

15 -ാം കേരള നിയമസഭ

13 -ാം സമ്മേളനം

നക്ഷത്ര ചിഹ്നം ഇല്ലാത്ത ചോദ്യം നം. 660

10-02-2025 - ൽ മറുപടിയ്ക്ക്

മുൻ സർക്കാർ കാലത്തെ കരാർ റദ്ദാക്കിയ നടപടിയിൽ കെ.എസ്.ഇ.ബി-യുടെ വിശദീകരണം

ചോദ്യം		ഉത്തരം	
ശ്രീ. ചാണ്ടി ഉമ്മൻ		ശ്രീ. കെ . കൃഷ്ണൻകുട്ടി (വൈദ്യുതി വകുപ്പ് മന്ത്രി)	
(എ)	മുൻ യു. ഡി. എഫ്. സർക്കാർ കാലത്തെ ദീർഘകാല കരാറുകൾ റദ്ദാക്കുന്നതിനെതിരെ അന്നത്തെ പവർ വകുപ്പ് സെക്രട്ടറി നിലവിലെ വൈദ്യുതി മന്ത്രിക്ക് നൽകിയ കത്തിന് ബോർഡ് നൽകിയ വിശദീകരണം എന്തായിരുന്നുവെന്ന് വ്യക്തമാക്കാമോ; പ്രസ്തുത കത്തിന് മറുപടിയായി കെ.എസ്.ഇ.ബി സി.എം.ഡി നൽകിയ വിശദീകരണത്തിന്റെ പകർപ്പ് ലഭ്യമാക്കാമോ?	(എ)	മുൻ യു. ഡി. എഫ്. സർക്കാർ കാലത്തെ ദീർഘകാല കരാറുകൾ റദ്ദാക്കുന്നതിനെതിരെ അന്നത്തെ പവർ വകുപ്പ് സെക്രട്ടറി നിലവിലെ വൈദ്യുതി മന്ത്രിക്ക് നൽകിയ കത്ത് അനുബന്ധം 1 ആയി ചേർക്കുന്നു. പ്രസ്തുത കത്തിന് മറുപടിയായി കെ.എസ്.ഇ.ബി സി.എം.ഡി നൽകിയ വിശദീകരണത്തിന്റെ പകർപ്പ് അനുബന്ധം 2 ആയി ചേർക്കുന്നു.

സെക്ഷൻ ഓഫീസർ

Pomjor/mto-I

From

Paul Antony,
No.70, GCDA Road,
Periyar Gardens,
Thottakattukara,
Aluva 683108



4-6-2022

Prl. Secretary (Power)**Examine & Put up**

Handwritten signature
8/6/22

K. KRISHNANKUTTY
Minister for Electricity
Government of Kerala

To

Shri K. Krishnankutty,
Hon'ble Minister for Electricity,
Government of Kerala,
Secretariat,
Thiruvananthapuram

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14/6

Dear Sir,

Sub: Request to re-examine the decision to not approve deviations in the Bidding Procedure for DBFOO power and cancel the purchase of 465 MW of power by KSEB - reg

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US(Power)

It was recently that I learnt about the decision taken in a meeting held by the Finance Secretary in January 2022 to not approve deviations in the Bidding Procedure for DBFOO power and cancel the purchase of 465 MW of power.

Since I have worked as Power Secretary from June 2016 to December 2017, and have therefore some knowledge of the issues involved, I request you to have this decision re-examined.

Some of the noteworthy issues in this context are the following:

DBFOO Tender link to Transmission Corridor Availability: The DBFOO tender was inextricably linked to transmission corridor availability. In the pre-2014 period, transmission corridor availability was severely limited, and several corridor applications of KSEB had been repeatedly rejected. As per the CERC guidelines for allotting interregional transmission corridors, applications for corridor allocation were to be processed on *first-come-first-served* basis, and applicants with long term power contracts had top priority. Applications for long term allocations were processed on a half yearly basis (January-June and July-December) and to be filed along with concluded contracts in the earliest window of opportunity as other Southern States were also vying for the upcoming availability. But this regime also stipulated that if a Discom could not draw power after contracting power from a generator for lack of corridor availability, the Discom would have to pay the generator 50% of the fixed costs. New transmission corridor availability for 600 MW was expected to become available from June 2016, with the next enhancement of corridor only from October 2017.

So award of DBFOO bids had to be synchronised with corridor availability.

Why Two Simultaneous Bids: KSEB's additional long term power requirement at that time was identified as 850 MW. Out of this, a 3 year contract for 400 MW entered in 2013 was to commence from March 2014 and continue till February 2017. So the requirement from 2016-17 was 450 MW, and 850 MW from 2017-18 onwards.

In view of the foregoing the option of two separate bids with separate start dates was selected. KSEB's bids were timed to be concluded latest by December 2014.

Deviations from Procedure: The deviations in the procedure followed by KSEB from that notified by MOP must be viewed against this background. KSEB did comply with the standard bid documents. KSEB's deviations were only in the bid evaluation part.

