

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 09.03.2017

+ **W.P. (C) No. 3786/2015 & CM No. 6764/2015**

MONNET POWER COMPANY LIMITED ... Petitioner

versus

UNION OF INDIA & OTHERS ... Respondents

Advocates who appeared in this case:-

For the Petitioners : Mr Parag P. Tripathi, Sr. Adv. with Mr Rishi Agarwala, Mr Karan Luthra, Mr Anuj Malhotra, Ms Nyati Kohli and Ms Kanika Tandon
For the Respondent/UoI : Mr Sanjay Jain, ASG with Mr Amit Mahajan, CGSC, Mr Kirtiman Singh, Mr Waize Ali Noor, Mr Gyanesh Bhardwaj and Mr Shreshth Jain

WITH

+ **W.P.(C) No. 3787/2015 & CM No.6773/2015**

MANDAKINI EXPLORATION AND MINING LTD & ORS ... Petitioners

versus

UNION OF INDIA & OTHERS ... Respondents

Advocates who appeared in this case:-

For the Petitioners : Mr Kapil Sibal, Sr. Adv.with Mr Prateek Kumar, Ms Divya Chaturvedi, Ms Anushka Sharda and Ms Anusha Nagaraj
For the Respondent/UoI : Mr Sanjay Jain, ASG with Mr Amit Mahajan, CGSC, Mr Kirtiman Singh, Mr Waize Ali Noor, Mr Gyanesh Bhardwaj and Mr Shreshth Jain

AND

+ **W.P.(C) No. 4885/2015 & CM No.19739/2015**

JAIPRAKASH POWER VENTURES LIMITED

... Petitioner

versus

UNION OF INDIA & OTHERS

... Respondents

Advocates who appeared in this case:-

For the Petitioners : Mr Parag P. Tripathi, Sr Adv. with Mr Kamaldeep Dayal, Mr Pawan Upadhyay, Mr Rajesh Chhetre, Mr Rajeev Chhetri, Ms Meenakshi Rawat and Ms Anasuya Choudhury

For the Respondent/UoI : Mr Sanjay Jain, ASG with Mr Akshay Makhija, CGSC, Mr Shreshth Jain, Ms Aastha Jain, Ms Mahima Behl and Mr Siddharth Thakur

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J

1. These three writ petitions were heard together as they raise common issues and, consequently, are being decided together. The essential grievance in each of these petitions is against the decision dated 15.04.2015 of the Ministry of Power indicating the reasons behind the decision of the Government of India to put a cap on the Fixed Charge / Capacity Charge Component of the power tariff in respect of the power generating companies which had been declared as the Successful Bidders for the coal mines. The consequent Resolution dated 16.04.2015 of the

Government of India (Ministry of Power) with regard to the amendment to the guidelines for future procurement for power from Thermal Power Stations by distribution licence under the DBFOO [Design, Build, Finance, Own and Operate] (earlier Case-I) bidding is also under challenge. This Resolution dated 16.04.2015 also resonates the aforesaid decision of putting a cap on the Fixed / Capacity Charges in terms of Rs./Kwh. As per the said Resolution, the power procurers, *inter alia*, shall determine in advance, in consultation with the Appropriate Commission, an upper ceiling in terms of Rs./Kwh towards the Fixed / Capacity charges and this shall also be indicated in advance to all the prospective bidders while inviting DBFOO (earlier Case-I) bids as part of the bid document.

2. As mentioned above, the decision dated 15.04.2015 and the Resolution dated 16.04.2015 are sought to be set aside by way of these petitions. Alternative prayers have also been made in *Monnet Power Company Limited v. Union of India* [WP(C) 3786/2015] AND *Mandakini Exploration and Others v. Union of India* [WP(C) 3787/2015] to allow the petitioners therein to withdraw from the bids of their respective coal mines and to direct the Nominated Authority to refund the

bid securities and restore *status quo ante* as existing prior to the bidding process. Prayers have also been made in each of the petitions for restraining the respondents from initiating any coercive steps against the petitioners pursuant to the order dated 15.04.2015 and 16.04.2015 and the decision of the petitioners in the case of Monnet Power Company and Mandakini Exploration to surrender the “Utkal-C” coal block and the Mandakini coal mine, respectively.

