

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

**APPEAL No. 32 OF 2024 &
IA NOS. 24 & 25 OF 2024**

Dated: 15th May, 2024

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Dr. Ashutosh Karnatak, Technical Member (P&NG)

In the matter of:

BHARAT PETROLEUM CORPORATION LIMITED

Through Mr. Vishal Paliwal, Project Leader

(Piyala Jewar ATF Pipeline Project)

Bharat Bhawan, No. 4 & 6,

Currimbhoy Road,

Ballard Estate, Mumbai – 400001.

...Appellant

VERSUS

**PETROLEUM & NATURAL GAS REGULATORY
BOARD**

Through the Secretary, PNGRB

Having its office at 1st Floor,

World Trade Centre,

Babar Road,

New Delhi- 110 001

... Respondent

Counsel for the Appellant(s) : Mr. Rajat Navet
Mr. Shashi Kant

Counsel for the Respondent(s) : Mr. Utkarsh Sharma
Ms. Sanskriti Bhardwaj
Ms. Tanuja Dhoulakhandi
Mr. Suyash Gaur
Ms. Harshita Tomar
Mr. Kartikey Joshi for Res.1

JUDGEMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

1. The present Appeal has been filed challenging the validity of Public Notice dated 14.12.2023 issued by the PNGRB, whereby the entire bidding process, initiated for laying, building, operating or expanding a petroleum product [ATF] pipeline from Malkapur to Hyderabad International Airport, vide Bid No. BID/PPL/13/2022/06/MHAPL, was annulled by the Board; and, subsequently, a fresh tender process was initiated by issuance of the fresh notice inviting tender by the PNGRB on 01.01.2024.

II. CONTENTS OF THE IMPUGNED PUBLIC NOTICE DATED 14.12.2023:

2. As it is the subject matter of challenge in the present appeal, it is useful to note the contents of the Public Notice dated 14.12.2023, which reads as under:

“Petroleum and Natural Gas Regulatory Board
1st Floor, World Trade Centre, Babar Road, New Delhi -110001 Tel
No: 23457700, Fax No: 23709151

14th December, 2023

Public Notice No: PNGRB/Auth/3-PPPL(01)/2023

Bid No: BID/PPL/13/2022/06/MHAPL

PUBLIC NOTICE

Online Application cum bids through e-procurement portal of NIC were invited from the interested and eligible entities on single stage two

bid system by Petroleum & Natural Gas Regulatory Board ('PNGRB/Board') for authorization of Malkapur (Telangana) to Hyderabad International Airport (Telangana) Petroleum and Petroleum Product (ATF) Pipeline spanning about 59 km with minimum system capacity of at least 0.75 MMTPA from 1st year to the entire economic life including common carrier capacity under Regulation 5 of PNGRB (Authorizing Entities to Lay, Build, Operate or Expand Petroleum and Petroleum Products Pipelines) Regulations, 2010) ('PPPL Authorization Regulations') vide Bid No. BID/PPL/13/2022/06/MHAPL.

2. In pursuance to the aforesaid public notice "NOTICE INVITING TENDERS", as per the Regulation 5(7) of the PPPL Authorization Regulations technical bids were received from Bharat Petroleum Corporation Limited (BPCL) and Indian Oil Corporation Limited (IOCL). Subsequently, on examination of the technical bid(s), it was observed that both bidders i.e. IOCL & BPCL met the eligibility criteria and the requirements as laid down under the PPPL Authorization Regulations as well as Application-cum-Bid Documents ('ACBD').

3. Upon qualifying the Technical Bids, the Financial Bids were opened, wherein it was observed that the tariff quoted by both the technically qualified bidders were unreasonable and not a profit-making proposition to sustain the operation and maintenance of the pipeline.

4. Since the both bidders had quoted unreasonable tariff which would not be able to sustain the operation and maintenance of the pipeline for the initial 10 years, therefore PNGRB has decided to annul the entire bidding process of the above Bid No. BID/PPL/13/2022/06/MHAPL in terms of the following provisions of ACBD: -

I. Clause No. 11 of Invitation for Application-Cum-Bid: PNGRB reserves the right to accept/ reject any or all Application-cum-Bids without assigning any reason(s) whatsoever.

II. Instructions to Bidders:

(a) Clause 4.1: PNGRB reserves the right to accept or reject any or all bid (s), and to annul the Application cum Bid process and reject all bids at any time prior to award of work, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for the PNGRB's action.

(b) Clause 18.1.1(e): Note#4 states that the Capex considered in the DFR must be reasonable and any unreasonable Capex may lead to rejection.

(c) Clause No. 31.3: PNGRB has the right to cancel the Application Cum-Bid.

III. Disclaimer: The Disclaimer clause in the ACBD states that “the issue of this bid does not imply that the Board is bound to select a bidder for the project and the Board reserves the right to reject all or any of the bidders or bids without assigning any reason whatsoever”.

III. CONTENTS OF THE APPEAL:

3. The relief(s) sought by the appellant, in the present appeal are:
(a) to set aside the impugned decision dated 14.12.2023 passed by the Petroleum & Natural Gas Regulatory Board bearing Ref. No. PNGRB/Auth/3-PPPL(01)/2023 annulling Bid No. BID/PPL/13/2022/06/MHAPL pertaining to the Malkapur- Hyderabad International Airport Petroleum and Petroleum Product (ATF Pipeline); (b) direct the PNGRB to accept the Appellant's Bid and issue the authorization letter for the Malkapur Hyderabad ATF Pipeline to the Appellant on the basis

of its bid; and (c) cancel bid No. BID/PPPL/14/2024/01/MHAPL dated 01.01.2024 issued by the Respondent for the Malkapur-Hyderabad International Airport ATF Pipeline.

4. The Appellant is a Government of India undertaking incorporated under the Companies Act, 1956 and is, inter alia, engaged in the business of Petroleum and Petroleum Products. Pursuant to an Expression of Interest (Eoi) dated 10.05.2022, submitted by Indian Oil Corporation Ltd. for laying, building and operating a common carrier ATF Pipeline from Malkapur (Telangana) to Hyderabad International Airport (Telangana), the PNGRB had issued a public notice dated 17.05.2022 seeking comments on IOCL's Eoi; subsequently, an open house discussion took place on 28.06.2022, minutes of which was circulated on 07.07.2022; during the open house discussions, participants, including the Appellant, were advised to submit various confirmations/documents, which were submitted by the Appellant on 01.09.2022; on 26.09.2022, the Board issued Public Notice No. BID/PPL/13/2022/06/MHAPL/01 inviting online applications cum bids on a single stage two bid system from interested and eligible entities for authorization of Malkapur – Hyderabad International Airport Petroleum and Petroleum Products (ATF) Pipeline (“the ATF Pipeline” for short) spanning about 59 km with a minimum system capacity of at least 0.75 MMTPA from the first year of its operation to the entire economic life including common carrier capacity, under Regulation 5 of PNGRB (Authorizing Entities to Lay, Build, Operate or Expand Petroleum Products Pipelines) Regulations, 2010 (“the 2010 Regulations” for short).

5. The Appellant submitted its bid, which included the financial bid along with the summary sheet of the feasibility report. Technical bids

were opened on 02.03.2023, pursuant to which certain technical clarifications were sought from the Appellant by the Board by way of its letter dated 12.04.2023, which were replied to and provided by the Appellant by way of its reply dated 19.04.2023. The Appellant as well as Indian Oil Corporation Ltd. were found technically qualified when technical bids were opened on 02.03.2023. Thereafter the financial bids were opened on 01.05.2023, wherein the Appellant was the successful bidder with the highest composite score. Subsequent thereto, the Board, by its letter dated 23.06.2023, sought certain clarifications from the Appellant with respect to its financial bid. The principal raised by the Hon'ble Board, in the said letter, was that the variable transportation tariff quoted by the Appellant for the first 10 years appeared to be highly subsidized and unrealistic and may not cover the variable operating cost of the pipeline. A confirmation was sought from the Appellant that the tariff considered after 10 years shall not be claimed by it, and the Appellant shall accept the tariff fixed by the Hon'ble Board as per Regulations.

6. Pursuant thereto, a meeting was held on 13.07.2023 between officials of the Board and officials of the Appellant when, the Appellant made its presentation and sought to justify the tariff quoted by it. It was also confirmed by the Appellant that, after the 10th year, it would accept the tariff as fixed by the PNGRB.

7. Subsequently, the Minutes of the Meeting held on 13.07.2023 was circulated by the Board wherein it was recorded that the Board had informed the Appellant that the bid quoted by it was unreasonable and not a profit making proposition to sustain the operation and maintenance of the subject pipeline, and that the Board had concluded that the pipeline project was not viable on the tariff quoted by the

Appellant (as well as by the other bidder i.e. Indian Oil Corporation Ltd.). The Appellant, by way of its letter dated 10.08.2023, responded to the minutes of meeting dated 13.07.2023 and submitted that :- (i) the bid submitted by them was fully compliant with the bid document / applicable Regulations; (ii) the tariff quoted by the Appellant for the initial 10 years, and thereafter from 11th to 25th years, was also fully compliant with the bid document / applicable regulations. (iii) the Tariff quoted took into account the overall business aspects, refinery product evacuation, current cost of product placement etc, and hence the subject pipeline operation would be fully sustainable based on the tariff quoted by the Appellant; (iv) the tariff quoted by Appellant for initial 10 years and thereafter from 11th to 25th years was comparable to the Pipeline tariffs authorized by PNGRB in past; (v) the Tariff fixed by the Board, from the 11th year onwards as per Regulations, would be acceptable to the Appellant; (vi) regarding the Board's query on viability of the project, the Malkapur Hyderabad International Airport pipeline was viable considering the cost incurred by the Appellant on alternate mode of transport of ATF i.e. by road; (vii) recently PNGRB had authorized Piyala Jewar ATF Pipeline to the Appellant, wherein the tariff quoted were on similar lines, and the Appellant was progressing much ahead of schedule, and had made more than 50 percent commitment within 9 months of authorization; (viii) the conclusion of the Board that the pipeline project was not viable, based on the tariff quoted by the Appellant, was against the very basics of the tendering process; (ix) the conclusion was against the Board's own regulations which was the applicable law in the present case along with other general laws; Regulation 7 of the 2010 Regulations provides for the criteria for selection of the successful bidder wherein one of the criteria is the lowness of the tariff; (x) it is up to the successful bidder to

work/fulfil its obligations as per the authorization provided under the regulations and sufficient safeguards are provided under the regulations in case of failure of the successful bidder to meet the obligations; (xi) the tariff quoted by the Appellant was in line with the industry practice for such projects, and the tariff quoted by IOCL (L2 bidder) clearly established such industry/standard practice; (xii) the Board, in the past, had issued authorization to other entities like IOCL for ATF Pipeline to Navi Mumbai International Airport on similarly placed bids which establishes that tariff quoted by the Appellant is in line with the applicable laws/regulations and practices; and (xiii) the conclusion arrived at by the Board, regarding the viability of the project, was arbitrary in nature and violative of the bid document and the regulations.

8. On the basis of these submissions, the Board was requested to issue the authorization letter to the Appellant (being the successful bidder for the Malkapur-Hyderabad ATF Pipeline) with the assurance that it would complete the pipeline laying and commissioning within the stipulated time and would follow all applicable regulations during the construction and the operative phase of the pipeline.

9. However the Board, by way of its order/public notice dated 14.12.2023, without considering and/or taking into account the above submissions, had arbitrarily annulled the entire bidding process on the purported ground that the tariff quoted by both the technically qualified bidders (i.e. Appellant and IOCL) were unreasonable and not a profit-making proposition to sustain the operation and maintenance of the pipeline. Within a few days of annulling the bidding process, the Board issued a fresh notice inviting tender on 01.01.2024 for the same pipeline i.e. Malkapur-Hyderabad International Airport ATF Pipeline.

