG is not so renewed at least one month before expiry of the PBG, the PBG shall be encashed by the Board and the authorisation may be terminated. PBG amount shall be reduced to the value of 40% of the initial PBG furnished by the successful bidder after 100% achievement of the work programme or

on expiry of exclusivity from purview of common carrier or contract carrier, whichever is later.

3) The performance bond has been prescribed for guaranteeing the timely commissioning of the proposed CGD network as per the prescribed targets and also for meeting the service obligations by the selected entity during the operating phase of the project.”

11. The post-declaration of the result of the bidding process was covered by regulations 10 (1) of un-amended regulations as under:

“10. Grant of Authorization

(1) The selected entity shall be issued a letter of intent (LOI) to grant authorization upon finalization of the bid. The entity shall be required to furnish Performance Bank Guarantee within 15 days of issue of LOI and complete such other formalities as may be directed by the Board. Upon furnishing the Performance Bank Guarantee and completion of other formalities, the authorization shall be granted to the selected entity in the form of Schedule D.

Provided that the Board may extend the date for submission of Performance Bond for a period not exceeding 15 working days failing which LOI shall deemed to be withdrawn or cancelled:

Provided further that in case of non-submission of Performance Bond within the stipulated time the bid bond (including additional bid bond) shall be forfeited or encashed and such entity shall be considered at default and shall be barred for a minimum period of three years from bidding. Further, the process of issuance of LOI and grant of authorization to the next qualified entity at the stage of tie shall be carried out in the same manner as prescribed in sub-regulation (3) of regulation 7:

Provided also that, in case of single bid remaining at this stage, the entire bidding process for the said geographical area shall be annulled and the defaulting entity shall be barred for a minimum period of three year from bidding.

(2) The grant of authorization is subject to the entity achieving a firm natural gas tie up and a financial closure as per regulation 11.

(3) The grant of authorisation to the entity shall not be renounced by way of sale, assignment, transfer or surrender to any person or entity during the period of five years from date of its issue or till the achievement of Minimum Work Programme, whichever is earlier;

Provided that the entity may induct eligible new partner as long as it remains a lead partner without impacting the eligibility criteria as provided in the regulations

Provided further that, for the purpose of remaining to be a lead partner, the entity shall have equity of more than fifty per cent. after inducting the new partner.

(4) The entity intending to renunciate the authorization in favour of another entity after the end of the three years shall submit a proposal to the Board at least thirty days in advance and shall provide all information as may be called for by the Board.

(5) The Board after satisfying itself that the proposal will not adversely affect the existing or proposed activities of laying, building, operating or expansion of the CGD network shall either accept the proposal in full or with such modifications as it may deem fit and in a case where the entity is permitted by the Board to take over the activities of laying, building, operating or expanding the CGD network such entity shall abide by the existing or modified terms and conditions of the authorization including compliance with the service obligations and adherence to the quality of service standards:

Provided that the Board reserves the right to reject the proposal in public interest and in such a case the Board shall provide in writing the reasons for such rejection.”

12. After amendment, the clause is in following shape:

“10. Grant of Authorization

(1) The successful entity shall be issued a letter of intent (LOI) upon finalisation of the bid. The entity shall be required to furnish performance bond within 30 days of issue of LOI and complete such other formalities as may be required by the Board. Upon furnishing the performance bond and completion of such other formalities, the authorisation shall be granted to the successful entity, in the format given in Schedule D, within 30 days;

Provided that the Board may extend the date for submission of performance bond for a period not exceeding 15 days, failing which LOI shall be deemed to have been withdrawn or cancelled.

Provided further that in case of non-submission of performance bond within the stipulated time, the bid bond shall be forfeited or encashed and such bidder entity shall be considered at default and shall be barred for a minimum period of three years from bidding. Further, the process of issuance of LOI and grant of authorisation to the bidder entity with second highest composite score shall be carried out in the same manner as specified in sub-regulation (3) of regulation 7.

(2) The grant of authorization is subject to the entity achieving a firm natural gas tie up and a financial closure as per regulation 11.

