



Delhi Electricity Regulatory Commission
Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 110017.

F.11(2046)/DERC/2022-23/7567

Petition No. 65/2022

In the matter of : Petition u/S 142 read with Section 86(1)(e) and 86(1)(k) of the Electricity Act, 2003 seeking declaration that the Request for Proposal (RfP) dated 21.10.2022 issued by the Municipal Corporation of Delhi for setting up of Municipal Solid Waste to Energy facility at Narela Bawana, Delhi, is violative of the Electricity Act, 2003 and the National Tariff Policy, 2016 and for issuance of appropriate directions.

Waste to Energy Research & Technology Council

...Petitioner

Versus

Municipal Corporation Delhi

....Respondent

Coram:

Hon'ble Dr. A. K. Ambasht, Member

Appearance:

- 1. Mr. Sanjay Sen, Sr. Advocate, WtE Research & Technology Centre**
- 2. Ms. Mandakini Ghosh, Adv., WtE Research & Technology Centre**
- 3. Ms. Swapna Seshadri, Adv. MCD**

ORDER

(Date of Order: 06.03.2023)

1. The Instant Petition has been filed by Waste to Energy Research & Technology Council (WTERT) under Section 142 read with Section 86(1)(e) and Section 86(1)(k) of the Electricity Act, 2003 seeking issuance of appropriate orders or directions as under;
 - a. To declare that the Request for Proposal (RfP/Impugned Tender) dated 21.10.2022, for setting up of Municipal Solid Waste (MSW) to Energy facility at Narela-Bawana, Delhi issued by the Respondent, is being issued in gross violation of the Electricity Act, 2003, the Rules and Regulations framed thereunder as well as the provisions of the National Tariff Policy, 2016;
 - b. To initiate appropriate proceedings in terms of Section 142 of the Act and issue appropriate directions against the Respondent; and

- c. To declare that the impugned tender issued by the Respondent is violative of environmental laws, incomplete, technically non-feasible and cannot be performed under the terms of the Impugned Tender document.

Petitioner's Submissions

2. That solid waste management is one of the most challenging and ever-growing scope of work and a primary responsibility of the Urban Local Bodies ('ULBs) and such services are provided for the purpose of ensuring the health and hygiene of the inhabitants.
3. That before adverting in detail as to the contentious issues engraved in the impugned Tender which gave rise to the cause of action for seeking indulgence of the Commission in exercise of its functions under Section 86(1)(e), Section 86(1)(k) read with Section 142 of the Electricity Act, 2003.
4. The Petitioner has further raised the following grounds for the maintainability of the present Petition:

a) Violation of the National Tariff Policy, 2016 and the provisions of the Electricity Act, 2003

- i. Tender as a medium of award of a contract by various Government instrumentalities or authorities are the true spirit of ensuring a level playing field which is transparent and a democratic procedure is followed in concluding the contracts as a result of such tendering processes. However, the very decision behind such tendering processes are policy decisions made by the executives in exercise of its constitutional or statutory power, as the case may be, however, such decision cannot be absolute in terms of the mandates laid down under the Constitution of India as well as the statute within the purview of which the specific activity for which tendering process has been initiated, falls under.

The very factum of coming back with an identical tender on the same day of closure of the earlier tender vide issuance of Corrigendum No. 10, is reflective of the reiteration of violative terms and conditions. Further, the conduct of the Respondent is also reflective of the failure to adhere to the provisions of law laid down under the Electricity Act, 2003, relevant Regulations and National Tariff Policy, 2016. Either there is lack of understanding with regard to the violations alleged herein above or an unwillingness to deliberate upon such violations and to take corrective measures.