3. We may point out that in Monnet Power, an interim order was passed on 17.04.2015 when the petition [WP(C) 3786/2015] first came up for hearing. The interim order was to the effect that the date for making the payment under the coal mine development and production agreement for Utkal – C and for furnishing the bank guarantee was extended to 22.04.2015. This extension was granted from time to time upto 27.05.2015. Similar interim orders were passed in Mandakini’s case [WP(C) 3787/2015]. In Monnet Power [WP(C) 3786/2015], when the matter was taken up for hearing on 26.05.2015, the learned counsel appearing for the petitioner therein made a categorical statement that the performance security shall not be paid by the petitioner in view of its stand against the cap on fixed charges and because of which the petitioner

was no longer interested in the Utkal-C mine for which the petitioner had been declared as the Successful Bidder. Thus, in Monnet Power, the only issue that survived was with regard to the forfeiture of the bid security and ancillary issues. Of course, the bid security, which was by way of a bank guarantee, was to be kept alive. Insofar as the Mandakini's petition [WP(C) 3787/2015] is concerned, the payment date, as pointed out above, was extended from time to time and even beyond 27.05.2015. On 16.02.2016, the interim orders were directed to continue till disposal of the writ petition. In the case of Jaiprakash Power Ventures Limited [WP(C) 4885/2015], however, there were no interim orders.

4. Monnet Power [WP(C) 3786/2015] is in respect of the Utkal-C coal block; Mandakini Exploration [WP(C) 3787/2015] is in respect of Mandakini Coal Mine and Jaiprakash Power Ventures Limited [WP(C) 4885/2015] is in respect of Amelia (North) Coal Block.

5. We may point out at the outset that the present petitions involve issues pertaining to the coal block auctions and fixation of power tariffs. All the coal blocks in the present petitions were reserved for the end-use of "Power". Therefore, the bidding process for the coal blocks would

definitely have an impact on the power tariffs arrived at subsequent to the use of coal for the manufacture of power.

6. Thus, a different methodology was adopted in respect of auction of coal mines earmarked for the power sector. The methodology was of reverse bidding in order to ensure that there was no rise in the power tariffs. Under the reverse bidding methodology, bidders are required to submit bids below the Coal India Limited's notified price for corresponding grade of coal, which functions as the ceiling price. The lowest bid submitted is taken as the fuel cost and, therefore, enters into the energy charge component in determination of the power tariff. In case the reverse bidding results in a bid being equal to "zero", the bidding process switches over to forward bidding where the bidders have to quote an additional premium payable to the State Government where the mine is located. This additional premium is over and above the fixed rate of Rs 100 per tonne which is, in any event, payable by the Successful Bidders. It is evident that the reverse bidding methodology, which has been adopted for auction of coal mines earmarked for the power sector, is intricately mixed and linked with the power tariff. Apparently, the

methodology of reverse bidding has been designed keeping in view the interest of the ultimate consumers of power.

7. It is clear that while considering the present petitions, one has to keep in mind not only the bidding process for the coal mines, which have been earmarked for the power sector, but also the methodology of arriving at the power tariff.

8. The grievance of the petitioners can be summed up in the following two propositions:-

- (1) The respondents, which include the Government of India (both through the Ministry of Power and the Ministry of Coal), cannot in law put a cap on fixed charges / capacity charges under the regime of electricity tariffs specifically under Section 63 of the Electricity Act, 2003 which provides for determination of tariff by a bidding process;
- (2) The decision to put a cap on the fixed charges / capacity charges component of the power tariff under the Section 63 regime impacts the decision making process with regard to the Final Price Offer of bidders in the coal block auctions.