(3) The grant of authorisation to the entity shall not be assigned by way of sale, transfer or any other manner or surrendered to or in favour of any person or entity during the period of five years from the date of its issue or till the achievement of work programme, whichever is earlier;

Provided that there shall be no bar on the entity on transferring less than fifty per cent equity shares during such period of five years from the date of authorisation or until the achievement of work programme, whichever is earlier, subject to the condition that the lead partner of the original consortium or joint venture shall hold not less than the percentage stake lower than any other partners. The lead partner shall be declared upfront in the bid.

No restructuring of the entity is allowed after submission of the bid and before issuance of Grant of Authorization.

Provided also that the Board may accept transfer of authorisation by the entity to its wholly owned subsidiary company, subject to the condition that the entity provides to the Board a corporate guarantee, in a form specified at Appendix III.

(4) The entity intending to renunciate the authorization in favour of another entity after the end of the five years or till achievement of cumulative work programme to be achieved by the end of five contract years, whichever is later shall submit a proposal to the Board at least thirty days in advance and shall provide all information as may be called for by the Board.

(5) The Board after satisfying itself that the proposal will not adversely affect the existing or proposed activities of laying, building, operating or expansion of the CGD network shall either accept the proposal in full or with such modifications as it may deem fit and in a case where the entity is permitted by the Board to take over the activities of laying, building, operating or expanding the CGD network such entity shall abide by the existing or modified terms and conditions of the authorization including compliance with the service obligations and adherence to the quality of service standards:

Provided that the Board reserves the right to reject the proposal in public interest and in such a case the Board shall provide in writing the reasons for such rejection.”

13. Even from the bare reading of the above clause in the authorisation regulations, prior to its amendment of 06.04.2018, it is clear that the Board did not have any power to give extension beyond the extension of 15 days under the first proviso. In case the chosen entity failed to submit the performance bond within the extended period, the bid bond (including additional bid bond) is to be treated as having been forfeited and the Lol “deemed to be withdrawn or cancelled”. Clearly, there is nothing to be done by the Board except to ensure that the timelines are strictly adhered to. In case of default in compliance with the regulations and timelines, by virtue and force of the regulations, the Lol stands withdrawn or cancelled, it not being within the domain or discretionary power of the Board to give any further leverage.

14. We are not impressed with the logic of “beneficial legislation” expressed by the Member (Legal) in his dissenting opinion. These are commercial regulations and have to be applied strictly

15. Undoubtedly, the regulations were amended with effect from 06.04.2018. Without doubt, under the amended regulations, the timelines were 30 days initially with a possible extension of 15 days. This would, if applied, take the matter beyond the date up to which the default committed by the appellant was allowed to be suffered. But we cannot ignore that the amendments brought about with effect from 06.04.2018 were not merely procedural in the matter of settling the timelines for such purposes as above. The authorisation regulations had been given a complete overhaul by the amendment carried. The technical criteria and the financial terms of grant of authorisation had undergone total change. In these circumstances, the amendments effective from 06.04.2018 were not mere procedural but substantive. Such substantive amendments cannot be allowed to have retrospective effect.

16. We may add that the contract award activities cease after issuance of the Lol which event had occurred on 06.03.2018. there being no other entity left in the fray, after failure on the part of the appellant to comply with requirements of the Regulations, the process itself was annulled by the Board. In this view, there is no occasion for its revival by this tribunal in appeal. The appellant would have the liberty to participate again as and when the grant of authorization for the GA is initiated in future.

17. For the forgoing reasons, we find no error, illegality or infirmity in the impugned order of the respondent Board. The appeal, therefore, is found

devoid of merits and is dismissed. The pending application is rendered infructuous and is disposed of accordingly.

18. The Registrar shall certify a copy of this judgment to both the parties.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERENCING ON THIS 12th DAY OF JANUARY, 2022.**

**(Dr. Ashutosh Karnatak)
Technical Member (P&NG)**

**(Justice R.K. Gauba)
Officiating Chairperson**

mg/mjk