

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 17 of 2011

In the matter of
Petition of Reliance Infrastructure Limited seeking review of Order dated January 27, 2011 passed by the Commission in Case No.53 of 2010.

Shri. V.P. Raja, Chairman
Shri. Vijay L. Sonavane, Member

Reliance Infrastructure Ltd.,
Santacruz (E).Mumbai-400055

.....Petitioner

V/s

Wardha Power Company Ltd.,
Jubilee Hills, Hyderabad-500033

.....Respondent

ORDER

Dated: May 16, 2011

Reliance Infrastructure Limited,(RInfra) submitted a Petition under affidavit on February 8, 2011 seeking a review of the Commission's Order dated January 27, 2011 in Case No. 53 of 2010. The Petition is stated to have been filed invoking Section 94 of Electricity Act, 2003 ("EA 2003") and inter- alia, Regulation 85 of MERC (Conduct of Business) Regulations, 2004 made under Section 181 of EA 2003.

2. The following are the main prayers of the Petitioner:

“

- a) *That this Hon'ble Commission may be pleased to review its Order dated 27th January, 2011 passed in Case No. 53 of 2010 to the extent this Hon'ble Commission directs RInfra to scrap competitive bidding process for 1500 MW on long term basis and invite fresh RFP for procurement of power under Case 1 single stage bidding process, so that all bidders get a fresh opportunity to bid in the competitive process;*
- b) *That pending the hearing and final disposal of this Petition, the Order dated 27 January, 2011 passed in Case No. 53 of 2010 be stayed to the extent this Hon'ble Commission directs RInfra to scrap competitive bidding process for 1500 MW on long term basis and invited fresh RFP for procurement of power under Case 1 single stage bidding process, so that all bidders would get a fresh opportunity to bid in the competitive bidding process;*
- c) *For ad-interim relief's in terms of prayer (b) hereinabove.”*
For such and further and other relief's as the Hon'ble Commission may deem appropriate in the facts and circumstances of the case.”

3. Reliance Infrastructure Ltd., in its Petition, submitted as under:

- a. RInfra submitted that in the Order dated January 27, 2011 in Case No.53 of 2010, where the Petition was disposed of by the Commission after hearing RInfra and Respondent the entire bidding process cannot be cancelled at the instance of one of the parties. RInfra further submitted that the direction to scrap the long term Competitive Bidding process affects other bidders all of whom were not heard by the Commission.
- b. RInfra referred to the impugned Order where it has been held that RInfra's actions purportedly violated several fundamental aspects of Competitive Bidding as under:
 - (i) Uncertainty of bid opening date
 - (ii) Continuous attempts to negotiate the prices of L1 (lowest bidder)
 - (iii) Persuading the bidder to extend the bid validity against their willingness.
 - (iv) Issue of Letter of Intent (LoI) despite a clear understanding that bidder is unwilling to extend the validity
 - (v) Not returning the bid bond

- (vi) Invoking the bid bond and encashing the bank guarantee.
- c. RInfra in its reply submitted that as far as the uncertainty of bid opening date was concerned, it had submitted letters which specified that there had been specific requests from bidders to extend the bid submission dates, inter- alia since, the bids of most of the bidders were blocked with other Long Term Power Procurement (LTPP) bids in Maharashtra, Gujarat, Punjab and Rajasthan, which has been brought out by RInfra in Case No.13 of 2011.
- d. RInfra submitted that the practice of negotiating price with L1, i.e., lowest bidder for reduction in price is in interest of consumer and considering the present market scenario. It also brings to the fact that negotiations were carried out in Case No. 22 of 2010 passed by the Commission in its Order dated December 28, 2010. RInfra also submitted that it brought to the notice a copy of an Order dated December 20, 2007 passed by Gujarat Electricity Regulatory Commission pertaining to adoption of tariff at negotiated rate.
- e. RInfra submitted that other bidders had extended the bid validity from time to time pursuant to the request from RInfra, thus they have not persuaded the bidder to extend the bid validity against their willingness.
- f. RInfra submitted that the position adopted by Wardha Power Company Limited (WPCL) is contrary to the representation made that the bid validity would be extended as intimated to RInfra in writing, hence RInfra invoked the bond.
- g. RInfra submitted that the Commission in its Order in Case No. 53 of 2010 (Para 9) held that there is an uncertainty about the status of the bid after L1 (Lowest Bidder) has been eliminated as RInfra is silent about placing Order to L2 bidder (2nd Lowest Bidder) and it has not approached the Commission.
- h. RInfra further submitted that RInfra through its letter dated January 15, 2011 informed the Commission that it has issued Letter of Intent (LoI) to RPower/Chitrangi Power Private Limited which has been accepted by RPower/Chitrangi Power Private Limited and the tariff rate therein is Rs. 3.26/kWh (including green cess of Rs. 50/Ton i.e. approximately 3.5 Paise/kWh levelised through long term Competitive Bidding.
- i. RInfra submitted that the tariff for which Power Purchase Agreement (PPA) is entered is lower than the regulated rate determined by the Commission for The Tata Power Company Ltd. (Fixed and Variable Charge). Further the said tariff is lower by approx 1.5 paise per unit than the price discovered in recently concluded Case I bidding process of MSEDCL which has been approved by this Hon'ble Commission in Case No.22 of 2010 in its Order dated December 28,