9. As a corollary to the above propositions, there is a third proposition, which is that, if at all the requirement of a ceiling on fixed charge / capacity charge component of power tariff can be imposed, it can be done only prospectively and not retrospectively. In other words, it would apply only with respect to Successful Bidders of coal block auctions held after 16.04.2015. This is so because such a move would be discriminatory against the Successful Bidders in coal block auctions prior to 16.04.2015 as against the Successful Bidders in such auctions held after 16.04.2015. This would be so because the Successful Bidders in the former case would not have known of the ceiling on fixed charges when they submit their bids, whereas the Successful Bidders in the latter case would have submitted their bids with full knowledge of the factum of a ceiling being placed on the fixed charge component of the power tariff.

10. On the part of the respondents, the argument is that the petitioners were well aware of the fact that additional premium could not be passed through to the power tariff. It was contended that this was clear from the methodology for fixing the floor / reserved price for auction of coal mines / blocks which was released by the Ministry of Coal on 26.12.2014 as

also from the response to queries in respect of the auction of Schedule-II coal mines which was specified on the website by the Nominated Authority, Ministry of Coal on 17.01.2015 wherein it was specifically stated that the reserve price of Rs 100 was permitted as a pass through in the energy charges and that the upfront payment was not a pass through and that the bidders were expected to bid accordingly. It was further submitted on the part of the respondents that Corrigendum No.3 to the Standard Tender Document in respect of Schedule-II Coal Mines for the power sector which was released on 31.01.2015, had also made it clear that the Additional Premium shall not be reckoned for the purposes of determination of tariff for electricity. It was, therefore, contended on the part of the respondents that the entire methodology was well-known and the subsequent decision expressly stating that there would be a cap on the fixed charge / capacity charge component of the power tariff was already known to the bidders and, therefore, they cannot resile from their bids. It was submitted that if a cap on the fixed charge / capacity charge was not placed, then the Successful Bidders in the coal mine auction would be permitted to do indirectly what they could not directly. In other words, they would hike up their fixed charge components by including the additional premia in that component when, in fact, the additional premia

could not be passed through as a component of energy charge. It was contended that the decision of the Government was taken in public interest because then alone would the benefits of the coal block auctions in respect of the mines allocated for the power sector result in a benefit to the consumers.

11. On behalf of the respondents, it was submitted that power is sold under Section 63 by participating in the bid process taken up by various electricity distribution companies (Discoms) from time to time. The power so purchased by the Discoms from the IPPS (Independent Power Procurers) is then distributed to the consumers. Under Section 63 of the Electricity Act, 2003, determination of the tariff is through a bidding process. The said provision stipulates that the Appropriate Commission shall adopt the tariff, if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government. The guidelines require that the bidders, that is, the IPPs have to quote both for the energy charge and the capacity charge in their bids made to the Discoms. It was submitted that while the energy charge covers the cost of fuel for generation of electricity, the other costs, relating to the availability of a power station are expected to

be covered under the fixed charge component. While the fixed charge is paid by the Discoms to the IPPs for availability of the power station, the energy charges are payable for supply of electricity. Throughout the tenure of the power purchase agreements, the Discoms are liable to pay the fixed charge component even if there is no drawal of electricity by them, whereas the energy charge component is payable only if the actual scheduled drawals of electricity are made from the IPPs. It was submitted that the methodology behind the reverse bidding was to arrive at a lower component of energy charge, the objective being that the lower the quote for the Run of Mine (ROM) cost of coal, the lesser would be the energy charge portion in the tariff for electricity, ultimately resulting in a benefit to the consumers of electricity. It was submitted on behalf of the respondents that the petitioners in the present writ petition want to load the benefits due to the consumers as a result of the lower energy charges on to the fixed charge component of electricity tariff and thereby take away the benefit which would have otherwise been passed on to the consumers. It was reiterated that the petitioners were always aware that the additional premium quoted in the coal auctions would not be allowed to be factored into the tariff. It was, therefore, submitted that if the stand of the petitioners were to be accepted, the entire purpose of reverse

auction would be defeated and the benefits would be denied to the ultimate consumers of electricity which would not be in the interest of the public. Thus, it was contended on the part of the respondents that there was nothing wrong in the impugned decision dated 15.04.2016 or the resolution dated 16.04.2015. It was also submitted that there was no question of allowing the alternative prayer of the petitioners of permitting them to withdraw from the bids for the mines in question. It was contended that the petitioners were trying to wriggle out of their contractual obligations only because they feel that the mining operations would not be profitable because of the aggressive bidding, but, that cannot be a ground for challenging the entire process at the cost of consumers.