The results on the opening of the two bids were as below:

Bid 1: Date of Opening : 31-10-2014				Bid 2: Date of Opening : 14-11-2014			
Sl. No.	Name of Firm	Quantum of power in MW	Tariff as on Bid Date (Rs./kWh)	Sl. No.	Name of Firm	Quantum of power in MW	Tariff as on Bid Date (Rs./kWh)
1	Jindal Power Limited	200	3.6	1	Bharat Aluminium Co. Ltd	100	4.29
2	Jhabua Power Limited	115	4.15	2	Jindal India Thermal Power Ltd	150	4.37
		315		3	Jhabua Power Limited	100	4.41
				4	Jindal Power Limited	100	4.43
				5	East Coast Energy Private Ltd	100	4.45
						550	

Validity Period of Bid 1: 28-2-2015
Power Supply from : 1-12-2016

Power Supply from : 1-10-2017

Bid 1 had 10 bidders, quoting from Rs.3.60 to Rs.7.29 per kWh, and Bid 2 had 11 bidders quoting Rs.4.29 to Rs.5.95 per kWh. But L1 in Bid 1 offered just 200 MW as against the tendered 450 MW, and L1 in Bid 2 offered just 100 MW as against 400 MW tendered.

MOP's Standard Bid Documents only provided for award of contract to L1 bidders, and did not provide guidance in a situation where the L1 offer was only 300 MW as against the tendered 850 MW. KSEB's queries to MOP on 23-8-2014 and 16-9-2014 in this regard went unanswered. Re-tendering would have delayed awards, leading to possible loss of corridor.

Hence in order to tie up the balance quantum, KSEB requested the L2 to L4 bidders of Bid 1 and L2 to L6 bidders of Bid 2 to match the tariff of the lowest bidder. No one was ready to match the L1 tariff in case of Bid 1. However, bidders L2 to L5 gave concurrence to match the L1 tariff of Bid 2, and their offers were accepted by KSEB.

During the period of processing Bid 2, Bid 1 was also live with a bid validity period upto 28-2-2015. The L1 tariff of Bid 2 is Rs.4.29 per kWh, whereas the tariff quoted by the L2 Bidder of Bid 1 is Rs.4.15 per kWh; over a 25 year period this 14 paise per kWh differential on 115 MW meant around Rs.350 crores. Considering this, KSEB accepted this offer of L2 also.

Later, as the East Coast Energy plant was not completed in time, 100 MW was terminated, so that KSEB now has only 765 MW.

Section 63 of the Electricity Act, 2003 requires the tariff discovered in tender to be adopted by the KSERC. But the KSERC on 30-8-2016 approved tariff for only 300 MW of

PSAs executed by L1 bidders of Bid 1 and Bid 2. KSERC directed KSEB to get the approval of the State Government and MOP for deviations in the bidding procedure used by KSEB to approve the tariff for the long term procurement of remaining power.

KSEB's rates were the lowest at a weighted average of Rs.4.11 per kWh, compared to L1 bid rates Rs.4.48 got by Uttar Pradesh, Rs.4.517 by Rajasthan, and Rs.4.91 by Tamil Nādu in the bids floated during that time.

KSEB obtained open access approval from PGCIL for transmitting 765 MW power, i.e 315 MW supply from 1-12-2016 onwards and 450 MW supply from 1-10-2017 onwards.

Purchase Already Approved by Government: The DBFOO purchase of 865 MW by KSEBL was approved by the Cabinet as Council Decision No.6114 on 17-12-2014, following which GO(Ms)No.45/2014/PD dated 20-12-2014 was issued.

I understand that the major points being used to decry the DBFOO power purchase are the following. I have asked around and my views on the ramifications thereof are given alongside.

1. Better to purchase from power exchanges as the rates there are much lower: Rates in power exchanges remained low, between Rs.3 to 4 per unit, from November 2018 till mid 2021. This was due to a combination of factors, like two consecutive good monsoons, significant increase in production of coal and lower than usual power demand due to Covid lockdowns.

The scenario has changed significantly from August 2021 onwards as power demand returned with economic activity picking up. The average price in power exchange was around Rs.5 per unit in August 2021 and has moved up to Rs.12 per unit now (it had gone up to Rs.20 per unit in March 2022). It is not going above Rs.12 now only because of the ceiling imposed by CERC from 1-4-2022.

Even though the present power shortage is ascribed to low coal stock, actually domestic coal production is at record levels in 2021-22 and in April 2022, with some problems only in rake availability. The issue has deeper roots: less than planned addition to power generation capacity, and higher global energy prices. Both factors are likely to persist for a long time.

Thus, the bid price in the disputed contracts of Rs.4.15 (L2, Bid 1) and 4.29 (Bid 2) per unit are much below present market rates and cannot be substituted profitably by power purchases from the exchanges.

2. KSEB has surplus power. Continuing the DBFOO contracts leads to unnecessary payment of fixed charges: The power flow from two bids commenced from December 2016 and October 2017. And with this power, KSEB could avoid power restrictions in the State during 2016-17 and 2017-18 despite those years being tough drought years. KSEB could avoid high cost power from the exchanges based on the enhanced availability from these contracts. Also, costly thermal stations within Kerala could be backed down.

But in 2018-19 and 2019-20, owing to high inflow into reservoirs due to floods, and fall in power demand due to wet conditions, there was surplus power availability. In 2020-21 the surplus was even more, due to Covid lockdowns. During this period power could be considered "surplus" only with Central allocation power from stations like Kudgi and Simhadri plants owned by NTPC, NLC, etc., which is costlier, at Rs.5 or more per unit, than the DBFOO power.

But now, this surplus has already disappeared and KSEB has had to contract 270 MW additionally from January 2022 onwards to meet the growing demand.