10. The grounds on which the impugned public notice is subjected to challenge in this appeal, are:- (i) the PNGRB erred in passing the impugned order/public notice dated 14.12.2023 by which it had annulled the entire bidding process of the Malkapur- Hyderabad International Airport ATF Pipeline on the ground that it had observed that the tariff quoted by both the technically qualified bidders i.e. BPCL and Indian Oil Corporation Ltd was unreasonable and not a profit making proposition to sustain the operation and maintenance of the pipeline; (ii) the action of the PNGRB is arbitrary, irrational, biased and perverse, inasmuch as, the PNGRB has itself, over the last many years, issued a number of authorizations for laying common carrier pipelines on similarly placed bids; (iii) the PNGRB erred in holding that the bid made by the Appellant was unreasonable and not a profit making proposition to sustain the operation and maintenance of the pipeline, inasmuch as, the Board has itself, over the last many years, issued authorizations for laying common carrier pipelines based on similarly placed bids, including but not limited to the Rewari-Kanpur Petroleum Product Pipeline (in favour of HPCL), Jawaharlal Nehru Port Trust to Navi Mumbai International Airport ATF Pipeline (in favour of IOCL), Piyala -Jewar International Airport ATF Pipeline (in favour of the Appellant) as well as many other pipelines. (iv) the discretion vested with the PNGRB has to be exercised judiciously which has not been done in the present case; (v) the decision making process suffers from irregularities and illegalities, inasmuch as the same has been made without considering or dealing with the submissions of the Appellant; (vi) the decision of the PNGRB is non speaking, non reasoned, in so far as the conclusion arrived at by the PNGRB (on the basis of which the entire bidding process has been annulled) is not supported by any justifiable reasons; (vii) the PNGRB erred in holding that the bidder

would not be able to sustain the operation and maintenance of the pipeline by totally ignoring the fact that Pipelines authorized on similar bids (including but not limited to HPCL's Rewari Kanpur Pipeline) have been functional and operational for many years; (viii) the PNGRB failed to appreciate that the tariff quoted by the Appellant for the first 10 years is as per Standard Industry Practice(s) and, with the Appellant having agreed to comply with the tariff fixed by the Board from the 11th year onwards, the bid submitted by the Appellant ought to have been approved and authorization issued in their favour; (ix) the PNGRB failed to appreciate that the tariff quoted by the Appellant was after taking into account the overall business aspects, refinery product evacuation, current cost of product placement etc. and thus the operation and maintenance of the said pipeline was sustainable based on the tariff quoted by the Appellant; (x) the PNGRB failed to appreciate that low tariff is itself a major criterion fixed by the Board itself to determine the successful bidder. Furthermore, the regulations more particularly Regulation 7 of the 2010 Regulations provides for criteria for selection of the successful bidder wherein one of the criteria is the lowness of the tariff and, as such, cancellation of the entire bidding process on the ground of purported low tariff is contrary and in violation of the Act and the Regulations; (xi) the PNGRB failed to appreciate that sufficient safeguards are provided and incorporated in the Regulations in case of failure of the successful bidder to meet its obligations and, therefore, it is for the bidder to fulfill its obligations as per its quoted bid; (xii) the PNGRB failed to appreciate that the bid submitted by the Appellant is well within the parameters of the bid document and does not violate any terms thereof. The purpose of tendering process being to secure the best price/tariff for consumers, sufficient reasons exist for setting aside the impugned order dated

14.12.2023 and grant of authorization in favour of the Appellant; (xiii) the PNGRB failed to appreciate that the bid submitted by the Appellant was strategic and competitive inasmuch as, in case the proposed ATF pipeline is laid by another entity as a common carrier, the Appellant will still have to construct storage tanks, pumping facility and lay pipeline from the Appellant's terminal to the terminal of the other entity; (xiv) issuance of a fresh notice inviting tender for the same pipeline, within a few days of cancellation of the tender/bid, even before the expiry of statutory period for filing an appeal against the cancellation order is not only illegal and perverse, but also vitiates the fresh issuance of the tender/bid; and (xv) even otherwise, the impugned decision is contrary to the facts of the case and to the well settled principles of law governing the same and are liable to be set aside.

11. The Appellant submits that this is a fit case for this Tribunal to exercise its Appellate Jurisdiction, set aside the impugned order/public notice dated 14.12.2023, and direct the Respondent to grant authorization of the Malkapur Hyderabad ATF Pipeline to the Appellant on the basis of the bid submitted by the Appellant.

IV. CONTENTS OF THE REPLY FILED ON BEHALF OF THE PNGRB:

12. In the reply filed by them, to the appeal filed by the appellant, the PNGRB stated that an Expression of Interest, in terms of Regulation 4(1) of the PPPL Authorization Regulations, was submitted by Indian Oil Corporation Limited [IOCL] to the Board on 10.05.2022, in relation to supply of Aviation Turbine Fuel [ATF] through a pipeline, proposed to be built from Malkapur (Telangana) to Hyderabad International Airport; in terms of Regulation 5(1) of the PPPL Regulations, the Board published a Public Notice dated 17.05.2022 in respect of the EOI

submitted by IOCL, announcing the commencement of the public consultation process and soliciting views on the EOI from any person or entity. Thereafter, the Board also held an Open House Discussion in relation to the proposed pipeline on 28.06.2022. After the public consultation process, the Board, vide Public Notice No. BID/PPL/13/2022/06/MHAPL dated 26.09.2022, invited bids for laying, building, operating or expanding a petroleum product [ATF] pipeline from Malkapur to Hyderabad International Airport and also issued an Application-cum-Bid-document [ACBD] to govern the bidding process. The length of the pipeline was specified as 59 kms with minimum system capacity of 0.75 MMTPA from the first year of operation of the pipeline to its entire economic life, including common carrier capacity. In terms of Regulation 7 of the PPPL Authorization Regulations, the bidding criteria were lowness of the present value of the fixed unit pipeline tariff for a period of ten years [50% weightage], lowness of the present value of the variable unit pipeline tariff for a period of ten years [20% weightage] and highness of the present value of the pipeline capacity [30% weightage].

13. It is stated by the PNGRB that Clause 11 of the Invitation for Application-cum-Bid stipulated that PNGRB reserved the right to accept/reject any or all Application-cum-Bids without assigning any reason(s) whatsoever. Clause 4.1 of the ACBD specified that PNGRB reserved the right to accept or reject any or all bid(s) and to annul the Application cum Bid process and reject all bids at any time prior to award of work, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for PNGRB's action. Further, Clause 31.3 stated that PNGRB reserved the right to cancel this Application cum Bid or

modify the requirement of the Application cum Bid. The Disclaimer appended to the ACBD clearly stated that the issue of this bid did not imply that the Board was bound to select a bidder for the Project, and the Board reserved the right to reject all or any of the Bidders or Bids without assigning any reason whatsoever. The Undertaking submitted by the bidders, including the Appellant, as Annexure-3 along with the ACBD, indicated that the bidder understood that PNGRB reserved the right to accept or reject any Application-cum-Bid and to annul the bidding process and reject all Application-cum-Bids. Till the last date of submission, two bids were received by the Board, one from the Appellant and the other from IOCL. Both the bidders were found technically qualified, subsequent to which the financial bids were opened on 01.05.2023. Upon scrutiny of the Financial Bids, the Appellant emerged as the bidder with the highest composite score. However, it was observed by the Board that the tariff figures quoted by both the entities, both for fixed unit tariff and variable unit tariff, were inordinately low, irrational and unreasonable, making the pipeline project completely unviable.

14. It is stated by the PNGRB that, in order to seek a clarification regarding the tariff figures quoted by the Appellant, in its capacity as the bidder with the highest composite score, the Board addressed letter dated 23.06.2023 to the Appellant and called it for a meeting at the Board on 13.07.2023. At the meeting, justifications were sought from the Appellant and various queries were posed to the Appellant by the Board. Post the meeting, the Minutes of the Meeting were sent to the Appellant, whereafter a letter dated 10.08.2023 was addressed by the Appellant to the Board, seeking to provide a response/clarification on certain aspects. Thereafter, the Board took up the matter for

deliberation and consideration in its meeting held on 21.11.2023. It was discussed amongst the Members of the Board that this was the third ATF Pipeline which had been put up for bidding by the Board, after the pipelines meant to supply ATF to the Navi Mumbai International Airport [Bidding in 2021] and the Jewar International Airport [Bidding in 2023] and the experience of the Board, with the bidding process undertaken in respect of the ATF Pipelines, showed that, due to the short length of the pipeline, the entities, which had the associated infrastructure near the proposed ATF Pipeline, like refinery, terminal etc., were striving to monopolize the field by ensuring that they somehow emerged as the successful bidder in the bidding process, even if it meant indulging in irrational bidding, especially in the case of bids received in relation to Jewar International Airport and the current bidding process; the Board deliberated that the said practice was undermining the sanctity of the entire bidding process and was resulting in setting an extremely wrong precedent, wherein the entire bidding process was getting manipulated and resulting in skewed figures being quoted by the entities. The said practice was also making the bidding process unfair and disturbing the level playing field, which was not in the interest of the sector, especially considering the fact that several ATF Pipelines were proposed to be put up for bidding in the near future by the Board.

15. It is thereafter stated that the Board discussed that the main reason as to why such a trend was getting established in the case of ATF Pipelines, as opposed to pipelines for other petroleum products, was because of the difference in length between ATF Pipelines and other Petroleum Product Pipelines. The Board also observed that a possible reason for quoting irrational figures in the ATF bidding process by the refinery owning entities, which were supplying ATF, was to

somehow get transportation rights through the bidding process and maximize their profits. It was noted by the Board that, since the prices of ATF were ultimately passed onto the consumers, the said practice, apart from monopolizing the entire field, also has the tendency of making the consumers vulnerable to the unreasonable demands which may be posed by a single entity, thus harming their interests. The Board noticed that the said bidding pattern was being made possible due to a lacuna existing in the Regulations, which provided for bid evaluation being done on the tariff figures quoted for ten years, whereas the economic life of the project, in terms of the Regulations, was twenty five years. Because of the said provision, entities like the Appellant were able to indulge in manipulative practices, where they quoted inordinately low tariffs for the initial ten years, knowing fully well that, since lowness of the tariff was a biddable parameter, the same shall ensure that they prove successful in the bidding process. The irrationality of the figures quoted by the Appellant was gauged by the Board from the fact that the figures were resulting in a huge negative cash flow for each of the first ten years of the project. The Board also noted as how. in order to depict a positive and reasonable Internal Rate of Return (IRR) and to justify the feasibility of the project, the Appellant, in its Feasibility Report, required to be submitted as a part of its bid [Annexure-14 to the ACBD], had then quoted highly inflated tariff figures from the eleventh year of the project, fully aware that the same are only indicative and are not relevant for bid evaluation and, in any case, the same did not hold any meaning, as the tariff from the eleventh year of the project was going to be determined by the Board. This practice was emerging as a trend only in the case of ATF Pipelines, and militated against the intention of the Board to ensure that the pipelines across the country are commercially viable on a

stand-alone basis, which is only possible through rational tariff figures being quoted, considering the only means of recovering the cost of the pipeline in order to make it commercially viable is the tariff charged by the pipeline owning entity. Further, if the bidding patterns are transparent, rational and aligned with the intention of making the pipelines commercially viable, then the bidding field is also widened, leading to a more competitive bidding process and eliminating the chances of monopolization. The Board also considered that an unviable pipeline, which is operating on losses, also leads to serious concerns about the pipeline being adequately maintained, which in turn poses safety concerns, leading to increase in chances of an accident taking place. In light of some of the pipeline accidents which have taken place in the recent past, the Board realized that it was incumbent upon it to ensure that no risks are taken in relation to the safety of the pipeline and any factor, which has the potential to compromise the safety of the pipeline, is immediately addressed.

16. It is stated that the Board, keeping the above factors in mind and in order to put an end to this practice of quoting irrational tariff figures for the first ten years to emerge successful in the bidding process and then inflate figures from the eleventh year onwards to justify the feasibility of the project, through its decision dated 14.12.2023, annulled the bidding process for the ATF Pipeline from Malkapur Terminal to Hyderabad Airport. Further, the Board thought it fit and necessary to take corrective action by introducing necessary amendments in the Regulations and plugging the lacuna existing therein, which was done by the Board on 18.12.2023. By way of the amendment, the significant changes brought about were that the Board made it incumbent for the bidders to quote the tariff for the entire

economic life of the project i.e. for each of the twenty five years and also changed the weightage assigned to each bidding criteria. As is evident from a perusal of the Board Agenda, prepared in consultation with the Board Members and finalised post their approval, a detailed analysis of the bidding figures quoted by the participating entities, including the Appellant, was undertaken by the Board and the response provided by the Appellant in its meeting with the Board on 13.07.2023 was also deliberated upon, including the admission of the Appellant that the pipeline shall be a loss-making one and their endeavour is to win the subject bid to safeguard their interest. The Board also compared the tariff figures quoted by the Appellant with the methodology adopted for tariff determination in the case of pre-PNGRB pipelines, which indicated that the tariff quoted by the appellant in the 11th year was five times higher than the tariff arrived from the earlier methodology, which lent credence to the fact that the bid offered by the Appellant was illogical. The Board further scrutinized the contents of the letter dated 10.08.2023 submitted by the Appellant to the Board and also analysed and considered the relevant clauses of the ACBD.