2010. The weighted average price at which MSEDCL has concluded the long term PPA, subsequently through negotiations with bidder is Rs 3.24/kWh (excluding green cess of approximately 3.5 paise per unit).

- j. Considering the bid given by L1 bidder i.e. Rs. 3.421/kWh and comparing the same with price at which PPA is entered with RPower (Chitrangi) the annual savings to the consumers would be Rs.282 crore for 25 years. (This annual savings has been considered on the basis of 680 MW to be received from Chitrangi out of 1000 MW which is for a price of Rs.3.26/kWh inclusive of green cess as against Rs.3.69/kWh (without green cess) as submitted in the bid.
- k. RInfra submitted that while in Para 30 of the petition in Case No. 53 of 2011 the respondent sought cancellation and termination of the process under the RFP issued by the Petitioner in July 2009, no material has been placed by the respondent in support of prayer (c) of the petition which related to cancellation of the process which read as follows:

“(c) Cancel and terminate the process under RFP issued by the Respondent in July 2009 and direct the Respondent to go for a fresh tender in accordance with law.”
- l. RInfra was under the impression that in support of prayer (c), as no material was produced by the Petitioner nor was this argued and hence there was no question of considering this prayer by this Commission.
- m. RInfra submitted that its letter dated May 19, 2010 has inter alia duly intimated MERC of the development and the reason for uncertainty in bid opening date. All bidders are given opportunity and sufficient time to participate in the bid taking into consideration the various reasons cited by the bidders.
- n. RInfra further submitted that, referring to the recent Order dated December 28, 2010 in Case No.22 of 2010 (Tariff Adoption Petition filed by MSEDCL) negotiation did take place and post approval of GoM . PPAs were executed with Indiabulls Power Ltd. and Adani Power Maharashtra Ltd. at negotiated levelised tariff.
- o. In the order under review, the Commission has also, inter alia, observed in its said Order that RInfra has persuaded bidder to extend bid validity against their willingness. It is submitted that other bidder had willingly extended the bid validity from time to time pursuant to the request from RInfra.
- p. Further, RInfra submitted that insofar as the Respondent is concerned its authorized representative, Shri. Hari Prasad, Head Business Development visited RInfra office on July 9, 2010 and agreed to extend the bid validity and consider request of RInfra for reduction in price an assurance and commitment given by

Shri. Hari Prasad was to be followed by writing. But later Shri. Prasad expressed his inability to reduce the financial bid. LoI was issued on July 21, 2010, however for reasons best known, the Respondent did not accept the said LoI.

q. RInfra in its affidavit in reply dated November 11, 2010 elaborately setting out between RInfra and WPCL. RInfra submitted that, there was no question of RInfra persuading the bidder against their willingness to extend the bid validity. In fact, negotiation took place even after July 1, 2010, averment in relation to which has neither been disputed nor denied by WPCL in its Rejoinder.

4. The Commission, vide its Notice dated February 10, 2011, scheduled a hearing in the matter on February 17, 2010 along with Case Nos. 13 of 2011, and directed Petitioner to serve a copy of its Petition to the respondent and authorized Consumer Representatives.

5. During the hearing held on February 17, 2011, Shri. Lalit Jalan, CEO, Shri. J.J Bhatt, Sr. Advocate, Anjali Chandurkar, Advocate, appeared on behalf of the Petitioner (RInfra). Shri.Rana.S.Biswas, Shri. Hemant Singh, Counsels and Shri. Ramesh Kumar, Director, WPCL appeared on behalf of the Respondent.

6. Shri. Bhatt submitted that the prayer (c) of WPCL 's petition dated September 28, 2010, for scraping the entire Competitive Bidding process was not argued by WPCL during the hearing in the Case No. 53 of 2010. The arguments were moreover related to Letter of Intent (LoI) and the return of bid amount invoked by M/s.RInfra Ltd. Shri.Bhatt further submitted that there is an error apparent on the face of record and there was no contention of the parties on bid opening date, and the prices were negotiated in the larger interests of consumers.