The shortage anticipated till 2026-27 by KSEB itself may be seen in its Tariff Petition filed before KSERC, projecting a deficit of around 300-500 MW in the summer months in next two years, with a significant deficit round the year reaching upto 1,200 MW from 2024-25 onwards.

There is no denying that Kerala has a long term power deficit. Capacity cannot be added in Kerala. Prudence requires addressing bulk of this deficit with long term arrangements rather than relying on power exchanges where prices can go either way.

3. The procedure followed by KSEB has deviated from the MOP's Standard Bidding Document, and Gol has not agreed to ratify it: KSEB has complied with the Standard Bid Documents; it has deviated only in the method for bid evaluation. But clause 1.1.4 of the Model Request for Proposal which is part of the Standard Bidding Documents notified by MOP implicitly allows price matching with L1 bidder for selection of subsequent bidders in case the entire bid quantity is not offered by the L1 bidder: *"1.1.4 Applicants may bid for the capacity specified in Clause 1.1.1, or a part thereof, not being less than 25% of such capacity. Provided, however, that the Utility may, in its sole discretion, accept only those Bids which match the lowest Bid."*

Thus, the price matching followed in Bid 2 appears to be in order as the L1 bidder has offered a quantum of only 100 MW against the bid quantum of 400 MW.

And the Rs.350 crore advantage to KSEB in purchasing 115 MW power from the L2 Bidder in Bid 1 is too huge to be ignored. Financial prudence demands approval of this as well. MOP has advised that consequent to the amendment to the 'Guidelines for Procurement of Electricity from Thermal Power Stations set up on DBFOO basis' notified on 6-5-2015, the matter may be resolved in consultation with KSERC, rather than with Gol as earlier.

4. C & AG has concluded that the contract is causing monetary loss to KSEB: The imputation of loss by C & AG was only in their Draft Para. Subsequently, based on the reply furnished by KSEB, the same was dropped. C & AG's *Report No.2 of 2021 -Public Sector Undertakings, Government of Kerala*, tabled in the Legislative Assembly in April 2021 (Chapter III, Para 3.1) does not include this portion. All it says is this: *"Recommendation 3.1: Power procurement may be carried out complying with all the applicable guidelines/ procedures. Any modifications required in the applicable*

guidelines/ procedures may be taken up with the appropriate authority for its approval before initiating the tendering process."

5. If the deviations from the MOP guidelines are not concurred to by the State Government, the gain will be about Rs.800 crores: Under the MOP guidelines and bid documents, tariff consists of a fixed charge and fuel charge components; the fuel charge is further segregated into fuel transportation charges and cost of fuel. During bid evaluation, comparison happens at level of only the total tariff.

But the price quoted as on bid date is allowed to vary during actual supply in each accounting year. Most importantly, the fuel cost and fuel transportation charge are pass-through items. Accordingly, any variation subsequent to the bid date in coal price as notified by Coal India Ltd (CIL) and rail transportation rate as notified by the Railways is automatically captured in the billing rate for each month.

Under Bid 2, BALCO was the L1 bidder. Their quote was based on a rail transportation distance of 275 KM based on the coal linkage provided by CIL at the time of bidding (2014 November). However, by the time actual supply commenced (2017 October) Railways had rationalised their coal linkages and supply to BALCO commenced from a mine within 50 KM. This resulted in reduction of the tariff of BALCO during actual supply from that quoted at the time of bidding.

However, the transportation distance in case of other generators who matched BALCO's total tariff has not changed. This resulted in a significant price difference with BALCO and other generators during actual supply.

But KSERC ordered in August 2020 that any rate higher than that of BALCO will not be allowed to KSEB as an expense item. Since recovery of cost of KSEB became an issue, KSEB started limiting the payment to other generators in Bid 2 at the rate billed by BALCO for the bills from August 2020 onwards. This order of KSERC is now under challenge before Appellate Tribunal for Electricity (APTEL) and Supreme Court (against interim order of APTEL).

KSEB has projected the NPV @ 10% discount of the differential amount between BALCO's tariff and other bidders of Bid 2 from August 2020 onwards for the entire contract period up to September 2042 as savings of Rs.1109 crores, and between L2 Bidder's tariff and L1 tariff of Bid 1 at Rs.758 crores, totalling Rs.1866 crores.

This assumption is flawed on many counts. In case the Supreme Court finally rules in favour of the generators, the projected savings vanishes.

Most importantly, KSEB is implicitly assuming that it will be able to procure power from alternate sources at a rate equal to or lower than the BALCO rate. The present rate for power in the market does not justify such an assumption. It seems unlikely that KSEB will be able to contract 1500 MW (1000 MW shortage from 2024 onwards plus 465 MW against contracts proposed to be canceled) at a rate cheaper than that of the present contracts. Also, the quantum being offered in recent bids in the country is much below the

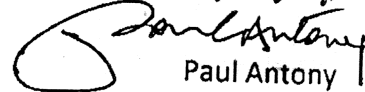
requisitioned quantum (often less than 30%), indicating lack of adequate untied generation capacity in the country.

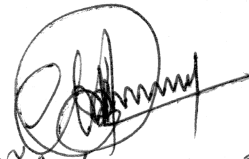
KSEB further computes the termination payments to the 3 PSAs in Bid 2 and 1 PSA in Bid 1 (in case they do not agree to their respective L1 tariff) at Rs.488 crores, and compensation for LTA relinquishment at Rs.543 crores, totalling Rs.1031 crores. There is no denying that this compensation will have to be paid under the contracts.