17. It is stated that, after an analysis of all factors, the Board came to the conclusion that, since both the bidders had quoted unrealistic and unreasonable tariff figures, which would not be sufficient to sustain the operation and maintenance of the pipeline, it was appropriate to annul the entire bidding process. Accordingly, a Public Notice dated 14.12.2023, which has been impugned by way of the present Appeal, was webhosted by the Board, providing information that the bidding process, initiated vide Bid No. BID/PPL/13/2022/06/MHAPL, had been annulled. Subsequent to the annulling of the earlier bidding process and introduction of the necessary amendments in the Regulations, the

Board, in its meeting held on 27.12.2023, decided to initiate a fresh bidding process, under the amended Regulations, for laying an ATF Pipeline from Malkapur to Hyderabad International Airport and accordingly, the Board issued Bid No. BID/PPPL/14/2024/01/ MHAPL on 29.12.2023, re-inviting bids for the said pipeline.

18. It is further stated that earlier also, the Board, in appropriate circumstances, has taken decisions to cancel/annul bidding processes. Illustratively, the bidding process in relation to the Contai-Paradip Natural Gas Pipeline had also been annulled by the Board vide Public Notice dated 15.07.2016, on the ground that the tariff bid submitted by the successful bidder [H-Energy Private Limited], like in the present case, was found to be leading to negative cash flows. H-Energy Private Limited had challenged the decision of the Board before this Hon'ble Tribunal by way of Appeal No. 211 of 2016 and this Hon'ble Tribunal, vide a detailed judgment dated 02.06.2017, had been pleased to dismiss the Appeal filed by H-Energy Private Limited.

19. It is further submitted that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction and the bid may not be accepted even if it happens to be the highest or the lowest. It has also been held in a catena of judgments that the scope of judicial review in matters pertaining to tender processes and award of contract is very limited and as long as the decision by the authority holding the bidding process is not vitiated by arbitrariness/irrationality or by mala fides/favouritism, the courts ought not to interfere with the same. There is no illegality or infirmity in the decision-making process undertaken by the Board, so as to warrant any interference from this Tribunal, and the

impugned decision has been taken by the Board completely in consonance with the provisions of the Act and the Regulations.

V. RIVAL SUBMISSIONS:

20. Elaborate submissions, both oral and written, were put forth by Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the appellant, and Sri Meet Malhotra, Learned Senior Counsel appearing on behalf of the PNGRB. It is convenient to examine the afore-said rival contentions under different heads.

VI. REASONS ASSIGNED BY THE BOARD FOR CANCELLATION OF THE ENTIRE BIDDING PROCESS:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

21. Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the appellant, would submit that, during the course of arguments, the main reason given by the PNGRB, for cancelling the bid, was that the then existing regulations permitted bidders to bid very low prices for the first ten years and thereafter bid very high numbers from the 11th year to the 25th year; and the same was not in the interest of consumers; the said submission is fallacious and is, in fact, contrary to the bid document itself as well as the record and the facts of the case; the financial bid Form, forming part of the bid document, clearly records that *“the Board shall review the tariff after 10 years of operation and fix for a block of five years thereafter on prospective basis”*; the Appellant had, in its reply dated 10.08.2023, clearly stated, in para 3.3, that *“Tariff fixed by the Board from the 11th year onwards as per Regulation shall be acceptable to BPCL”*; PNGRB was itself aware that the tariff quoted by BPCL, from the 11th years onwards, was indicative only and

that it was the Board which had to fix the tariff from the 11th year onwards (as recorded by the Board itself in its agenda note dated 21.11.2023); therefore, the self-created, self-serving purported apprehension of the PNGRB, regarding alleged higher rates from the 11th year onwards, is not borne out from the record or even otherwise; neither does the record nor the reply of PNGRB justify their action to cancel the bidding process on the ground that the tariff quoted would not sustain the operation and maintenance of the pipeline for the first 10 years; none of the objectives for which the Board has been constituted under the PNGRB Act are met by the action of the Board; and, to the contrary, the action of the Board is actually detrimental to the interests of the consumers.

B. SUBMISSIONS URGED ON BEHALF OF THE PNGRB:

22. Sri Meet Malhotra, Learned Senior Counsel appearing on behalf of the PNGRB, would submit that, post opening of the Financial Bid on 01.05.2023, a letter dated 15.05.2023 was received by the Board from IOCL raising certain concerns regarding the bid submitted by the Appellant; the contents of the letter submitted by IOCL were scrutinised by the Board, and after due deliberations and detailed analysis undertaken independently by the Board, it was noticed that not only the Appellant but also IOCL (ie the other participating entity) had quoted tariff figures, especially variable unit tariff (considering that generally in bids for pipelines the fixed unit tariff figures are quoted on the lower side and it is through the variable unit tariff quotes that the cost of the pipeline is recovered), which were inordinately low, highly subsidized and unrealistic, not sufficient to cover the variable operating cost of the pipeline and not justifying the commercial viability of the pipeline on a stand-alone basis. The Board had also noticed that, in

order to somehow justify the feasibility of the pipeline in its Feasibility Report, the Appellant had quoted highly skewed figures to achieve a reasonable IRR in respect of the project, with very high tariff figures being quoted for the 11th to 25th years to compensate for the very low figures for the first ten years. The Board, vide letter dated 23.06.2023 called the Appellant for a meeting and asked it to offer clarifications justifying its bid. In the Meeting held on 13.07.2023, the Appellant submitted that, in order to safeguard their interest, it was important to win the subject bid. They also admitted that they had quoted such figures because the prevailing regulations permitted them to quote such figures, and that this project alone may not be profitable for them. The Board informed the Appellant that the bid quoted by them was unreasonable, unviable and not sufficient to sustain the operation and maintenance of the pipeline. The Appellant thereafter wrote a letter dated 10.08.2023 seeking to provide a response/clarification on certain aspects.

23. Learned Senior Counsel would further submit that the Board, thereafter, took up the matter for deliberations and consideration in its meeting held on 21.11.2023 (Board Agenda for the Meeting was prepared with the approval and in consultation of the Board Members). During the Meeting, after considering all related aspects, the Board noted that, due to the small length of the ATF Pipelines, a trend was emerging that all bidders were quoting extremely low and unreasonable tariff figures in order to somehow win the bid. After deliberations, the Board was of the view that the said practice was undermining the sanctity of the entire bidding process, and was resulting in setting of an extremely wrong precedent, wherein the entire bidding process was getting manipulated and resulting in skewed

figures being quoted by the entities. The Board also observed that the same was being made possible due to a lacuna in the existing Regulations. Taking into account all factors, and considering that the pipeline was unviable, the Board took the decision to annul the entire bidding process, and intimated the same through the impugned Public Notice dated 14.12.2023. The Board also brought in amendments to the existing Regulations on 18.12.2023, requiring the bidders to quote the tariff for the entire economic life of the project i.e. for each of the twenty five years, and also changed the weightage assigned to each bidding criteria. Subsequently the Board, in its meeting held on 27.12.2023, decided to initiate a fresh bidding process, under the newly amended Regulations, for laying an ATF Pipeline from Malkapur to Hyderabad International Airport and, accordingly, the Board issued Bid No. BID/PPPL/14/2024/01/ MHAPL on 29.12.2023, re-inviting bids for the said pipeline, in terms of the new criteria.

C. ANALYSIS:

24. The application-cum-bid document (“ACBD” for short) was issued by the Board inviting applications for grant of authorization for laying, building, operating or expanding petroleum and petroleum product (ATF) pipeline from Malkapur to Hyderabad International Airport. The financial bid form, enclosed with the said application-cum-bid document, records, in Note#1 of Clause A, that the Year 1 tariff bid as quoted shall be applicable from the first year of operation of the pipeline, the pipeline shall be considered operational when its trunk pipeline is fully commissioned, for partially commissioned trunk pipeline, the first year tariff shall be applicable till its trunk pipeline is fully commissioned, and the Board shall review the tariff after 10 years

of operation, and fix for a block of five years thereafter on a prospective basis.

25. Annexure A-6 of the Appeal is the Item Rate BoQ and contains the price schedule. It also contains a summary sheet of the feasibility report in terms of which the Appellant had quoted an extremely low tariff of Rs. 0.01/MT/KM for the first 10 years. For the 11th year, it had quoted Rs.10.85/MT/KM which keeps increasing each year culminating in a Variable Unit Tariff of Rs.41.20/MT/KM in the 25th year. It does appear that, while quoting a very low tariff for the first 10 years, the Appellant (as also the other technically qualified bidder ie IOCL) had increased their variable unit tariff from the 11th year onwards evidently to compensate for the very low quote of variable transportation tariff submitted by them in the first 10 years and to meet the IRR requirements of the bid.

26. The minutes of the meeting held on 13.07.2023, between the Board and the Appellant, records the Board having observed, from the bid quoted by the Appellant, that the subject pipeline project would not be a profit-making proposition, a high tariff was quoted after 10 years onwards to recover the total cost, and the IRR was calculated accordingly. The Appellant was advised to justify the tariff quoted by them for the initial 10 years. The minutes dated 13.07.2023 further records the appellant having informed that, in the initial 10 years, it was not going to make any profits from the subject pipeline, and would operate the pipeline with its existing manpower; as per their business model, considering the overall ATF business in comparison with placing the product through other modes of transportation, placing the product through the subject pipeline would be more viable; if it laid the subject ATF pipeline, it would have a competitive advantage over other

entities; other entities would have to move their products to the Appellant's terminal first, and then that product would be further moved to the airport; swapping of the products may not happen in the future; in order to safeguard their interest, it was important to win the subject bid; and, hence, it had quoted a low tariff. With respect to the high tariff quoted by them from the 11th to 25th year, the minutes record the Appellant having informed that, after the 10th year onwards, the tariff fixed by the Board would be accepted by them, and the prevailing regulations permitted them to quote a low tariff for the initial 10 years; therefore, it had quoted a low tariff in order to win the bid; this project alone may not be profitable for the Appellant, but considering the overall viability of the business, the Appellant would be in an advantageous position; and earlier, considering the overall viability of the project, the Appellant had made a similar kind of investment in some of the projects like Thanjavur Air Force Station project, with approval from the PNGRB. On being asked by the Board to confirm whether the 10th year quoted variable tariff of Rs.0.91 would be applicable for the remaining period of the entire life of the pipeline, the Appellant had informed that, for the initial 10 years, it was ready to charge the quoted tariff and, after the 10th year onwards, it would accept the tariff as fixed by the Board; and the Appellant did not accept the total tariff of Rs.0.91 from the 11th year onwards.

27. The minutes dated 13.07.2023, thereafter, records the Board having informed the Appellant that the Bid quoted by them was unreasonable and not a profit-making proposition to sustain the operation and maintenance of the subject pipeline; the tariff quoted by the Appellant from the 11th year onwards was indicative only, and for the calculation of IRR; though the methodology for tariff fixation from

the 11th year onwards was not prescribed in the Regulations, the Board would decide later on, after bringing the required amendments to the tariff regulations, which may not match the tariff considered by the Appellant after the 10th year onwards. In conclusion, the minutes of the meeting dated 13.07.2023 records that the pipeline project was not viable based on the tariff quoted by the Appellant; it had quoted a very low tariff; and it was also observed that the other bidder, IOCL had also quoted similarly very low tariff making the pipeline unviable.

28. By its letter dated 10.08.2023, the Appellant stated that the capital expenditure considered for the Malkapur to Hyderabad ATF pipeline was comparable to the recently completed Bina Panki multi-product pipeline project; and, on the tariff to be applicable after 10 years, the Appellant had given acceptance for the tariff to be fixed by the Board as per the Regulations. The Appellant further stated that the tariff quoted by them from the 11th year to the 25th year were in compliance with the bid document, and the tariff fixed by the Board, from the 11th year onwards as per Regulations, was acceptable to them; the Malkapur-Hyderabad International Airport pipeline was viable considering the cost incurred by the Appellant on alternate modes of transport of ATF i.e., by road; recently the Board had authorized Piyala-Jewar ATF pipeline to the Appellant, wherein the tariff quoted were on similar lines, and the Appellant was progressing much ahead of schedule, and had made more than 50 percent commitment within six months of authorization.