- ii. The terms as well as the recitals of the Model PPA makes it abundantly clear that the manner in which tariff is determined in the instant impugned Tender is the Section 63 adoption of tariff route under the Electricity Act, 2003 i.e. adoption of Tariff by the Appropriate Commission so arrived during the Competitive Bidding process. It is submitted that the same is in absolute contravention to the clear mandate of the National Tariff Policy, 2016, providing for a Section 62, determination of Tariff route in case of mandatory waste to energy procurement for the distribution licensee.
- iii. The impugned is issued in violation to the provisions of the Electricity Act, 2003, the Authority in the subject Tender has mentioned the formula to calculate the Levelized Tariff under Clause 5.2.1, the clause 5.2.1. adoption of the tariff by the appropriate Commission so arrived during the competitive based bidding process. It is submitted that the same is in absolute contravention to the clear mandate of the National Tariff Policy, 2016 providing for a Section 62 determination of tariff route in case of mandatory waste to energy procurement for the distribution licensee.
- iv. It is relevant to note that the Authority herein, i.e., MCD by providing for the detailed terms and conditions of the PPA and further mandating the same to be executed by the bidder with the Delhi DISCOMs without approval from the Commission is transgressing its jurisdiction and has abrogated to itself the jurisdiction vested with this Commission under the Electricity Act, 2003. The same is in material contravention of the provisions of the Electricity Act, in particular Section 86 which provides that power procurement and tariff determination is the sole jurisdiction of the Appropriate Commission under the Electricity Act, 2003.

b) MCD in absence of being an Authorised distribution licensee, cannot float the impugned tender:

- i. Distribution license is granted by the State Commission as per the requirement of Section 14 and 15 of the EA 2003 read with the relevant Regulations. The licensee is also regulated by the terms and conditions on which such licensee has been granted. It is a distribution licensee which has the authority to procure power through competitive bidding route by following the guidelines to be notified by the Central Government from time to time under Section 63 of the Electricity Act, 2003.
- ii. Therefore, for the purpose of procuring power by floating a tender these 2 characteristics are essential viz. i) the procurer shall have to be a distribution licensee, and ii) the tender so floated shall have to be in accordance with the guidelines issued by the Central Government. In the present case, the

Respondent Corporation is neither a distribution licensee nor the Impugned Tender is being framed in consonance with any bidding guidelines published by the Central Government and in fact, such bidding guidelines are conspicuously non-existent for Waste to Energy.

iii. This premise that the MCD is not a distribution licensee within the meaning of the Electricity Act, 2003, is required to be tested in the light of the act in its entirety. The following sieving mechanism is being argued in support of the premise, for the appreciation of the Commission.

- Firstly, Section 12 of the Electricity Act, 2003 makes it mandatory for a person to distribute electricity only through a license issued under Section 14 or if it is exempted under Section 13;
- The Corporation is not holding any distribution license authorized to operate and maintain a distribution system for supplying electricity to the consumers in its area of supply;
- No license has ever been applied by MCD nor granted by the DERC under Section 14 of the Electricity Act, 2003. Further, under 5th proviso to Section 14, a Government company is deemed to be a licensee under the Act. A Government company is defined under Section 2(31) of the Act as a company within the meaning of Section 617 of the Companies Act, 1956 which is now substituted by Section 2(45) of the Companies Act, 2013.
- Under Section 13, an appropriate Commission has power to exempt applicability of Section 12 for such period as may be specified by notification, in respect of any Local Authority, Panchayat Institution, User Association etc. However, no such exemption has been notified in favor of the Respondent Corporation by DERC.

iv. Therefore, in the absence of the ability to procure power, the entire Impugned Tender falls flat being illegal and violative of the Electricity Act, 2003.

c) Violation of the Solid Waste Management Rules, 2016:

i. The impugned Tender along with the terms of the Model PPA while mandating compliance with the Solid Waste Management Rules, 2016 have itself contravened the said rules in as much it has adopted a tariff adoption

route through competitive bidding under the Electricity Act, 2003 contrary to the mandate of Section 62 of the Act determination of tariff approach.

d) Conduct of the Respondent Corporation:

The Respondent Corporation in as much as it has floated the Impugned Tender on the identical subject matter as was previously issued under the NIT dated 15.07.2022 has repeated the contravention of the provisions of the Electricity Act, 2003 and the categorical mandate under National Tariff Policy, 2016 as well as the Solid Waste Management Rules 2016. It has also submitted that such repeated overstepping of the jurisdiction vested with this Commission by the Respondent Corporation also bears relevance while determination the factum of contravention and the consequential action to be taken in terms of Section 142 of the Electricity Act, 2003

5. The Petitioner has submitted a brief note on arguments dated 06.02.2023, in which it has raised the following contentions:
 - a. MCD is neither competent nor authorized to invite tariff-based bids;
 - b. Competitive bidding is impermissible in case of 'waste to energy' power procurement;
 - c. Commission's plenary power including power to declare the impugned NIT in contravention of the provisions of the act and to quash the same.