KSEB has projected the difference between Rs.1866 crores and Rs.1031 crores of about Rs.800 crores as *'the gain if the deviations are not accepted by Government'*. This is baffling. Compensation of Rs.1031 crores will certainly have to be paid, while the projected savings of Rs.1866 crores may never happen.

Thus, cancelling the present contracts of KSEB is likely to result in financial loss to the State /KSEB, major power restrictions, scheduling of the unaffordable Kayamkulam and diesel stations, raising cost to consumers and derailing KSEB finances in coming years. In view of the foregoing, I urge you to kindly re-visit the January 2022 decision.

Yours faithfully,


Paul Antony



01/06/2022 03:25/mon

URGENT

Bomford II



KERALA STATE ELECTRICITY BOARD LIMITED

(Incorporated under the Indian Companies Act, 1956)

Website: www.kseb.in. CIN : U40100KL2011SGC027424

No.CMD/106/DBFOO-complaint/2022

Dated: 16/07/2022

To:

The Principal Secretary to Government,
Power Department,
Government of Kerala.

Sir,

Sub: - Request to re-examine the decision to not approve deviations in the bidding procedure for DBFOO power and cancel the purchase of 465 MW of power by KSEBL - Letter from Shri. Paul Antony-reg

Ref: - Government letter No. B1/125/2021/PD dated 29/06/2022 enclosing the representation from Shri.Paul Antony.

R. submit
21/7
JS: Power

Handwritten initials and signatures:
29/7/2022
P. sub. y.
on [signature]

1. I invite kind attention to the representation by Shri. Paul Antony, No. 70, GCDA Road, Periyar Garden, Thottakkattukara, Aluva before the Hon'ble Minister for Electricity, Government of Kerala dated 4/6/2022 captioned "Request to re-examine the decision to not approve deviations in the Bidding Procedure for DBFOO power and cancel the purchase of 465 MW of power by KSEBL". It is understood that the petitioner is a former Chairman of KSEBL (from 2/6/2016 to 24/10/2016) and Secretary to Government (Power Department) from 2/2016 to 12/2017 and also former Chief Secretary to Government of Kerala. The contentions raised in the reference have been examined in detail in KSEB Finance, TRAC and at the CMD's level and the pertinent response is provided:
2. Against contentions in paragraph (1) of the reference, it is stated that the DBFOO tender in question (2014) and the deviations in the bid process from what was stipulated in the standard bidding documents (SBD) approved by the Govt. of India has absolutely no bearing on the staggered opening of the transmission corridor in two capacities from June 2016 and thereafter from October 2017. The tendered quantum in each bid has no bearing on the scheduling of power and even if 850 MW were tendered together as a single bid, as the present response pattern in the bid shows, pre-qualified individual power plants were offering only part of the bid capacity in lots such as 100 / 115/ 200 MW which could be separately synchronized with the opening up of the corridor, i.e., 600 MW from June 2016 in one lot, and the next lot thereafter in 2017. At any rate, if splitting was indeed essential (assuming for the sake of argument) as it was known that 600 MW of corridor was available in June 2016 in one lot, the first bid could have been at least of that quantity (600 MW) if the reason for splitting the bid was the staggered opening of the transmission corridor. Splitting 850 MW quanta into two separate bids of 400 and 450 MW, as done, do not make any logical reason that can be explained by the staggered availability of the transmission corridor. The splitting of the bid of 850 MW to 400 MW + 450 MW has instead created a host of avoidable complications in the bid process and evaluation which were not supported by robust procedure prescribed in the standard bidding document. The split bidding as against bidding the entire quantum has led to bid anomaly as much as 69 paisa (e.g. Jindal Power Ltd, New Delhi; Rs. 3.6 in Bid 1 ~ 4.29 in Bid 2); the same bidder from same machine commanding favourable pricing as variable as 14 paisa per unit (in the case of Jhabua); conferring undue avoidable commercial advantage. This was clearly avoidable, had the bids been done as a single lot. This deviation resulted in the same bidder from the same machine during the duration of the contract being awarded a higher rate in one of the bids for the power, which is absolutely unjustified. The award of higher than due rate to a bidder for power from the same machine and at about the same time is detrimental to public interest. Also, the inter bid

comparison of prices which are never envisaged in any bidding is being given as justification for the acceptance for the higher rate is neither correct nor acceptable and is an afterthought to justify the undue price advantage given to the bidder. It is also a fact that discrete bids offer competitive prices and acceptance of one bid cannot be mixed, compared and matched between the bids. Bidders who did not get allotment in bid 1 got subsequently qualified on their relative merit to bid 2 prices. These are very avoidable irregularities that were significant when compared to the option of single repeated bid until price meets volume mechanism. It is also not understood as to why the available corridor cannot be further used by medium/long term contracts from the replacement bids called thereafter. These aspects have been fully lost sight of.