7. Shri. Lalit Jalan, CEO, RInfra made a presentation to the Commission, highlighting the importance of price negotiation in consumer interests which has resulted in savings of Rs.7700 Crore for period of 25 years and prices discovered were lower than discovered in Case I bidding of MSEDCL and other States. Shri. Jalan also stated that the price of Rs.3.26/kWh is lower than the regulated price of TPC-G. Shri. Jalan further submitted that 1000 MW from RPower (Chitrangi Unit) would help in bridging the demand-supply gap and prayed to adopt the tariff discovered under Case I bidding.

8. The Advocate of the Respondent submitted that there was no scope for review of petition and that there was no error apparent on the face of record.

9. The Commission enquired of M/s. RInfra about the project implementation status of Chitrangi Power Private limited and Sasan project to which petitioner replied that it has all requisite clearances in place. Shri. Lalit Jalan, further stated that Sasan and Chitrangi projects would be completed in 2 years and 3.5 years respectively.

10. The Commission also enquired RInfra, whether it would get a lower price if it goes with a complete fresh round of Competitive Bidding which would take a year so, as more generation would come up and also the contracted power would be available from FY 2014-15, which could be in the larger interests of consumers.

11. Shri Bhatt responded to it saying that it cannot guarantee future prices to be lower than that of present negotiated price, as prices are linked to fuel availability. RInfra's existing distribution licence is expiring on August 14, 2011, so the present procurement.

12. Shri Bhatt further submitted that it has no difficulty to return Rs.9.60 Crore along with interest to WPCL, if they do not wish to scrap the entire bidding process. The Commission enquired of WPCL, whether it is willing to supply power at price lower than Rs.3.26/kWh. In response, WPCL submitted that it is not willing to match the price at Rs. 3.26/kWh.

13. Replies submitted by WPCL on March 15, 2011 are as follows:

- a) The Respondent, through the present reply to the Review Petition filed by the Petitioner, prayed that the same may be rejected. It is stated therein that an error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error on the face of records justifying the court /tribunal to exercise its power of review. WPCL submitted that fresh RFP will give all the other bidders a fresh opportunity and level playing field vis – a vis the sister Company of the review petitioner to quote their tariff.
- b) The respondent quoted the lowest price and thus was eligible for the grant of the LoI within the bid validity period. However, the LoI was issued to the respondent after the bid validity period is over. As a result the respondent was well within the rights in refusing to accept the said LoI. It is submitted that the

process initiated was not transparent as the review petitioner initiated negotiation with the L 2 i.e., second lowest bidder which is a sister Company and sought to create a contractual relationship even after the bid process.

- c) It is submitted that the Commission has rightly observed in Para No. 9 of Order dated January 27, 2011 in Case No. 53 of 2011 that the petitioner herein is silent about placing an order on the L2 viz. the sister Company of the petitioner and same cannot be a ground for the review of the said Order.
- d) It is submitted that the review petitioner, subsequent to the issuance of LoI to its sister company i.e, L 2 bidder in a clandestine manner on 2.12.2010, which was hidden from the Commission, has purportedly executed a PPA on 21.01.2011. The said alleged execution of a PPA stands vitiated in the light of the earlier non disclosure of the issuance of an LoI and thus now cannot be a ground for review of the Order dated January 27, 2011
- e) WPCL submitted that the pleadings and the written submissions tendered by the respondent in Case No. 53 of 2010, clearly mentioned the argument advanced as regards the cancellation of the entire bidding process
- f) WPCL submitted that Para 3.5.9. of the RFP specifically prohibited any negotiation on the quoted tariff between authorized representative of procurers and bidder during the process of evaluation of the bid, however in the present case the review petitioner herein indulged in negotiation even after the bid validity period was over.
- g) The Petitioner cited a Judgment of the Supreme Court in the case of *Food Corporation of India Vs M/s. Kamdhenu Cattle Feed Industries* AIR (1993) 1 SCC 71 as regards the negotiation which can be held with all the tenderers as to revision of the submitted tender. It is stated that the said Judgment also mentioned that such negotiation, if any, have to be held within the stipulated period of acceptance of the tender. Thus, the Judgment cited by the review petitioner also contradicts their stand.
- h) It is denied that Shri. Hari Prasad, Head Business Development of the respondent, on 9.7.2010 agreed to extend the bid validity and consented to consider the request of the review petitioner for reduction in price. It is submitted that these matters have come to rest when the impugned Order was passed.

- i) It is submitted that the review petitioner herein was not justified in encashing the bank guarantee once the LoI was refused by the respondent herein as the same was beyond the bid validity.

14. During the hearing held on March 17, 2011, Shri. Lalit Jalan, CEO, Shri. J.J Bhatt, Sr. Advocate, Anjali Chandurkar, Advocate, appeared on behalf of the Petitioner (RInfra). Shri. Rana.S.Biswas, Shri. Hemant Singh, Counsels and Shri. Ramesh Kumar, Director, WPCL appeared on behalf of the Respondent.