29. The PNGRB Board Agenda Note dated 21.11.2023 records that a meeting was held, between the Board officials and the Appellant on 13.07.2023, to seek justification for the tariff quoted by the appellant to meet the project return and operational cost of the subject pipeline, and

as the appellant had quoted a very low fixed and variable tariff for the initial 10 years which would not suffice to sustain the operation and maintenance of the pipelines for the initial 10 years. In the said meeting, the Appellant had intimated the following: (a) in the initial 10 years, it was not going to make any profits from the subject pipeline, and would operate the pipeline with its existing manpower; as per their business model, considering the overall ATF business, in comparison with placing the product through other modes of transportation, placing the product through the subject pipeline would be more viable; (b) if it laid the subject ATF pipeline, it would have a competitive advantage over other entities; the other entities would have to move their products to the Appellant's terminal first, and then that product would be further moved to the airport; swapping of the products may not happen in the future; in order to safeguard their interest, it was important for the appellant to win the subject bid, and hence it had quoted a low tariff; (c) after the 10th year onwards, the tariff fixed by the PNGRB would be acceptable to them, and the prevailing Regulations permitted them to quote a low tariff for the initial 10 years; therefore, it had quoted a low tariff in order to win the bid; the project alone may not be profitable for the Appellant, but considering the overall viability of the business, the Appellant would be in an advantageous position; earlier, considering the overall viability of the project, the Appellant had made a similar kind of investment in some of the projects like Thanjavur Air Force Station project, with approval from their Board; and (d) the Appellant did not accept the total tariff of Rs.0.91 from the 11th year onwards for the remaining period of the entire life of the pipeline.

30. The Board Agenda Note dated 21.11.2023, thereafter, records the PNGRB having informed the Appellant that the bid quoted by them

was unreasonable, and not a profit-making proposition to sustain the operation and maintenance of the subject pipeline; the tariff quoted by the Appellant from the 11th year onwards was indicative only, and for calculation of IRR; though the methodology for tariff fixation from the 11th year onwards was not prescribed in the Regulations, the Board would decide later about bringing the required amendments to the tariff regulations, which may not match the tariff considered by the Appellant after the 10th year onwards; in view of the above, it was concluded that the pipeline project was not viable based on the tariff quoted by the Appellant, as the Appellant had quoted a very low tariff; and it was also observed that the other bidder, IOCL, had also similarly quoted very low tariff making the pipeline unviable.

31. Para 17 of the Board Agenda Note dated 21.11.2023 records the observations of the Board, the figures quoted by the Appellant in its financial bid, and the summary of the DFR submitted by them. With respect to variable tariff, the PNGRB observed therein that the Appellant had quoted variable tariff of Rs.0.01/MT/KM in the 1st year and maximum of Rs.0.90/MT/KM in the 10th year of operation for their offered pipeline capacity of 4.99 MMTPA. A comparative statement of variable unit tariff quoted by the bidders for the first 10 years in three similar ATF pipelines project is, thereafter, furnished in the form of a table. The said table refers to the bids quoted for (1) the NJPT ATF pipeline, (2) the Piyala-Jewar ATF pipeline, and (3) the Malkapur-Hyderabad ATF pipeline. While IOCL was one among the two technically qualified bidders for all the three projects, the Appellant was found to have technically qualified for the Piyala-Jewar ATF pipeline and the Malkapur-Hyderabad ATF pipeline.

32. After the table, the Board Agenda Note dated 21.11.2023 records that the low variable transportation tariff quoted by the appellant appeared to be highly subsidized and unrealistic, and may not cover the variable operating cost of the pipeline, which did not justify commercial viability on a stand-alone basis; further the Board shall review the tariff after ten years and fix for a block of five years; but, in order to ascertain the IRR, the entities were advised to assume the tariff from the 11th year onwards up to the 25th year; it was observed that the Appellant had considered very high tariff for the period between the 11th and 25th year for calculating its IRR; and the comparative statement of fixed and variable tariff, assumed by the bidders for the 11th year to the 25th year, in three similar types of ATF pipeline, were being detailed in the form of a table. The said table furnishes details of the fixed unit tariff and variable unit tariff quoted by the bidders for the afore-said three pipeline projects.

33. The variable tariff quoted by the bidders for the first 10 years is extremely low, and the tariff quoted from the 11th to 25th year is fairly high, evidently to make up for the low tariff quoted for the 1st to the 10th years, and for calculating its IRR. The tariff quoted by the appellant, from the 11th to 25th year, was indicative only and only for the purposes of the bid, since the tariff after the 10th year was to be determined by the PNGRB in terms of the extant Regulations. While the PNGRB claims that such quotation by the bidders would unduly burden customers from the 11th to 25th years, the fact remains that the Board had itself called upon the Appellant to give its concurrence for the tariff to be fixed by the Board from the 11th to 25th year, to which the Appellant had conveyed its consent.

34. The Board Agenda Note dated 21.11.2023 also records the Board having considered Regulations 7(1)(a) and 7(1)(b) of the 2010 Regulations which required the Board to regulate the tariff after 10 years, and fix for a block of five years thereafter on a prospective basis; and to have observed that, in the recent past, the Bidders had started quoting un-realistic figures in the bid for the initial 10 years; and, in order to prevent this practice by the bidders, amendment of Regulation 7 of the 2010 Regulation was proposed by the Board wherein the entities bid the tariff for each of the 25 years.

35. The Board Agenda Note dated 21.11.2023 thereafter recommends that the Board may consider cancellation of the bids invited for laying, building, operating or expanding Malkapur-Hyderabad International Airport Petroleum and Petroleum product (ATF) pipeline (MHAPL) in line with the clauses mentioned in the Board Agenda, as the financial bids submitted by both the bidders, (ie the Appellant and IOCL) were unreasonable and would not be sufficient to sustain the operation and maintenance of pipelines for the initial 10 years; and, on approval of the above, draft public notice duly vetted by the Legal Division may also be approved.

36. After the impugned public notice was issued on 14.12.2023, another bid process was initiated under the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand Petroleum and Petroleum Products pipelines) Amendment Regulations, 2023 (hereinafter called “the 2023 Regulations”), which came into force on the date of their publication in the Official Gazette. The 2023 Regulations amended various clauses of the 2010 Regulation. In Regulation 7(1)(a), the words “*a period of ten years*” was substituted by the words “*each year of the economic life of the pipeline*”

starting from its operation”, and the words “the tariff shall be bid for each of the ten years” was substituted by the words “the tariff shall be bid for each of the twenty-five years”. Likewise in Regulation 7(1)(b), for the words “a period of ten years”, the words, “each year of the economic life of the pipeline starting from its operation” was substituted, and for the words “the tariff shall be bid for each of the ten years”, the words “the tariff shall be bid for each of the twenty-five years” was substituted.

37. The Board Agenda Note dated 27.12.2023 records details of the amendment of the earlier 2010 Regulations. The Pre-amended 2010 Regulations and the amendment of the bidding criteria in the 2023 Regulations, including Regulation 7(1)(a) and 7(1)(b), are recorded in the said agenda note in the form of a comparative table, which reads thus:

S. No.	Reg. No.	Earlier Bidding criteria in PPPL Authorization Regulations	Amended Bidding criteria in PPPL Authorization Regulations
1	Reg. 7(1)(a)	Lowness of the present value of the fixed unit petroleum and petroleum products pipeline tariff bid under this clause for the petroleum and petroleum products pipeline tariff (Rs/MT) for the purpose of bidding shall be for a period of ten years from the date of start of the operation of the pipeline. The Board shall review the tariff after ten years and fix for a block of five years thereafter on prospective basis.	Lowness of the present value of the fixed unit petroleum and petroleum products pipeline tariff bid under this clause for the petroleum and petroleum products pipeline. Petroleum and petroleum products pipeline tariff (Rs/MT) for the purpose of bidding shall be for each year of the economic life of the pipeline starting from its operation.

		The tariff shall be bid for each of the ten years. This shall have a weightage of fifty percent.;	The tariff shall be bid for each of the twenty-five years This shall have a weightage of forty percent.;
2	Reg. 7(1)(b)	Lowness of the present value of the variable unit petroleum, petroleum products pipeline tariff bid under this clause for the petroleum, petroleum products pipeline. Petroleum and petroleum products pipeline tariff (Rs/MT/KM) for the purpose of bidding shall be for a period of ten years from the date of the start of operation of the pipeline. The Board shall review the tariff after ten years and fix for a block of five years thereafter on prospective basis.	Lowness of the present value of the variable unit petroleum, petroleum products pipeline tariff bid under this clause for the petroleum, petroleum products pipeline. Petroleum and petroleum products pipeline tariff (Rs/MT/KM) for the purpose of bidding shall be for each year of the economic life of this pipeline starting from its operation.
		The tariff shall be bid for each of the ten years.	The tariff shall be bid for each of the twenty-five years.
		This shall have a weightage of twenty percent.:	This shall have a weightage of forty percent.;

38. The Board Agenda Note dated 27.12.2-23, thereafter, records initiation of a re-bidding process with modified Application cum Bid Documents (ACBD); and it proposes to initiate a bidding process afresh for the 59 km long Malkapur – Hyderabad Airport Petroleum and Petroleum Product (ATF) pipeline; for modification of the ACBD Document to provide for the changes brought about by the amended

Regulations 7. It is pursuant thereto that a fresh ACBD was issued on 01.01.2024 inviting bids afresh.

39. To summarize, the reasons assigned by the Board for cancellation of the entire bidding process for grant of authorization of the 59 km long Malkapur – Hyderabad Airport Petroleum and Petroleum Product (ATF) pipeline, in which the Appellant was found to be the successful bidder and to whom the Bid Evaluation Committee had recommended grant of a letter of intent, are:- (1) the bid quoted by the Appellant was unreasonably low, and was not a profit-making proposition to sustain the operation and maintenance of the subject pipeline; (2) the low variable transportation tariff quoted by the Appellant appeared to be highly subsidized and unrealistic, and may not cover the variable operating cost of the pipeline which would not justify commercial viability on a stand-alone basis; (3) in view of the very low variable tariff quoted by the Appellant, and the other bidder i.e. IOCL, the subject pipeline project was not viable; (4) the high tariff quoted by the appellant from the 11th year to the 25th year would adversely affect the interests of consumers; and (5) the tariff quoted by the Appellant, from the 11th year till the 25th year, was indicative only and for calculation of IRR, as the Regulations conferred on the Board the power to fix the tariff in terms of the Regulations.

40. We shall analyze, later in this Order, whether the afore-said reasons justified cancellation of the entire bidding process more so in the light of the explanation furnished thereto by the appellant. Before doing so, it is useful to take note of the judgements relied upon by Learned Senior Counsel on either side in this regard.

VII. JUDGEMENT RELIED UPON BY BOTH SIDES:

A. ON BEHALF OF THE PNGRB:

41. Sri Meet Malhotra, Learned Senior Counsel for the Board, would rely on the following judgements: (i) **H-Energy Private Limited vs PNGRB (Order of this Tribunal in Appeal No. 211/2016 dated 02.06.2017)**; and (ii) **Sarvesh Security Services Private Limited vs Institute of Human Behaviour and Allied Sciences & Anr :2017 SCC OnLine Del 10806**.

B. ON BEHALF OF THE APPELLANT:

42. On the other hand, Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the appellant, would submit that it is not the case of the PNGRB that the Appellant may abandon the project at any stage on account of the low tariff quoted for the first ten years; therefore the judgment of the Delhi High Court relied on behalf of the PNGRB. i.e. **Sarvesh Security Services Pvt. Ltd. vs. Institute of Human Behaviour and allied sciences & Anr: 2017 SCC Online Del 10806** is not applicable, more so in view of **para 20** thereof in which the court noted that, on account of the apprehension of the successful bidder abandoning the project in between, the same would be detrimental to public interest. However, no such facts or circumstances exist in the present case. The case of the Appellant is squarely covered by the judgment of the Delhi High Court in **Orion Security Solutions Pvt. Ltd. vs. Govt. of NCT of Delhi & Ors: 2017 (237) DLT 101 [Paras 20 to 26]**.

C. CONTENTS OF THE JUDGEMENTS:

43. i. In **Orion Security Solutions Pvt. Ltd. v. Govt. (NCT of Delhi), 2016 SCC OnLine Del 4652**, on which reliance is placed on behalf of the appellant, the challenge before the Delhi High Court was

the decision of the Tender Opening Committee of Respondent No. 2, Directorate of Education, GNCTD (Caretaking branch)], and the order dated 25.04.2016 whereby the e-tender of the petitioner, for providing of security services to Government schools, stadia and offices under the Directorate of Education, Government of NCT of Delhi was rejected.