3. The unscheduled splitting of the bid which cannot be justified merely stating the staggered availability of the corridor led to two distinct L1 values at the same timeframe and subsequent mixing and matching of L2/L3/L4 values of both the bids, which is impermissible, especially when the same standard bidding document is exercised within less than a month's timeframe to contract the same category of power on more or less same parameters from the same machines / companies. This has in turn conferred avoidable commercial advantage to some bidders, especially in bid 2.
4. It is pertinent to point out that the Standard bidding document did not permit the award of contract to any bidder other than the L1. In case the bid quantity was not fully subscribed by the L1 bidder, then the then prevailing GOI bidding procedure required rebidding for the balance quantity and there was no approval sought for either from the GOI or KSERC for the bucket filling procedure. The justification sought to be given that this procedure was included in the standard bidding documents of 2015 is not relevant, cannot be accepted and an afterthought to cover up the irregularity. The procedure adopted by KSEBL for comparing the rates of the split bids and the bucket filling principle adopted, in the event of the offered quantum did not match the requirement had to be got approved prior to the award of the PPA from the Government of India. This fact has been indicated twice by the Government of India's competent authority after examining Government of Kerala's specific requests to approve the deviations in the bid process and evaluation, in 2016 and 2020. This rejection sets at rest the viewpoint that the deviation from the standard bidding documents and bid evaluation by KSEBL were justified in any manner.
5. The other related point which is also an established fact that the tendered quantity has a direct bearing on the prices offered. This is clearly from the average bid prices offered in bid 1 and bid 2, which showed a significant increase between the two bids. The economy of scale advantage of the bid has also been compromised because of the unjustified splitting of the volume and simultaneous operation of two bidding OP opportunities, thus allowing the prospective bidders an opportunity to game and thereby manipulate the subsequently quoted second bid rates.
6. The third and inexplicable fact is the opportunity given to a bidder (M/s. Jhabua Limited) who offered two different values for the specific heat rate to be used for computing the variable cost of the same power plant, resulting in two different successful bid values of Rs. 4.15 for 115 MW in bid 1 and Rs. 4.29 for 110 MW in bid 2 within a matter of just 15 days. This was made possible only due to the splitting of the bid, the irregular and unauthorized deviations exercised and ignoring of this aspect during bid evaluation.
7. The bid evaluators did not take due cognizance of this serious manipulation of this difference in the specific heat rates from the same machine which cannot physically vary at all in within the same timeframe, resulting in the successful bids being scheduled from the single machine in the same plant with two variable costs. The approved rates is seen to vary by as much as 14 paise per unit for 100 MW and the significant advantage to the successful bidder across a period of 25 years resulting in a substantial evaluation anomaly and commensurate undue advantage to the bidder. The splitting of the entire tendered quantum into two bids has resulted in an undue benefit from the same plant and same machine. For M/s. Jindal Power Ltd, New Delhi this is as much as 69 paise per unit. M/s. Jindal Power Ltd, New Delhi in bid 1 has quoted Rs. 3.6 for 200MW and Bid 2 has quoted Rs. 4.43, which was subsequently reduced to the L1 rate of bid 2, i.e Rs. 4.29. Considering the quantum of power involved, this has resulted in a huge avoidable commercial burden on the utility and thereby on the public.

8. At the cost of repetition, it is submitted that the standard bidding documents did not provide for contracting with any party other than L1. Even if the bid authority /bidders desired to resort to bucket filling prior approval of the duly authorized body had to be obtained. But, KSEBL during the bid evaluation process chose to ignore this requirement and instead unauthorizedly entered into "bid matching" with L2, 3, 4 and L5 bidders and signed PSA with them. It is interesting to note that this bid matching price was only valid and relevant for that particular day and thereafter the prices significantly varied between L1 and the other bidders resulting in overpayment of around Rs. 250 crores to other than L1 bidders.
9. It is also relevant to mention that against the contentions in paragraph (2) of the petition, it is submitted that the relatively higher value bids in every single separate bid can be compared with only the respective L1 bid and no cross matching or mix and match of values with bidders who quoted in two different bids is ever conceived in any standard bid process. By design, separate bids invite and compare separate offers and acceptance and no intrusion from extraneous values can be used to evaluate/devalue any merit order in a bid return. The separate offers operate in mutually exclusive legal compartments. Only offers received to a specific call to bid can be compared. Their respective offers, acceptances and resultant contracts operate in different legal realms. However, in this case, the bid values have been compared between bids and bidders preferred against subsequent offers and evaluation conducted retrospectively and favourably. Also the argument that the bid quantum was fully necessary to the extent of 865 MW as accepted, also falls flat as one of the "successful" bidders, i.e., East Cost Energy Limited for 100 MW failed subsequently to materialize. This volume was subsequently overcome by procurement from sources other than from the bids in question. Therefore, the contentions through paragraphs 1 and 2 by the petitioner are wholly without merit.
8. The petitioner is also incorrect in stating that the 865 MW purchase of DBFOO by KSEBL was approved by the Government of Kerala after deliberation in the Cabinet through a Government Order 45/2014 (PD) dated 20/12/2014. The cited order is only for scheduling power in the absence of approval by the Hon'ble Electricity Regulatory Commission, vested with the sole power to approve PSA/PPAs. Also, scheduling of power as required either in the short term or otherwise is not an authoritative statutory policy decision in specific exercise of powers under the Electricity Act 2003 so as to issue a policy direction to adopt a specific course of action to be complied by the Hon'ble KSERC. Further, settling a specific rate in a PPA cannot be taken over by Government in the guise of a general policy advisory. Nowhere the Government order mentions an examination or ratification of the deviations in the bid process and the absence of the same have been specifically noted in the Hon'ble KSERC's order dated 21/4/2015 in OP No. 13/2015. In other words, the G.Os cited in the reference are not in cognizance of the bid irregularities and a mere administrative expediency to tide over the shortage due to the unconcluded PSA, and not meant to answer the questions in the final order of OP No.13/2015. It is also unclear as to whether the KSEBL and Power Department had while seeking the Government approval brought to notice that the bids were finalized in deviation to the standard bidding documents and these approvals did not have the approval of the Ministry of Power and KSERC. In other words the Government Orders cited are not in cognizance of the bid irregularities and at best reflect a mere administrative expediency to tide over the temporary power shortage and does not exonerate the irregularities or contradict the final orders in OP No. 13/2015.
9. In fact the KSERC's orders in OP No. 13/2015 has specifically directed the petitioner to secure the specific views of the Government of India and the Government of Kerala on the deviations noted in the order from the standard bidding process as notified by the Government of India. In another order dated 21/6/2022, in the matter of petition for truing up of accounts of M/s. KSEB Limited for the financial year 2019-20, in OP No. 22/2022, this aspect has been further clarified in detail and the so called approval is merely stated as "provisional" in the absence of the views of Government of Kerala/India as to the specific aspect of the deviations observed in the standard bid process. A provisional order is liable to be revisited and revised or even set aside, if infirm.
10. So, what is significant is whether the Government of Kerala, after due examination of the deviations noted by the Hon'ble Commission would now take up and approve / condone the