Respondent's Submissions

6. The Respondent, MCD, has submitted preliminary objections to the maintainability of the Petition vide Affidavit dated 24.01.2023. The respondent, MCD, has submitted that:
 - a. the Petition filed is an abuse of the process of the Commission and is not maintainable either under Section 142 or Section 86(1)(e) and Section 86(1)(k) of the Electricity Act, 2003.
 - b. the action taken by the Respondent- MCD in issuing the Request for Proposal (RfP) dated 21.10.2022 are neither in violation of the Electricity Act, 2003 nor the National Tariff Policy, 2016.
 - c. the Petitioner describes itself as registered private trust with its chair situated at Earth Engineering Center, Columbia University, New York, USA.
 - d. the Petition is not maintainable and the Petitioner is seeking stay of a bidding process, which can only be by way of judicial review. The Commission is a

creature of statute and performs its functions under the Electricity Act, 2003. There is no power of judicial review to stop a bidding process in the Commission.

- e. it is well settled that even Writ Courts, which exercise the widest judicial power available, cannot interfere ordinarily in the bidding processes.
 - f. there is no mandate in the National Tariff Policy, 2016 that the Waste to Energy plant cannot be setup through a competitive bidding route under Section 63 of electricity Act, 2003. There is no compulsion or mandate in the National Tariff Policy, 2016 that the waste to Energy projects should only come up under Section 62 route.
7. On 06.12.2022, the Commission was *prima facie* not convinced with the maintainability of the Petition and directed the respondent to file a reply/objection only an exclusively on the subject of maintainability.

Commission's Analysis

8. The instant Petition has been filed by Waste to Energy Research and Technology Council, impugning the Request for Proposal dated 21.10.2022, being reference NIT No. EE/SLF/B/TC/2022-23/01 (impugned Tender), issued by the Municipal Corporation of Delhi as being violative of the provisions of the Electricity Act, 2003, National Tariff Policy, 2016 as well as Solid Waste Management Rules, 2016.
9. The Petitioner has filed the Petition invoking jurisdiction of this Commission under Section 142 read with Section 86(1)(e) and (k) of the Electricity Act, 2003.
10. The Petitioner has submitted that
- a. MCD is neither competent nor authorized to invite Tariff-Based Bids
 - b. Competitive Bidding is impermissible in case of Waste to Energy power procurement.
11. The Commission was not inclined to entertain the petition in its present form initially, and had also recorded their view in the interim order dated 06.12.2022. The relevant part of the order is as follows;
- "..... . Prima facie, we are not convinced with this argument. Let a reply/objection be filed by MCD, only and exclusively on the subject of maintainability by the next date."*
12. The Respondent filed a brief reply and submitted objections against the maintainability of the Petition before this Commission. In support of their objections, they have relied upon the following judgments:

- a. National High Speed Rail Corpn. Ltd. Vs. Montecarlo Ltd. (2022) 6 SCC 401.
 - b. Michigan Rubber (India) Ltd. Vs. State of Karnataka, 2012 8 SCC 216
13. The Commission heard the arguments on both sides and also examined the written submissions of the parties as well as the judgements cited by Learned Counsels in support of their case. The Commission has decided to first decide upon the issue of maintainability under Section 142 of the Act and not to dwell upon the case on merits at this stage.
14. The Counsel for the Petitioner invited the attention of the bench to the provisions of Section 142 of the Electricity Act, 2003, which is reproduced as below
- Section 142. (Punishment for non-compliance of directions by Appropriate Commission):*
- "In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction"*
15. Petition under Section 142 of the EA, 2003 could be filed by a Petitioner who suffers a grievance arising out of an alleged violation of the provisions of the Act. The Petitioner in the instant case, has no dispute at all with the Respondent. The Petitioner has failed to provide specific provisions for maintainability of the Petition. Also, it has failed to provide as to which specific Rules, Regulations, Directions or Orders of the Act have been violated by the Respondent. It is pertinent to mention that Section 142 of the Electricity Act, 2003 does not contemplate the alleged violations of the National Tariff policy to be dealt with by the State Commission.
16. The Petitioner seeks to stop a bidding process by invoking jurisdiction of the Commission under Section 142 and 86(1)(e) and (k), which at this stage is premature and not maintainable. General Clauses of the Act cannot be invoked to interfere or quash the bidding processes.
17. It is a settled law that unless there is malafide or perversity in the understanding and appreciation of the tender conditions, the Court should not interfere with tender processes.
18. The Hon'ble Supreme Court in **National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd., (2022) 6 SCC 402** has held as under:

“ 26. At this stage, it is to be noted that what can be said to be substantially responsive technical bid has been defined under Article 33.2. The High Court in the impugned order has observed and held that the bid submitted by the original writ petitioner can be said to be substantially responsive technical bid. However, it is required to be noted that when the author of the tender document, in the present case, JICC/JICA, had taken a conscious decision that the bid submitted by the respondent-original writ petitioner can be said to be non-responsive and suffering from material deviation, it was not for the High court to consider/opine whether the bid submitted by the original writ petitioner is substantially responsive technical bid or not unless the decision is found to be perverse and/or suffered from mala fides and/or favoritism.

....”

19. Also, in **Michigan Rubber (India) Ltd. v. State of Karnataka**, Hon'ble Supreme Court has held as under:

“ 23. (a)...

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. if the Government acts in conformity with certain healthy standards and norms such as awarding of contracts inviting tenders, in those circumstances, the interference by courts is very limited;

...”

20. The next limb of argument of the Petitioner is that Municipal Corporation of Delhi (MCD) is not an authorized Distribution licensee, therefore MCD cannot float the tender. The Petitioner has further submitted that Bidding Procurement under Section 63 of Electricity Act, 2003 is impermissible in case of 'Waste to Energy' Power. In response to this, the Counsel for the Respondent submitted that MCD is performing its statutory functions under the Solid Waste Management Rules, 2016 notified by the Ministry of Environment, Forest Climate Change on 08.04.2016.

Rule 15 (v) of SWM Rules, 2016 has been cited which inter alia stipulates as follows;

“15. Duties and responsibilities of local authorities and village Panchayats of census towns and urban agglomerations- The local authorities and Panchayats shall, -

.....

(v) facilitate construction, operation and maintenance of solid waste processing facilities and associated infrastructure on their own or with

private sector participation or through any agency for optimum utilisation of various components of solid waste adopting suitable technology including the following technologies and adhering to the guidelines issued by the Ministry of Urban Development from time to time and standards prescribed by the Central Pollution Control Board. Preference shall be given to decentralized processing to minimize transportation cost and environmental impacts such as:

a) bio-methanation, microbial composting, vermi-composting, anaerobic digestion or any other appropriate processing for bio-stabilisation of biodegradable wastes;

b) waste to energy processes including refused derived fuel for combustible fraction of waste or supply as feedstock to solid waste based power plants or cement kilns;

..."

21. Further, it is also observed that this Commission in Petition No. 56 of 2017 filed by South Delhi Municipal Corporation had approved levelised tariff discovered by the Petitioner through bidding route of Tehkhand Waste based plant.
22. On Perusal of above, it is viewed that MCD being a statutory body is mandated under SWM Rules, 2016 to facilitate construction, operation and maintenance of solid waste processing facilities and associated *infrastructure*. Further, there is no debar in the National Tariff Policy, 2016 that the Waste to Energy plant cannot be setup through competitive bidding route under Section 63 of Electricity Act, 2003.
23. In view of above, the Commission finds no merit in the Petitioner's submission and the Petition is not maintainable. The Petition is therefore, dismissed.
24. Ordered accordingly.

Sd/-
(Dr. A.K. Ambasht)
Member