44. The Delhi High Court observed that, except for the low commission charges (Re 1/-), the bid of the petitioner was compliant and responsive to all the conditions of the Tender; the sole ground for rejecting the tender of the petitioner was the low working rate quoted by it in its bid; the financial bid for security services mandated that no bidder would quote nil or zero amount as against agency charges and should any bidder quote nil or zero towards agency charges, the bid would be rejected; initially, the bidder was also required to quote agency charges which could not be below 5%; however, the requirement of not quoting agency charges below 5% was deleted by a clarificatory order dated 13.07.2015, and there remained no base minimum agency charges towards commission/agency.

45. It is in this context that the Delhi High Court held that, if there was no prohibition in the tender condition for quotation of Re. 1/- as agency charges, then any decision of the Tender committee based on the agency charges quoted by the petitioner would be arbitrary and not in consonance with the conditions of tender; if the decision is based on irrelevant consideration or it overlooks relevant considerations, it has necessarily to be termed as arbitrary; in a publicized government contract, it is always expected that the lowest bid would be accepted, a possible exception being, its commercial un-viability; an agency inviting tender has the discretion to accept or reject the tenders which includes

the right to reject even a lowest tenderer, but such decision has to be based on objective considerations relatable to the requirements in the tender notice and the contract requirements to be performed; and, if there is no stipulation of any base rate, a governmental authority cannot assume that the rates quoted by a bidder is unviable or unworkable.

46. The Delhi High Court further held that, in the case before it, the viability range fixed by the tender document could only be taken as above zero; the Tender Committee appeared to have taken note of the requirements under the contract which definitely would entail heavy expenses and which could not, under normal conditions, be covered under an agency charge of Re.1/- which had been quoted by the petitioner; nonetheless, it was difficult to accept the logic of Respondent no. 2 that any explanation furnished by the petitioner regarding the Hybrid business model would not be looked into as these were made after submission of bids, and furnishing/acceptance of any document in support of such model would be in the nature of an offline submission which would be contrary to the terms of the tender or beyond the requirements of tender evaluation.

47. After referring to its earlier judgements, in *MI2C Security & Facilities Pvt. Ltd. v. Govt. of NCT* (2013) 205 DLT 288, the Delhi High Court held that, if at all, the petitioner had quoted a low rate, he was aware of his financial health and his capacity to perform his obligation in case of award of contract; in this case, the petitioner claimed to be of sound financial health as it received funding from government agencies under various schemes of manpower development; It would not be open for the Tender Opening Committee to completely ignore this aspect of the matter while evaluating the candidature of the petitioner

as a tenderer; that the requirement of the base minimum charges was removed was a good enough indicator and evidence of the fact that the Respondent No. 2 was looking for an offer which would be above zero or nil, and it would not be open for the tender evaluation committee to say that low commission charges at Re 1 was similar to nil' the bid of petitioner was compliant and responsive in all respects, and along with the bid document, the petitioner had furnished evidence of sound financial health in the form of many projects which were being simultaneously run by it in different states.

48. After referring to the judgement of the Supreme Court, in *Dutta Associates Pvt. Ltd. v. Indo Merchantiles Pvt. Ltd.* (1997) 1 SCC 53, and *UOI v. Dinesh Engineering Corporation*, (2001) 8 SCC 491, the Delhi High Court observed that the decision of the Tender Opening Committee was not reasonable in as much as it did not take into account the financial health of the petitioner and in view of the initial requirement in the tender of not offering any rate below 5%, which requirement was consciously removed/deleted by a later clarificatory order. The impugned orders dated 23.03.2016 and 25.04.2016, whereby the e-tender of the petitioner had been recommended to be rejected on the ground of low and unworkable rates, was quashed and the 2nd Respondent was directed to consider the case of the petitioner afresh in the light of what had been stated in the Order, and take a fresh call over the issue.

49. In short, the Delhi High Court, in **Orion Security Solutions Pvt. Ltd**, held that the decision of an agency inviting tender should be based on objective considerations relatable to the requirements in the tender notice and the contract requirements to be performed; if there is no stipulation of any base rate, a governmental authority cannot

assume that the rates quoted by a bidder is unviable or unworkable; it was difficult to accept the logic of the 2nd Respondent that any explanation furnished by the petitioner regarding the Hybrid business model would not be looked into as these were made after submission of bids; if the petitioner had quoted a low rate, he was aware of his financial health and his capacity to perform his obligation in case of award of contract; the petitioner claimed to be of sound financial health as it received funding from government agencies under various schemes of manpower development; It was not be open for the Tender Opening Committee to completely ignore this aspect of the matter while evaluating the candidature of the petitioner as a tenderer; the requirement of the base minimum charges being removed was a good enough indicator and evidence of the fact that the 2nd Respondent was looking for an offer which would be above zero or nil; along with the bid document, the petitioner had furnished evidence of sound financial health in the form of many projects which were being simultaneously run by it in different states; and the decision of the Tender Opening Committee was not reasonable in as much as it did not take into account the financial health of the petitioner.

50. ii. In **Sarvesh Security Services Pvt. Ltd. v. Institute of Human Behaviour and Allied Sciences, 2017 SCC OnLine Del 10806**, on which reliance is placed on behalf of the PNGRB, the Petitioner, a private limited company providing manpower services to various government and non-government organizations, was aggrieved by the rejection of its tender/bid offering to provide security services, to the first respondent IHBAS which was a hospital under the control and regulation of the second respondent, i.e. the Department of Health & Family Welfare, Government of NCT of Delhi. The IHBAS had issued a

Notice inviting Tender on 02.03.2017 seeking deployment of adequate number of manpower services. Under the NIT, bidders had to submit documents listed in Section 2 under 4.1 of the eligibility conditions at the pre-qualification stage and thereafter under Sections 4.2 and 4.3 for evaluation at the Technical Bid and Financial Bid stages, respectively.

51. In terms of Annexure-III of the NIT, the wages to be disbursed to the workmen was already fixed and designed in such a manner that there was full compliance with the *Minimum Wages Act*, statutory deposit of EPF and ESI etc. and there was no negotiation/diversion of such amount to ensure that no workmen were exploited. Responding to the terms of the NIT and in keeping in mind the economic viability, the petitioner submitted its bid along with nine other bidders. On the financial bids being opened, the Petitioner was declared as the lowest and responsive bid. The petitioner later received an e-mail dated 14.08.2017 by IHBAS rejecting its bid on the ground that it was unresponsive.

52. It is in this context that the Delhi High Court observed that it was noticeable from the bid of the Petitioner that they had quoted an unusually low amount as the total administrative cost of Rs. 0.01; and, in the Invitation for Bids on the NIT issued by the IHBAS, under the Disclaimer tab on page 32 of the NIT, IHBAS reserved its discretion for the appointment of the bidder.

53. The Delhi High Court then held that, when the State invites tender bids, it ought to stick to the terms of the NIT, and ideally not waver from complying with the conditions set forth in it; thus, invitations for tender amounted to a commercial transaction; once the tender bid

of a party was accepted, the Court, as far as practicable, ought not interfere in reviewing such transactions; the Petitioner, in their bid, quoted the administrative cost at an abominably low Rs. 0.01; although, as averred by the Petitioner, this was within the limits of the *Minimum Wages Act*, statutory deposit of Employees Provident Fund (EPC) and ESI etc., the viability of this quote, on discussion and deliberation by the Respondents, it was not found to be sustainable from a business perspective; it was also deliberated on how IHBAS could foresee that the lowest bidder may abandon its contractual duties abruptly on account of its incapacity to bear expenses from his own pockets against administrative charges, and may leave IHBAS in a situation where Patient Care Service would be in jeopardy; and, therefore, the bid of the lowest bidder was considered as non-responsive and held to be taken in public interest.

54. The Delhi High Court held that, in *Jagdish Mandal v. State of Orissa* (2007) 14 SCC 517, the Supreme Court, while widely exploring judicial review of administrative discretion, held that, where the bid quote was abominably low and was found that this could affect the work to be conducted and hence rejected, there existed no justification for the Court to interfere with the decision of the tenderer, and the Court ought not sit in appeal over such technical assessment; the Delhi High Court, in *Orion Security Solutions Pvt. Ltd. v. GNCTD* [W.P. (C) 10884/2016] where the bidder had quoted Rs. 1 as agency charge, took a contrary view that, since the bidder had explained its capacity to perform the contract in view of the “Hybrid Business Model” and source of funding by the government in other self-sustainable projects, there was no reason to doubt that the petitioner was not able to perform the contract; and the above reasoning could not have universal application.

55. The Delhi High Court then held that the decision on whether award of contract should be to one party or another is not dependent entirely on the price or cost quoted for the goods or services; it is also dependent upon the *ability* of the bidder, which is to be seen from a consideration of several other factors; one factor certainly would be *viability* of the bid; in the present case, the petitioner had offered to provide services at an overall consideration of Rs. 0.01; others had quoted more; a disembodied look at the rates conveyed the impression that all those rates too were depressed; however, the Court should not, here, substitute its view; the respondents took into consideration all these aspects; it undertook to discuss the viability of the bid of the Petitioner; the rejection of the bid was not taken on an arbitrary whim and the freak low administrative charge quoted by the Petitioner was found to be unsustainable from a business perspective; the element of public interest casts a serious responsibility on the IHBAS in the particular instance, as IHBAS is a tertiary level institute and deals with hospital functioning under the aegis of the GNCTD; the same cannot be compromised on any accord, let alone on non-performance of manpower contract by the contracting agency; furthermore, the committee took note of and was guided by the Supreme Court decision in *Jagdish Mandal* (supra); it was, therefore, clear from the above analysis that the State exercised a considerable latitude of administrative discretion in the awarding of government contracts by the process of inviting tender; this discretion of the State, though, was subject to judicial review, *albeit*, one that was limited to analysing if such exercise of discretion was illegal or arbitrary; if the State decided on the award of the contract by veering from the conditions of the NIT, and such decision was *bonafide* and in due consideration of the sustainability of the corresponding project/work to be conducted and

maximising the expenditure of public money, then the Court deems it right to not interfere in such decision of the State; in the present case, likewise, the low quote for the administrative cost, cited in the petitioners' bid was found to be unsustainable as evident from the deliberations made by the Respondents; the bid rejection by IHBAS was not arbitrary, but based on a carefully contemplated decision that champions the functional viability of the purpose of the invitation of the tender and the efficient utilisation of public money, and was thus, not arbitrary or *malafide*.

56. The Petitioner, in **Sarvesh Security Services Pvt. Ltd. v. Institute of Human Behaviour and Allied Sciences, 2017 SCC OnLine Del 10806**, had, in its bid, quoted an unusually low amount as the total administrative cost of Rs. 0.01. although, as averred by them, this was within the limits of the *Minimum Wages Act*, statutory deposit of Employees Provident Fund (EPC) and ESI etc. The Delhi High Court refused to interfere with the action of the respondents in cancelling the bid as the viability of this quote was not found to be sustainable from a business perspective; it could be fore-seen that the lowest bidder may abandon its contractual duties abruptly on account of its incapacity to bear expenses from his own pockets against administrative charges, and this may leave the hospital in a situation where Patient Care Service would be in jeopardy.

57. The Delhi High Court had, in refusing to interfere with the cancellation, relied on the judgement of the Supreme Court, in *Jagdish Mandal v. State of Orissa* (2007) 14 SCC 517, wherein it was held that, where the bid quote was abominably low, and this was found that this could affect the work to be conducted and hence rejected, there

existed no justification for the Court to interfere with the decision of the tenderer.

58. As shall be detailed hereinafter, the Board has not, in any of the proceedings placed on record, even expressed an apprehension regarding the appellant's inability to execute the project because of the low bid quoted by them. On the other hand, the Appellant has specifically stated that it had submitted similar bids for the Thanjavur Air Force Station Project pipeline as also the Piyala-Jewar ATF pipeline, and was successfully implementing the said projects.

59. Reliance placed on behalf of the PNGRB, on **Sarvesh Security Services Pvt. Ltd. V. Institute of Human Behaviour and Allied Sciences, 2017 SCC OnLine Del 10806**, is therefore misplaced.