irregularities in the bid evaluation process which are against the bid conditions at this point of time, after a gap of 7 years of temporary scheduling of power. This delay to settle the question is in itself a pointer to the fact that the bid evaluation process has been in error and one that benefits the wrongfully executed contracts leading to further legal complications. Regarding the paragraphs contained in page 3 of the petition, it is submitted that the question before to the Government of Kerala was to take a decision whether it can provide post facto approval on the deviations noted by KSERC from the bid process duly notified. There was no proposal to advise it on a comparative market advantage perspective vis a vis new procurement, as against the indexed cost of same power quantum as on today.

11. It would be wrong to assume (as stated) that the only compensatory measure possible at this point is to resort to real time purchase from power exchanges and KSEBL has never stated or contended that procurement from power exchanges is the only alternative to the reduced quantum on the event of final disapproval of the PSAs in question. This is purely an incorrect assumption by the petitioner and not a valid KSEBL position.

12. Options to contract power through short/ medium (5 years) or long term contracts up to 12 to 18 years is possible, in case the final decision of the competent authority is to finally disallow the PPAs. This is to be as per the new bid design reflecting load, generation balance for 2022-2030 and thereafter. It is true that due to temporary post Covid-19 shortage of coal, there has been an increase in the variable costs of coal. However, it is also a fact that the Ministries of Coal, Power and Railways have already worked out a contingency plan whose success is clear from the fact that the price of market power has fallen from Rs.20/12 Kwh to around Rs.4.00 plus. This situation will further improve due to the urgent measures taken by the Ministries and the pre Covid 19 prices within the Rs.3.00 plus range can be expected within the next 4 to 6 months. Upon such normalization of the supply scene, the bids for the residual period can be contracted afresh, say for next 5 to 10 years and at reasonable prices. Hence, temporary coal shortage phase may not be a good indicator period for future prices as idling coal generation will resume with higher plant loads upon normalization of coal related supply chain issues. It is also a fact that this temporary shortage of coal and price increase is used as a justification to condone a serious irregularity.

13. The petitioner has further contended that because of these deviant PPAs, KSEBL could avert power shortages and avoid compensatory power purchase from power exchanges. This is at best a hypothetical argument to counter the facts and does not in any way justify erroneous conclusion of the bids in question. As mentioned earlier, these PPAs lack the fitment to transparent bidding norms which is as an essential pre-condition for contracting to be approved under the power delegated under section 63 of the Indian Electricity Act 2003. In fact Section 63 is the only exception to section 62 which calls for a cost plus norms based tariff determination under regulations. A transparent bid process approved by the bid notifying authority is a pre-requisite for a PPA which in this case is the Government of India. Here, the Hon'ble Commission is legally required to examine the PSAs submitted before it and to approve or otherwise the PSAs under section 63. Such an exercise will questioned the competency, fairness, competitiveness, adherence to due procedures and integrity of the bid process and in case it fails this test, the PSAs are denied approval. This aspect cannot be lost sight of at all. This cannot be overcome by a Government decision at this point at all, since it is only the Commission that has been conferred with such powers under the Electricity Act, 2003 and the Government cannot step into the role of the statutory regulator at all.

15. The subsequent commercial merit of a wrongly concluded bid is of no salience in determining whether the discovered evaluation was compliant as per notified standard bidding document. The question is whether to post facto approve a bid which has been evaluated cardinally distorting the propriety of the bid. Further, whether this process was transparent, in public interest and legally valid act which could be now be condoned *de hors* its recorded irregularities is itself open to interpretation. No other authority has found the bids to be in order and irregularities condonable.