15. Shri. Sanjay Sen appearing on behalf of WPCL stated that in case of Long Term Power Procurement the order was awarded to L2 i.e., M/s. Chitrangi Power Private Ltd. Chitrangi Power Private Ltd. cannot be allowed to supply the power because the tariff rate offered by L2 Company has not been discovered under a transparent process of Competitive Bidding, but arrived after negotiations between RInfra and Chitrangi Power Private Ltd. Therefore, there is no transparency in the working of the Petitioner. Further, he said that law also provides that there should be transparency in the process by which a tariff rate is discovered. Further, Shri. Sen argued that the petitioner had negotiated the price with L2 Company on the ground to reduce the prices in the interest of consumers. The aforesaid reduced prices cannot be obtained by negotiations but the petitioner should have gone for rebidding in the interest of the consumers. Shri Sen also advocated that jurisdiction is a matter of statute, and not a matter of discretion. Public interest, even though it is to be established by RInfra, cannot expand jurisdiction.

16. The Commission vide Notice dated March 31, 2011 scheduled a hearing in the matter on April 25, 2011 at 11.00 hrs along with Case No.13 of 2011 in the presence of authorized Consumer Representatives under Section 94(3) of the EA 2003.

17. During the hearing held on April 25, 2011, RInfra submitted that it has preferred an appeal from the impugned Order dated January 27, 2011 in Case No. 53 of 2010 before the Appellate Tribunal for Electricity.

18. The appeal challenging the Order dated January 27, 2011 in Case No. 53 of 2010 was filed on March 11, 2011. In the said appeal, RInfra has specifically averred that it has filed a Review Petition seeking review of the Order dated January 27, 2011 and the same is pending before the Commission. The period for filing an appeal under Section 111 (2) of EA 2003 is 60 days. As the period of limitation would have expired on March 13, 2011, the appeal was filed on March 11, 2011.

19. RInfra also submitted that it has been held in the case of *Tungabhadra Industries Limited Vs The Govt. of Andhra Pradesh*, AIR 1964 SC 1372 that while interpreting the date for determining whether or not the terms of order 47 Rule 1 (1) are satisfied is the date when the application for review is filed, if on that date no appeal has been filed, it is competent for the Court hearing the petition for review to dispose of the application on merits notwithstanding the pendency of the appeal subject only that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the Court hearing the Review Petition would come to an end. This Judgment holds the field today and has been followed in case of *Kunhayammed & others Vs State of Kerala & Anr*, (2000) 6 SCC 359.

20. Having heard both the Petitioner and the Respondent and after considering the materials placed on record, the Commission holds as under:

(a) The provisions related to review of orders by the Commission are as follows –

(1) Electricity Act, 2003:-

“Powers of Appropriate Commission

94. (1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) ..
- (f) reviewing its decisions, directions and orders;
- (g) ...”

(2) Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004:-

“Review of decisions, directions, and orders:

85. (a) Any person aggrieved by a direction, decision or order of the Commission, **from which (i) no appeal has been preferred** or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face

of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Commission.

(b) An application for such review shall be filed in the same manner as a Petition under these Regulations.

(c) The Commission, shall for the purposes of any proceedings for review of its decisions, directions and orders be vested with the same powers as are vested in a civil court under the Code of Civil Procedure, 1908.

(d) When it appears to the Commission that there is no sufficient ground for review, the Commission shall reject such review application.

(e) When the Commission is of the opinion that the review application should be granted, it shall grant the same provided that no such application will be granted without previous notice to the opposite side or party to enable him to appear and to be heard in support of the decision or order, the review of which is applied for.”

{Emphasis supplied}

(b) In accordance with the above provisions a petition for review cannot be entertained if an appeal had been preferred. Admittedly, RInfra submitted that it has preferred an appeal from the impugned Order dated January 27, 2011 in Case No. 53 of 2010 before the Appellate Tribunal for Electricity. The appeal was filed on March 11, 2011. The present review petition was filed on February 8, 2011. However, there is no scope under Regulation 85 to entertain the present review on the ground that appeal was preferred after filing the review petition. The present review petition deserves to be rejected as it is barred under Regulation 85 extracted below -

*“85. (a) Any person aggrieved by a direction, decision or order of the Commission, from which (i) **no appeal has been preferred** may apply for a review of such order.....”*

Hon’ble Appellate Tribunal held in its Order dated 28th February, 2011 in Appeal No. 199 of 2010 & I.A. Nos. 280 of 2010 and 45 of 2011, that “*Any statutory authority which is subordinate to another statutory authority within the periphery of the appellate jurisdiction must not go through revision and re-examination of its own orders after the appeal is presented and admitted*”.

In view of the above, the present review petition deserves to be rejected as not maintainable and accordingly stands dismissed.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V. P. Raja)
Chairman