VIII. FINANCIAL VIABILITY AS A FACTOR IN ACCEPTING OR REJECTING THE BID:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

60. Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the appellant, would submit that, from a bare perusal of the impugned order dated 14.12.2023, read with the agenda note dated 21.12.2023 (which was the basis of the passing of the impugned order), what is apparent is that the bidding process has been cancelled by PNGRB not on account of the reason that the rates for the common carrier capacity (25%) after 11 years would be very high but for the reason that the Tariff quoted was "*unreasonable tariff which would not be able to sustain the operation and maintenance of the Pipeline for the initial ten years*"; given the fact that lowness of tariff itself is the criteria for the bidding, PNGRB cannot and ought not to have delved into the issue of "Financial Viability" of the pipeline'; it is for the entity, proposing to lay

the pipeline. to take a business decision, considering the overall viability of its business; the appellant's bid is in line with the tender conditions and is fully compliant with the Regulations; this, coupled with the fact that the Bid Evaluation Committee (BEC) had recommended issuance of Lol to BPCL, the Board could not have gone into the issue of financial viability without any valid reasons for the same; the PNGRB has lost sight of the fact that 75% of the capacity of the pipeline is to be utilized by the Appellant itself to transport its own product from its storage facility to the Airport; the savings and economies on account thereof itself justify the Appellant's decision to quote a low tariff for the first ten years which is not only permissible but is actually the criteria under the bid document and the Regulations; the Appellant cannot, therefore, be penalized for having complied with the terms of the Bid and the Regulations; the submissions put forth on behalf of the PNGRB implies that an entity should quote a particular tariff which makes the project financially viable on a stand alone basis; if this is taken to its logical conclusion, the PNGRB will ultimately have to come up with a tariff rate on a case to case basis which, according to it, makes the project financially viable; the PNGRB would then exercise its jurisdiction to grant authorization to the entity which has quoted a tariff similar to or near the tariff rate determined by the PNGRB; and this is unknown and totally contrary to the PNGRB Act and the Regulations made thereunder.

B. SUBMISSIONS URGED ON BEHALF OF THE PNGRB:

61. On the submission, urged on behalf of the Appellant, that they were willing to accept the tariff determined by the Board from the 11th year onwards, no computation methodology had been evolved by the Board for determining the said tariff, and hence it was misleading to

project that the low tariff figures for the first ten years must necessarily be compensated in the tariff from the 11th year onwards, Sri Meet Malhotra, Learned Senior Counsel appearing on behalf of the PNGRB, would submit that any computation methodology to be evolved by the Board had to necessarily be uniform for all pipelines and based on scientific factors; as a reference point, the methodology of tariff determination adopted by the Board under the PNGRB (Determination of Natural Gas Pipeline Tariff) Regulations, 2008 [in Schedule A] mandated the Board to ensure a rate of return of 12 percent post tax on capital employed by the authorized entity; further, operating costs towards heads like consumables, utilities, salaries and wages, repairs and maintenance etc. are all taken into account while determining the tariff; hence there is no question of low tariff figures for the first ten years not having a bearing on the tariff values from 11th year onwards; and the contention that the Board could fix whatever tariff it wanted from the 11th year onwards was ex-facie untenable.

C. ANALYSIS:

62. The reasons discernable, from the impugned public notice issued by the Board on 14.12.2023, are that, upon the Technical Bids being found qualified, the Financial Bids were opened wherein it was observed that the tariff quoted by both the technically qualified bidders were unreasonable, and not a profit-making proposition, to sustain the operation and maintenance of the pipeline; and, since both the bidders had quoted unreasonable tariff which would not sustain the operation and maintenance of the pipeline for the initial 10 years, the Board had decided to annul the entire bidding process of the bid in terms of the provisions of the ACBD.

63. Reference is thereafter made, in the public notice dated 14.12.2023, to Clause 11 of the Invitation for Application-Cum-Bid, whereunder the PNGRB reserved the right to accept/reject any or all Application-Cum-Bids without assigning any reasons(s) whatsoever; to Clause 4.1 of the instructions to bidders under which the PNGRB reserved the right to accept or reject any or all bid(s), and to annul the Application-cum-Bid process and reject all bids at any time prior to award of work, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for the PNGRB's action; to Clause 18.1.1(e) of the instructions to bidders, which states that the Capex considered in the DFR must be reasonable and any unreasonable Capex may lead to rejection; to Clause 31.3 of the instructions to the bidders which states that the PNGRB had the right to cancel the application-cum-bid; to the disclaimer clause in the ACBD which states that *“the issue of this bid did not imply that the Board was bound to select a bidder for the project and the Board reserved the right to reject all or any of the bidders or bids without assigning any reason whatsoever”*.

64. The only reason, stated in the public notice dated 14.12.2023 for annulling the entire bid process, is that the financial bids quoted by both the technically qualified bidders were unreasonably low and not a profit-making proposition to sustain the operation and maintenance of the pipeline for the initial 10 years.

65. Section-I of the ACBD relates to instruction to bidders and Clause 1.2 thereunder stipulates that the bidders, participating in the Application Cum Bid, were advised to go through the various provisions under the Petroleum and Natural Gas Regulatory Board Act 2006 as also the relevant regulations notified by the Board; and the PNGRB has

notified the following regulations related to petroleum and Petroleum Products pipelines in the Gazette of India and are available on website <http://www.pngrb.gov.in>. Among the Regulations notified thereunder, include (A), GSR 722 (E) – Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand Petroleum and Petroleum Products Pipelines) Regulations, 2010 (ie the 2010 Regulations).

66. It is useful in this context to take note of the provisions of the 2010 Regulations to the extent relevant. Regulation 2(1)(e) defines “economic life” of petroleum, petroleum products pipeline to be for a period of twenty-five years commencing from (i) the date of grant of authorization to the entity by the Board in case an entity proposes to lay, build or expand a petroleum and petroleum products pipeline on or after the appointed day. Regulation 3 stipulates that the 2010 Regulations shall apply to an entity – (a) which is laying, building, operating or expanding or which proposes to lay, build, operate or expand a petroleum and petroleum products pipeline for transporting one or more petroleum products including LPG and LNG; or (b) which proposes or is directed by the Board to convert a dedicated or contract carrier pipeline for supply of petroleum products to a specific consumer into a common or contract carrier petroleum and petroleum products pipeline, as the case may be.

67. Regulation 7 of the 2010 Regulations related to the bidding criteria and, there-under, it is stipulated that (1) the Board 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 fixed unit petroleum and petroleum products pipeline tariff bid under this clause for the petroleum and petroleum

products pipeline. Petroleum and petroleum products pipeline tariff (Rs/MT) for the purpose of bidding shall be for a period of ten years from the date of start of the operation of the pipeline. The Board shall review the tariff after ten years and fix for a block of five years thereafter on prospective basis. The tariff shall be bid for each of the ten years. This shall have a weightage of fifty per cent; (b) Lowness of the present value of the variable unit petroleum & petroleum products pipeline tariff bid under this clause for the Petroleum and petroleum products pipeline tariff (Rs/MT/KM) for the purpose of bidding shall be for a period of ten years from the date of the start of operation of the pipeline. The Board shall review the tariff after ten years and fix for a block of five years thereafter on prospective basis. The tariff shall be bid for each of the ten years. This shall have a weightage of twenty per cent. (c) Highness of the present value of the petroleum and petroleum products pipeline capacity (MMTPA) proposed to be created for transportation of petroleum and petroleum products in the petroleum and petroleum products pipeline over the economic life of the project. Petroleum and petroleum products pipeline capacity bid for transporting petroleum and petroleum products in the pipeline shall be for a period of twenty-five years. The present value shall be computed for such stage wise, year wise capacity build up. This shall have a weightage of thirty per cent.

68. Regulation 7(2) of the 2010 Regulations stipulated that the present value in the criteria, at clauses (a) to (c) of sub-regulation (1), shall be calculated by the entity using a discount rate equal to twelve per cent. To bring all accruals or tariff at the end of the first year, that is, the first year tariff or capacity shall not be discounted. In other words, the discount factor for the first year shall be taken as unity.

Regulation 7(3) stipulated that the bids for the petroleum and petroleum products pipeline tariff under clauses (a) to (b) of sub-regulation (1) and the volume under clause (c) of sub-regulation (1) by the entity shall be consistent with the assumptions considered by the entity in its approved DFR of the project. Regulation 7(4) stipulated that the entity with the highest composite score, considering the criteria under clauses (a) to (c) of sub-regulation (1) and as illustrated in Schedule C, shall be declared as successful in the bid.

69. It is because both Regulations 7(1)(a) and 7(1)(b) (which accorded weightage of 50% and 20% respectively) required the Board to tabulate and compare all financial bids on the basis of lowness of the present value of the fixed unit and variable unit of the petroleum and petroleum products for a period of ten years from the date of start of the operation of the pipeline, and in as much as the bids were to be evaluated on the basis of the tariff quoted by the bidders only for the first 10 of the 25 years, that the bidders sought to quote an extremely low tariff for the first 10 years. Further, as Regulation 7(2) required a discount rate equal to twelve percent to be applied from the second year of tariff onwards, the extremely low tariff quoted for the first 10 years was sought to be compensated by quoting a high tariff from the 11th to 25th year. While it is true that Clause (a) and (b) of Regulation 7(1) states that the Board shall regulate the tariff after 10 years and fix the tariff for a block of five years thereafter on a prospective basis, the fact remains that the tariff quoted by the bidders, from the 11th year onwards, does not enter into the computation of the relative scores of the bidders, and evaluation of the bids is confined only to the tariff quoted for the first 10 years.

70. As noted hereinabove, Clause 1.2 of Section 1 of the ACBD (Instruction to Bidders) required the bidders to keep themselves appraised of the provisions of the PNGRB Act 2006 and the 2010 Regulations. Regulation 7 of the 2010 Regulations relates to the bidding criteria, and Regulation 7(1)(a) & (b) assign 50% weightage to the lowness of the present value of the fixed unit and the variable unit of the petroleum and petroleum product pipeline tariff bid for a period of ten years from the date of start of operation of the pipeline. Both Clauses 1(a) and (b) of Regulation 7 stipulate that the Board would review the tariff after ten years of operation, and fix the tariff for a block of five years thereafter on a prospective basis. In short, the tariff quoted by the bidders for the first ten years was not only to operate but was alone required to be considered in the evaluation of the bid, and the tariff quoted by the bidders from the 11th year onwards was not be taken into consideration in assigning weightage of 50% since these figures were only indicative and the actual variable tariff was to be reviewed and fixed by the Board for a block of five years thereafter on a prospective basis. It is relevant to note that the Appellant had also given its consent to abide by the tariff determined by the Board from the 11th year onwards as per the Regulations.

71. It is because Regulation 7(1)(a) and (b) gives 50% weightage to the lowness in fixed unit and variable unit tariff, that the bidders have been quoting an extremely low tariff in the first ten years, though it may not be profitable. The high tariff quoted by the bidders from the 11th year onwards is evidently to comply with the requirement of Regulation 7(2), which requires the bidders to quote IRR of 12%. It is to comply with this requirement that the bidders have been quoting high tariff from the 11th year onwards despite being fully aware that Regulations

7(1)(a) & (b) expressly stipulate that the tariff after ten years would be reviewed by the Board, and be fixed by it for a block of five years thereafter on a prospective basis. That the Board was also conscious, that the high tariff quoted by the bidders from the 11th year onwards was indicative and was made only for the purpose of the bid, as the Regulations conferred on the Board the power to fix tariff in terms of the Regulations, is evident from what has been recorded in the minutes dated 13.07.2023.

72. Viability or otherwise of the subject pipeline project and whether or not it was a profit-making proposition was not a factor, required to be taken in the bid evaluation process, either in terms of the PNGRB Act or the 2010 Regulation or even the ACBD. It is for each bidder to determine its business model and take into consideration all relevant factors, including viability, before submitting its bid. While the Board as a Regulator can, undoubtedly, ascertain the viability of the project in case it has any reservation on the ability of the successful bidder to complete execution of the project, the minutes of various meetings as also the correspondence which the PNGRB had entered into with the Appellant do not reflect any such apprehension having been expressed by the Board regarding the Appellant's ability to execute the project.

73. Further, as has been repeatedly highlighted by the Appellant and as has been recorded in the Board Agenda Note dated 21.11.2023, a more or less similar fixed and variable transportation tariff was quoted by the Appellant for the Piyala-Jewar ATF pipeline, less than six months prior to the present bid process, which bid was accepted by the Board. The Appellant's assertion that they were executing the said pipeline well ahead of the time stipulated therefor has not been disputed by the Board. That the appellant has been successfully

implementing the said project also indicates that the apprehension, if any, regarding their inability to execute the project is unfounded.