16. It may be reiterated here that the noted deviations have been since twice taken up with the Government of India by KSEBL and Government of Kerala only for categorical rejection on the ground that the deviations could not be approved *post facto*. Therefore it is an admitted fact by the KSEBL, Government of Kerala and Government of India that the evaluation of the bid has not progressed as per the SOP prescribed for evaluation in the applicable standard bid document. In other words, the privileges of contracts conferred by the unapproved bid are not due and are badly awarded. Creative hindsight or new interpretations cannot compensate for the lack of conformance and fidelity of the bid process.
17. Therefore, a legally established Government cannot be petitioned to seek to and take refuge under the argument of assumed commercial advantage attributed *post facto* to the period of operation of the contract due to relative market circumstances which are extraneous to the point of bid evaluation. In other words, the poorly concluded contracts cannot be justified by a respective justification on the *post facto* market condition which is self-evident in the petitioner's argument. A bad contract cannot be stated to have turned good based on such temporary market logic situation. It had to be tested against the principles of propriety, integrity and adherence to established procedures before it can be approved. The merit of bid evaluation must be tested on merit on the facts of that date and not on any passing temporary market conditions developed thereafter which are fortuitous and is not remedial of the inherent lapses.
18. With respect to the remarks on the conclusions of the Hon'ble C&AG, the C&AG has, in report 2 of 2021 stated that '*the power procurement may be carried out compared with all applicable guidelines and procedures and any modifications required in the applicable guidelines / procedures may be taken up with the appropriate authority for its approval before initiating the bid process*'. This precisely implies that the procurement in consideration has invited this recommendation on its observations that has caused monetary losses as per the CAG's report 2 of 2021. That the recommendation has not alleged mis-procurement directly is only due to the fact that the competent authority (KSERC) had already done so. These have to be read together and one not against the other. The language used is obviously the politest way to recommend corrective action. It cannot be used as a tool to shield the badly concluded PPAs as on 2014-16.
19. Hon'ble KSERC has already rejected the merit contentions to approve the PSAs. Detaching a single remark from the voluminous reporting made on the subject does not absolve the role of Government in examining / approving its merit. That will not be of any financial advantage to KSEBL or in the overall public interest at all.
20. The further contention that KSERC have not passed final orders in the matter is also untrue as they have indeed passed final orders. This fact is clearly revealed in the Writ Petition filed by KSERC against the decision of the Hon'ble APTEL in the petition filed before it by JIPTL, one of the PSA holders. In addition, KSERC in OP No. 22/2022 relating to the truing up of accounts for M/s. KSEB Limited for the financial year 2019-20 as on 21/6/2022 have clearly and unequivocally denied any consequential benefits flowing from the bid evaluation above the L1 rates in both the bids. Therefore, the contentions made through paragraph 5 of the petitioner's letter are in suppression of well known facts.
21. The gist of the long argument made is only that the potential cancellation must not result in risking of KSEBL finances as at the point of cancellation and reasonably priced competitive but time-indexed bids must be used to replace the cancelled portion of the bids for the remaining period of power requirement from reputed contenders with sufficiently transparent procedure / procedural fairness. The scheduling issues stated on account of losses on transmission corridor are quite baseless as transmission corridor which becomes released upon the cancelled portion of the bid would automatically shift to the newly contracted quantum and there shall be no palpable loss to KSEB/Kerala on that account. This aspect is entirely lost on the petitioner.
22. The presumptive statement made on the possible adverse outcome of legal challenge at the apex court need to be repelled as that involves several aspects of contract law to be argued and settled. The unapproved PSAs *prima facie* fall to the category of *null and void contracts* as the gavel of approval by the Hon'ble Regulatory Commission is a condition precedent as per the Electricity Act, 2003 for the PSAs to obtain legal validity and sanctity, which in this case has not been obtained. Without approval by the Commission there is no valid PSA. The provisional

approval to schedule power or provisional approval to operate power supply agreements etc. do not stand in the same legal footing of a statutory final approval of the PPA and the fact of existence of one cannot be *ipso facto* equated with the other.

23. It is noteworthy to point out that the provisional approval given by KSERC was beset with conditions which unfortunately, the petitioner has conveniently avoided to mention. Also, such a conditional approval to schedule power cannot be cited as a ground to seek approval for PSAs which have been rightly denied through considered orders by the competent authority on the original petition disposed as OP No.13/2015. The contentions of the petitioner that the potential cancellation of PSAs would incur potential higher termination costs are a misplaced and mere presumptive pre-judgment to persist with these PSAs. Any punitive termination costs can be awarded only if there is a legally valid contract and in these PSAs since the condition precedent that is approval of these PSAs have already been denied by the Commission as early as in August 2016, such a presumption is farfetched and have to be determined by competent Courts and not by the petitioner as a ploy to continue with these PSAs.

24. Further onus of defending its original orders in OP No.13/2015 and OP No. 22/2022 falls squarely on the KSERC in both appellate and writ jurisdictions. The KSEBL and Government of Kerala are not to be primary respondents on potential legal challenge of the private agreement parties and it is for the Hon'ble Commission to defend its considered orders. In the event of an appellate or constitutional authority overturning the KSERC's present orders in OP No. 13/2015 and OP No. 22/2022 orders on a future date, the original contentions on the period determined by the KSERC would be overturned and that settled final judgment will be operated as the final settlement. It is not for KSEBL or Government of Kerala to prejudge the outcome or defend the case on behalf of the contractual parties who are denied the PSAs by the Hon'ble KSERC inconsequential of the commercial/ merit based contentions. It also does not stand to lose as KSEBL, a distribution licensee, is allowed re-contracting costs for deficit power on account of cancellation of PFA on cost basis by the regulations on its tariffing / truing up regulations in force at that point of time.