74. Both the appellant and IOCL are public sector undertakings and are more than capable of assessing, for themselves, the feasibility and the viability of the bids submitted by them. In the absence of any such requirement being stipulated either under the 2010 Regulations or in the ACBD, rejection of the bidding process by the Board, on such extraneous considerations, may not be justified.

i. STATUTORY REGULATIONS ARE BINDING:

75. As Regulations are incorporated and become part of the Act, they are governed by the same principles as the statute itself. The statutory presumption that the legislature inserted every part thereof for a purpose, and that legislative intention should be given effect to, would be applicable to Regulations also. (***Peerless General Finance and Investment Co. Ltd. v. RBI, (1992) 2 SCC 343***). Applying the test of “general application”, a Regulation would stand on a higher pedestal vis-à-vis an order (decision) of the Board, in the sense that an order passed by the Board should be in conformity with the Regulation. (***PTC India Ltd. v. Central Electricity Regulatory Commission, (2010) 4 SCC 603***). (***H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17***).

76. In the hierarchy of regulatory powers and functions under the 2006 Act, Section 61, which deals with the making of regulations by the Board, under the authority of subordinate legislation, is wider than Section 11 of the 2006 Act which enumerates the regulatory functions of the PNGRB. While discharging its regulatory functions under Section 11, and in exercising its adjudicatory powers under Section 12, the

Board is bound by the Regulations made by it under Section 61 of the said Act. (**H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17**).

77. The Regulations made by the Board, under Section 61 of the 2006 Act, are in the nature of Subordinate/Delegated Legislation, they have the force of law, and are statutory in character. It is settled law that rules and regulations made under a statute must be treated, for all purposes of construction or obligations, exactly as if they were in that Act, and are to the same effect as if they were contained in the Act. (**State of U.P. v. Babu Ram Upadhyaya : AIR 1961 SC 751; Peerless General Finance and Investment Co. Ltd. v. RBI, (1992) 2 SCC 343**).

78. Consequently the 2010 Regulations, made by the PNGRB in the exercise of the powers conferred on it under Section 61 of the 2006 Act, must be treated, for all purposes of construction or obligations, exactly as if they were in the 2006 Act, and to be of the same effect as if they were contained in the said Act. The 2010 Regulations are statutory in character, constitute law, and are binding on all the regulated entities including the appellant herein (as well as the PNGRB and even this Tribunal). (**H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17**).

79. As the 2010 Regulations have the force of law and are binding not only on the bidders but also on the PNGRB itself, the PNGRB would only be justified in cancelling the bidding process, if the bids submitted were to be found to violate either the 2010 Regulations or the conditions stipulated in the application-cum-bid document. It is not even the case of the Board that there has been any such violation.

ii. SUBORDINATE LEGISLATION IS PROSPECTIVE IN ITS APPLICATION:

80. Unlike legislation made by a sovereign legislature, subordinate legislation made by a delegate cannot have retrospective effect unless the Rule or Regulation making power in the concerned statute expressly or by necessary implication confers power in this behalf. **(State of Madhya Pradesh v. Tikamdas (1975) 2 SCC 100; North Eastern Electric Power Corporation Ltd vs Tripura State Electricity Corporation Ltd & others: 2009 SCC OnLine APTEL 179)**. No such power is conferred on the Board by the PNGRB Act, 2006. The ACBD was issued, and bids were invited, in terms of the pre-amended 2010 Regulations. Since Regulations made by the Board, in the exercise of the powers conferred on it by the PNGRB Act, are prospective in its application, the amendment made thereto, after cancellation of the bids, would have no bearing on the validity of the bids submitted in terms of the pre-amended 2010 Regulations. Needless to state that, new bids invited after the 2023 amendment to the 2010 Regulations, would be governed by the 2023 amendment, and not the pre-amended 2010 Regulations.

81. The averments in the reply regarding monopoly status and safety concerns are not reflected in the Board Agenda notes, the minutes of the meetings or even the correspondence with the appellant, copies of which have been filed along with the reply. The complaint of the PNGRB, regarding monopolization, does not stand to reason as only two bidders ie the appellant and IOCL had participated in the bidding process.

82. In this context, it is also relevant to note that despite having called for the Appellant's explanation, the Board has failed to consider

the explanation furnished by them before cancelling the bid. No reasons have been assigned by the Board as to why the explanation furnished by the Board did not merit acceptance. As noted hereinabove, in response to the query of the Board that the variable tariff quoted by them would affect the overall viability of the project, the Appellant had explained that, while it may not make any profit on the subject pipeline in the initial 10 years, they had taken into consideration the cost of transporting the products by other modes such as by road, and found that laying the subject ATF pipeline would be more viable; if the work were to be awarded in their favour, they would have an advantage over other entities in as much as the other entities had to move their products to the Appellant's terminal first and thereafter move it from there to the Airport. The Appellant had also drawn the attention of the Board to a similar kind of investment made by them, in other projects like Thanjavur Air Force Station Project as also the Piyala-Jewar ATF pipeline. No reasons have been assigned by the Board as to whether, and if so why, it found this explanation not to be valid, necessitating cancellation of the entire bidding process.

83. In so far as consumers interest being affected, as a result of the high tariff quoted by the Appellant from the 11th year onwards, is concerned, Regulations 7(1)(a) & (b) of the 2010 Regulations make it amply clear that the tariff would be reviewed by the PNGRB from the 11th year onwards and would be fixed on a prospective basis for a block of five years. The high tariff quoted by the Appellant in their bid, even on the Board's own understanding, was only indicative and for the purpose of calculation of the IRR, for not only did the 2010 Regulations disable the successful bidder from claiming the tariff quoted by them in their bid from the 11th year to 25th year as the tariff was required to be

fixed by the PNGRB, the Appellant, (on their having been called upon by the Board to furnish its consent for fixation of tariff by the Board in terms of the Regulations), had also given its consent to the Board fixing the tariff in terms of the Regulations. No reasons are discernible, either from the Board Agenda notes or the minutes or the correspondences which the Board had entered into with the Appellant, as to why, despite seeking the Appellant's consent and having received it, the Board nonetheless chose to cancel the entire bidding process. It is evident, therefore, that the reasons assigned by the Board for cancellation of the bids neither accords with the 2010 Regulation nor with the conditions stipulated in the ACBD.

IX. IS THE DECISION TO CANCEL THE ENTIRE BIDDING PROCESS CONTRARY TO THE TERMS OF THE TENDER?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

84. Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the appellant, would submit that it is settled law that an authority cannot supplant its views which are contrary to the express terms of the tender; it should abide by the express terms of the tender document; though, in the present case, the Lol has not been issued in favour of the Appellant, the Appellant's case squarely falls within the definition of "Aggrieved person" who has the right to challenge the decision of the Board by way of an Appeal before this Tribunal under Section 33 of the PNGRB Act; as the scope of an Appeal being greater than that of a writ court in such challenges, the present appeal is liable to be allowed as the PNGRB has not been able to substantiate or justify its actions; and cancellation of the bidding process by PNGRB (instead of granting the Lol to the Appellant as recommended by the Bid Evaluation Committee

(BEC)) is arbitrary, irrational, perverse, amounts to non-application of mind and is a colourable exercise of power, inasmuch as the PNGRB cannot sit in the arm chair of an entity to determine the “financial viability” of a project.

B. SUBMISSIONS URGED ON BEHALF OF THE PNGRB:

85. Sri Meet Malhotra, Learned Senior Counsel appearing on behalf of the PNGRB would submit that several clauses of the Application-cum-Bid Document [ACBD], namely Clause 11 of the Invitation for Application-Cum-Bid, Clause 4.1 of the ACBD, Clause 31.3 of the ACBD, Disclaimer of the ACBD, Annexure-3 (Undertaking) of the ACBD gave sufficient leeway to the Board, and put the participating entities to sufficient notice that the Board could accept or reject any bid and annul the bidding process without assigning any reasons; issuance of the bid does not imply that the Board is bound to select a bidder for the project; the Board has the necessary power to annul the bid; this decision was not arrived at in an arbitrary or whimsical manner, but was taken after noticing that the Regulations and relevant clauses of the tender needed to be amended as the then subsisting provisions in the Regulations, and the clauses of the tender, were encouraging parties to make unrealistic bids not in the interest of the pipeline; hence, the bid was annulled and requisite amendments were made, and thereafter, new bids were invited; Lol was never issued to the Appellant which, till then, had no concluded contract in its favour; and the action of the Board was in accordance with the terms of the bid as well as the law applicable.

C. ANALYSIS:

86. Clause 11 of the Invitation for Application-cum-Bid reads thus:

“11. PNGRB reserves the right to accept / reject any or all Application-cum-bids without assigning any reason(s) whatsoever.”

87. Section I of the ACBD are the instructions to bidders, and Clause 4.1 thereunder reads thus:

“PNGRB reserves the right to accept or reject any or all bid(s), and to annul the Application cum Bid process and reject all bids at any time prior to award of work, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for the PNGRB’s action.”

88. Clause 31.0 of the ACBD relates to Applicable Law. Clause 31.3 reads thus:

“31.3 PNGRB reserves the right to cancel this Application cum Bid or modify the requirement of the application cum bid.”

89. Clause 31.4 reads thus:

“31.4 PNGRB also reserves the right to modify/relax any of the terms & conditions of the Application cum Bid by declaring /publishing such amendments in a manner that all prospective bidders to be kept informed about it.”

90. Section-IV of the ACBD are the annexures. Annexure-3 requires the bidder to provide the required undertaking in the given format on its letter-head duly signed by the bidder or authorized signatory along with the official seal; and for it to be submitted separately as a part of the technical bid. The format of undertaking in Annexure-3 of Section-IV of the ACBD requires, among others, for the applicant to acknowledge

that they understood that the PNGRB reserves the right to accept or reject any Application-cum-Bid, and to annual the bidding process and reject all Application-cum-Bids.

91. While the PNGRB, undoubtedly, has wide powers, in terms of the various Clauses of the ACBD, to cancel the bid, that does not mean that such a power can be exercised by the Board on its whim or without any justification whatsoever.

i. SCOPE OF ENQUIRY IN AN APPEAL PREFERRED AGAINST THE ORDER OF THE PNGRB:

92. Section 33 of the PNGRB Act relates to appeals to the Appellate Tribunal, and sub-section (1) thereof stipulates that any person, aggrieved by an order or decision made by the Board under the 2006 Act, may prefer an appeal to the Appellate Tribunal. The right of appeal to the Appellate Tribunal, under Section 33 (1) of the 2006 Act, is similar to those provided under Section 111 of the Electricity Act, 2003 (**H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17**), and is akin to a first appeal.

93. A first appeal is a full re-hearing of the original proceedings, and the appellate forum possesses all powers, jurisdiction and authority as the forum of first instance, the jurisdiction and range of subjects being co-extensive. (**Southern Power Distribution Company of AP Limited v. Andhra Pradesh Electricity Regulatory Commission, 2022 SCC OnLine APTEL 110**). An appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person (**Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC**

179; *Madhukar v. Sangram*, (2001) 4 SCC 756; *B.M. Narayana Gowda v. Shanthamma*, (2011) 15 SCC 476; *H.K.N. Swami v. Irshad Basith*, (2005) 10 SCC 243; *Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar*, (1980) 4 SCC 259; *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74), unless the statute conferring a right of appeal limits the rehearing in some way. (*Hari Shankar v. Rao Girdhari Lal Chowdhury* : AIR 1963 SC 698). It is a valuable right of the parties and, unless restricted by law, the whole case is therein open for re-hearing both on questions of fact and law. (*Girijanandini Devi v. Bijendra Narain Choudhary* : AIR 1967 SC 1124; *Santosh Hazari v. Purushottam Tiwari*; (2001) 3 SCC 179) (*H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board*, 2023 SCC OnLine APTEL 17).

94. The parties have a right to be heard both on questions of law and on facts, (*Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179; *Madhukar v. Sangram*, (2001) 4 SCC 756; *B.M. Narayana Gowda v. Shanthamma*, (2011) 15 SCC 476; *Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar*, (1980) 4 SCC 259), and the appellate court has jurisdiction to reverse or affirm the findings of the trial court. (*H.V. Sreenivasa Murthy v. B.V. Nagesha*, 2008 SCC OnLine Kar 837; *Vinod Kumar v. Gangadhar*, (2015) 1 SCC 391; *B.V. Nagesh v. H.V. Sreenivasa Murthy*, (2010) 13 SCC 530). (*H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board*, 2023 SCC OnLine APTEL 17).

95. As the Appeal to this Tribunal, against the orders passed by the Board, is akin to a first Appeal, this Tribunal has the power to examine the validity of the impugned order both on facts and law. While the

Board would, undoubtedly, be entitled to a play in the joints, especially when inviting and accepting bids, that does not mean that the bids called for by the Board can be cancelled in its entirety without any valid reasons whatsoever. As noted hereinabove, the bids were cancelled by the Board on grounds which were not in accordance with the 2010 Regulations and the ACBD, that too without considering the explanation furnished by the appellant, and without stating why their explanation did not merit acceptance.

X. HAS THE APPELLANT'S RIGHTS CRYSTALIZED?

96. Sri Meet Malhotra, Learned Senior Counsel appearing on behalf of the PNGRB, would submit that, till the time the Board took the decision to annul the bidding process, no steps had been taken subsequent to the opening of the financial bid and no Letter of Intent, leave alone an Authorization, had been issued in favour of the Appellant, and thus no right whatsoever had crystallised in favour of the Appellant. Learned Senior Counsel would rely on, **Rishi Kiran Logistics Private Limited vs Board of Trustees of Kandla Port Trust & Ors. (2015) 13 SCC 233**, in this regard.

A. ANALYSIS:

97. In **Rishi Kiran Logistics Private Limited vs Board of Trustees of Kandla Port Trust & Ors. (2015) 13 SCC 23**, on which reliance is placed on behalf of the PNGRB, the Kandla Port Trust took a decision to allot these plots on leasehold basis for a period of 30 years for the purpose of enabling the allottees to put up the construction of liquid storage tanks, and for this purpose issued notice inviting tenders; the annual rent in respect of these plots was fixed at a nominal rate of Re. 1/- per plot; however, the bidders were required to submit the price bid

in the form of premium in respect of the concerned plots for which they intended to bid; the basic value of this premium was fixed at Rs. 612/- per sq. mtr. The appellant submitted its bid in respect of Plot Nos. 14, 15 and 17. The technical bids of the bidders, including that of the appellant, were opened on 11.8.2005, and the bid of the appellant was found to be technically qualified. Thereafter, price bids were opened on 30.8.2005. These bids were scrutinised by the Tender Committee of the Port Trust. Recommendations were placed before the Board of Trustees in its meeting held on 8.12.2005. It was followed by communication dated 7.1.2006 to the appellant in the form of Letter of Intent (LOI), inter alia stating that the leasehold rights in respect of Plot Nos. 14, 15 and 17 were given for a premium of Rs. 3,200/- per sq. mtrs., 3,150/- per sq. mtr. and 3,120 per sq. mtr. respectively. This communication further mentioned that the formal letter will be issued to the appellant after the receipt of CRZ clearance in general. The letter of allotment to the various successful bidders went into limbo, thereafter, awaiting CRZ clearance. CRZ clearance was ultimately received on 16.8.2010, more than 5 years after the NIT dated 12.3.2005 was floated. This prolonged time lag resulted in the Board of Trustees taking a decision on 9.12.2010 to cancel the tender process started in the year 2005. This decision of the Port Trust was conveyed to the appellant vide letter dated 9.12.2010. Similar letters were written to other tenderers as well who were issued similar LOI's. All the affected persons challenged the validity of the decision of the Port Trust.

98. On the question whether there was a concluded contract, the Supreme Court held that the issue as to whether a concluded contract was entered into between the parties and if so, the question of enforcement of such a contract, would be in the field of law of contract.

99. The Supreme Court then referred to its earlier decision in *Kisan Sahkari Chini Mills Ltd. & Ors.* (Supra), wherein it was held that, ordinarily, the remedy available for a party complaining of breach of contract lies for seeking damages; he would be entitled to the relief of specific performance, if the contract was capable of being specifically enforced in law; and the remedies for a breach of contract, being purely in the realm of contract, are dealt with by civil courts.

100. After noting the case of the appellant that, with the issuance of LOI, a concluded contract was entered into; only CRZ clearance was required and even if LOI, which amounted to acceptance of the author given by the appellant in his bid was contingent based on CRZ clearance, even that clearance was granted by the competent authority ultimately, the Supreme Court observed that, what was lost sight of in the entire process was that the said clearance was delayed by a period of 5 years, because of which neither any final LOI could be issued, nor possession of the plots given or the payments received; apart from general CRZ clearance, specific clearances on individual basis in this behalf were also to be obtained; under clause 12 of the 'Rules and Procedure for Allotment of Plots' issued by the Kandla Port Trust, the Port Trust had reserved with itself right of acceptance or rejection of any bid with a specific stipulation that mere payment of EMD and offering of premium will not confer any right or interest in favour of the bidder for allotment of land; such a right to reject the bid could be exercised 'at any time without assigning any reasons thereto'; Clause 13 related to 'approvals from statutory authorities', with unequivocal assertion therein that the allottees will have to obtain all approvals from different authorities and these included approvals from CRZ as well; and as per clause 16, the allotment was to be made

subject to the approval of Kandla Port Trust Board/ Competent Authority.

101. The Supreme Court observed that its earlier judgement in Dresser Rand S. A. v. M/s. Bindal Agro Chem. Ltd. & Anr.; **AIR 2006 SC 871**, was squarely applicable; in the said judgement it was held that a letter of intent merely indicates a party's intention to enter into a contract with the other party in future; a letter of intent was not intended to bind either party ultimately to enter into any contract; a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms; it was not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that a detailed contract would be drawn up later; if such a letter was issued to the contractor, though it may be termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties; but the question whether the letter of intent is merely an expression of an intention to place an order in future or whether there is a final acceptance of the offer thereby leading to a contract, is a matter that has to be decided with reference to the terms of the letter; when the LOI is itself hedged with the condition that the final allotment would be made later after obtaining CRZ and other clearances, it may depict an intention to enter into contract at a later stage; however, when the completion of these formalities had taken undue long time and the prices of land, in the interregnum, shot up sharply, the respondent had a right to cancel the process which had not resulted in a concluded contract.

102. Para 12 of the Board Agenda Note dated 21.11.2023 records that, on evaluation of the financial bids, the Bid Evaluation Committee

had submitted that the Appellant had a higher composite score of 1.0, and therefore it had emerged as the successful bidder for the subject pipeline; and, accordingly, the Bid Evaluation Committee had recommended to issue the Letter of Intent (LoI), for grant of authorization, to the Appellant for the development of the proposed petroleum and petroleum product (ATF) pipeline from Malkapur to Hyderabad International Airport.

103. It is no doubt true that mere recommendation by the Bid Evaluation Committee, that a Letter of Intent be issued in favour of the Appellant, would not confer any right on the Appellant to be granted an LoI, since a decision as to whether or not an authorisation should be issued in favour of the Appellant is to be taken by the Board in the discharge of its statutory functions under Regulations 9(1) and (2) of the 2010 Regulations. That does not mean that the Board can, without any justification, cancel the bidding process in its entirety. While this Tribunal may not be justified, in directing the Board to grant the Appellant the authorisation merely on its being found to be the successful bidder, we are of the view that the PNGRB ought to have, at the very least, consider the explanation submitted by the Appellant in justification for having quoted a low variable transportation tariff, as also with respect to their consent (given at the request of the Board itself) for the tariff to be fixed by the Board in terms of the Regulations from the 11th year onwards, and then take an appropriate decision in accordance with law as to whether the appellant should be granted authorisation, or the bidding process should be cancelled in its entirety.

XII. LETTER OF IOC DATED 15.05.2023:

104. Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the appellant, would submit that the PNGRB, on the basis of IOCL's

letter dated 15.05.2023 (i.e. after the date of opening of the financial bid), raised certain queries vide its letter dated 23.06.2023 (without intimating that the same was based on IOCL's letter dated 15.05.2023) which were verbatim to those stated by IOCL (which had itself participated in the bidding process but was not successful and was therefore a competitor); this action of initiating cancellation on account of a competitor's letter is itself arbitrary, malafide and not expected of a sector regulator; and, furthermore, the Board never brought the so-called issues to the notice of the BEC before seeking to cancel the bidding process.

A. ANALYSIS:

105. It does appear that, after the financial bids were opened, Indian Oil Corporation Limited had addressed a letter to the PNGRB on 15.05.2023 pursuant to which the PNGRB raised certain queries seeking the Appellant's response thereto vide its letter dated 23.06.2023. Curiously, this letter of the Board dated 23.06.2023 makes no reference to the earlier letter of IOCL dated 15.05.2023. In the said letter dated 23.06.2023, the PNGRB observed that (1) the Appellant had quoted a fixed tariff of Rs.0.01/MT from the 1st year to the 10th year of operation for their offered pipeline capacity of 4.99 MMTPA; similarly, the variable tariff varied from Rs.0.01/MT/KM to Rs.0.90/MT/KM for the first 10 years; the low variable transportation tariff, quoted by the Appellant, appeared to be highly subsidized and unrealistic, and may not cover the variable operating cost of the pipeline; (3) the Appellant had submitted a capex of Rs.208 crores towards capital cost of the 14 inch dia and 4.99 MMTPA capacity pipeline which was very low and may result in subsidized tariff and overstated IRR; and (4) the Appellant had taken a higher fixed and

variable tariff beyond 10 years for calculation of IRR as per the submission in Annexure-14 of the ACBD; as mentioned in Regulations 7(1)(a) and 7(1)(b) of the PNGRB (Authorizing Entities to Lay, Build, Operate or Expand Petroleum and Petroleum products Pipelines) Regulations, 2010 (“the 2010 Regulations” for short); the Board shall review the tariff after ten years and fix for a block of five years thereafter on a prospective basis; and the Appellant should confirm that the tariff considered in Annexure-14 after 10 years shall not be claimed, and it shall accept the tariff fixed by the Board as per the Regulations. The Appellant was directed to make a presentation before the PNGRB on 05.07.2023, and submit clarifications on the afore-said issues.

106. It is only on the Board Agenda Note dated 21.11.2023 being filed by the PNGRB, along with its reply to the appeal filed by the appellant before this Tribunal, has the contents of the letter of IOCL dated 15.05.2023 (received by the Board) come to light. The Board Agenda Note dated 21.11.2023 records IOCL having requested PNGRB, vide their dated 15.05.2023, to call upon the Appellant to present the detailed financials of the pipeline project, its viability and whether unrealistic investment was being made by it, considering that it was a public sector undertaking and would be investing public funds in the project; and to their having highlighted certain points on the Appellant’s financial bid, among which are (i) unrealistic low tariff, and (iv) Low Capex. Curiously, while the IOCL appears to have found fault with the financial bid submitted by the Appellant, it appears that they have also quoted a more or less similar variable tariff at least for the first 10 years.

107. Not only has the Board acted on the letter addressed to it by a competing bidder, that too one which has quoted a similar low tariff as that of the appellant in the first 10 years and a higher tariff from the 11th to 25th year, the Board has chosen not to disclose receipt of the letter from IOCL to the Appellant herein anytime before filing their reply to the present appeal. While the conduct of the Board. in acting on a letter addressed to it by a competing bidder, that too without bringing this information to the notice of the Appellant, may not show them in good light, we see no reason to delve on this issue any further, since, for the reasons afore-mentioned, we are of the view that the Board ought to reconsider the entire matter including the explanation furnished by the Appellant in justification for their having quoted a low variable transportation tariff, as also their having consented for the tariff from the 11th year onwards to be fixed by the Board in terms of the Regulations.

CONCLUSION:

108. The impugned public notice dated 14.12.2023 is, accordingly, set aside. In the light of the observations made hereinabove, the Board shall pass a reasoned order on the afore-said aspects and communicate its decision to the Appellant. The subsequent tender process, initiated by the Board in its meeting held on 27.12.2023, and the bid notice issued in Bid No. BID/PPPL/14/2024/01/ MHAPL on 29.12.2023, re-inviting bids for the said pipeline, shall not be given effect to till the Board considers the Appellant's explanation and communicates its reasoned decision to the Appellant.

109. It is made clear that we have not expressed any opinion on the merits of the Appellant's explanation or with respect to their consent for tariff to be fixed by the Board in terms of the Regulations, as these are

all matters for the Board to consider in accordance with law, more particularly the pre-amended 2010 Regulations. The Appeal stands disposed of accordingly. Pending IAs, if any, shall also stand disposed of.

Pronounced in the open court on this the **15th day of May, 2024.**

(Dr. Ashutosh Karnatak)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / NON-REPORTABLE