25. In other words, the cause for confirming the PSAs not approved by the Hon'ble Commission rather falls on the beneficiary contractor-suppliers and not the KSEBL / Government of Kerala. It is clear that the Government cannot be called upon to defend irregularly entered PSAs based on presumptive relative commercial advantages as clearly brought out in the foregoing paras. The Government cannot also be addressed to justify a blatantly erred bid evaluation process based on assuming it to be retrospectively commercially advantageous. Such inductive logic does not save the legally infirm PSAs. The burden of proof is on the KSERC and the bidders.

26. Therefore in sum and substance, the petitioner's unsolicited views on the risks of cancelling the PSAs are not based on facts and are merely hearsay or possibly extraneous ghost written material. The contentions raised by the petitioner have already been gone into in detail by the Committee of Secretaries (CoS) chaired by the Finance Secretary and the observations are available on the Govt. record and these arguments do not have merit to overturn their findings.

27. It is also not known whether some of the material quoted in the letter which may be confidential has been secured through legal means such as the Right to Information Act, which may be kindly verified separately. If the data are indeed secured through irregular means, then the actions of the petitioner is sufficient to constitute a prosecutable offence under the provisions of section 3(C) of the Official Secrets Act punishable with imprisonment upto 3 years. The propriety of a former senior officer of a constitutional service seeking to intervene unsolicited unilaterally into the judgment of competent legal authorities and the recommendations of the presently serving officers in so far as to bypass them and plead directly the Hon'ble Minister for Electricity with highly colourable and misleading arguments advancing private interests involving significant financial is unheard of.

28. The petitioner's action constitutes avoidable transgression into the due process of the functioning of the Government and is apparently intended to protect/ remedy / absolve him of any wrong doings in the event of a probing enquiry. He is a non-party in the entire issue. His arguments reflecting insufficient reasoning can be categorized as an act of colourable, avoidable

and demonstrable gainful lobbying at the behest of manifest commercial interests, than one prompted by any demonstrable element of public interest.

29. It is understood that the petitioner sought a private audience with the Hon'ble Minister at his residence and lobbied in favour of the infirm contracts lamenting the lack of professional competency of the officers in Government who called the matter. This is an unprecedented deviation from the high standard of conduct expected at such senior level, especially after serving as Chief Secretary to the State Government.

30. It may also be stated that the former officers of KSEBL stated below have presided personally over the excess payment of Rs 250 Crores to the unapproved contractors in 2018-20 as per orders of KSERC in OP No. 22/2022 which has been brought to the notice of the Board of Directors and the Government.

Director Finance

1. Shri.N.Sivasankara Pillai IA&AS 10/08/2015 – 17/07/2021

Deputy Chief Engineer with full power of Chief Engineer (Commercial and Tariff)

1. Pradeep B 13/08/2017 - 30/04/2022

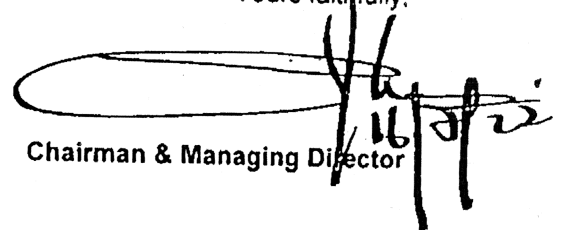
31. Shri N. Sivasankara Pillai IA&AS also continued to hold the post of Director(Finance) upon his appointment as Chairman & Managing Director during which the excess payment noted by CAG for 2018-20 also occurred. This holding of additional charge led to a situation where there were no oversight or due checks and balances on the defrayment of power purchase bills of DBFOO leading to the unwarranted excess payments now disallowed by the KSERC. It is seen that a series of deliberate errors in corporate governance have facilitated the wrong payments now denied by the Commission.


32. As such the entire contracts are known to be under a vigilance enquiry ordered by State Government as per information in the Board. Such high extraneous interest and palpitation at the mere prospect of the consideration a different option indicates undue interest and the need to conclude that probe early. If the Vigilance & Anti Corruption Bureau is not recording due progress or showing insufficient results, Government may kindly consider recommending a probe by the Central Bureau of Investigation as the manifest error in these contracts confer possible high commercial advantage to private parties, located outside Kerala and now being championed by former high officials.

33. It is understood that some of these above officers are also presently aspirant's/applicants for the vacant post of Member of KSERC and the recently vacant post of Chairperson KSERC. It is necessary to state that the potential appointment of these officers will irrevocably compromise the fairness and neutrality of the working of the Commission in future due to their considerable conflict of interest in this pending matter and several connected others at appellate fora.

34. The Regulatory Commission is required to justify its orders in OP No. 13/2015 and OP No. 22/2022 with appellate and Constitutional Courts /bodies in the coming days. Therefore it is recommended to kindly avoid appointment of any of the above mentioned individuals to a regulatory position in KSERC as member / Chairperson until a suitable probe as indicated in para 32 is concluded formally and their role in the irregularity involving undue higher payments is cleared beyond doubt. This aspect may kindly be brought to the kind notice of the Chief Secretary, and the other Hon'ble members of the Selection Committee.

Yours faithfully,


Chairman & Managing Director


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