12. The sequence of events leading to the impugned decision of 15.04.2015 and the impugned resolution of 16.04.2015 needs to be examined. We start with the Approach Paper for auctioning of coal mines issued by the Nominated Authority, Ministry of Coal, Government of India on 17.12.2014. Under the head “Methodology for Fixing the Floor Price and Upfront Payment”, it was provided in the draft clause 2.4.2 that a ceiling price of the prevailing Coal India Limited notified

price for each coal mine would be fixed and the bidders would be required to quote lower than the ceiling price. The ceiling price would be fixed in the Run of Mine (ROM) price of equivalent grade, as specified for the Coal India Limited for the power sector. The bidder quoting the lowest would be the Successful Bidder. It was further suggested under the said draft clause that a fixed reserved price of Rs 100 per tonne of coal would be payable as per actual production by the mine allocatee. Furthermore, the reserve price would be escalable using the formula provided therein. Certain additional conditions were prescribed, *inter alia*, in respect of the generation capacity conducted through the tariff bid based PPAs (Purchasing Power Agreements) (Case-I). This was provided in the draft clause 2.4.2(f)(ii). The said draft clause provided that the Appropriate Commission would review the quoted “energy charge” keeping in view that the actual bid price of coal as equivalent to the ROM cost of coal alongwith statutory levies and other permissible components of energy charge provided that such a revision would not lead to higher energy charge throughout the tenure of the PPA than that which would have been obtained as per the terms and conditions of the existing PPA. It was also suggested that for this purpose, the allocation of the coal mine under the new provisions would be treated as “Change in Law” to enable

the Appropriate Commission to review the tariff in accordance with the provisions of PPA. From the above clause, it is evident that it related to the review of the coal “energy charge”. There was no mention of the fixed charge / capacity charge. This is an important aspect which needs to be kept in mind while we are dealing with the sequence of events.

13. Thereafter, there was an inter-Ministerial meeting in which certain suggestions were made.

14. On 26.12.2014, the Government of India, Ministry of Coal issued an order setting out the methodology for fixing the floor / reserve price for auction and allotment of coal mines / blocks. The said order dated 26.12.2014 reads as under:-

“Most Immediate

No.13016/9/2014-CA-III
Government of India
Ministry of Coal

Shastri Bhawan, New Delhi,
Dated the 26th December, 2014

ORDER

Subject:- Methodology for fixing Floor / Reserve Price for Auction and Allotment of Coal Mines / Blocks.

In accordance with the provisions of Rule 8(3) of the Coal Mines (Special Provisions), Rules, 2014 and Section 8(5) of the Coal Mines (Special Provisions), Ordinance, 2014

the Government is pleased to approve the Methodology for fixing Floor/Reserve Price for Auction and Allotment of Coal Mines/Blocks as mentioned below:-

METHODOLOGY FOR FIXING FLOOR/RESERVE PRICE

1. For fixing floor price for Auction for sectors like Steel, Sponge iron, Cement, Captive Power etc.:

The Intrinsic Value of the coal block will be calculated by computing its Net Present Value (NPV), based on Discounted Cash Flow (DCF) method. The 10 % of this intrinsic value will be payable upfront in 3 installments of 5%, 2.5% and 2.5% as prescribed in the bidding document. The final NPV (after subtracting the upfront payment received from the bidder) will then be annuitized to become equal to a unit ratio in terms of Rs/tonne (viz. floor price). In this case for calculation of intrinsic value, it is proposed that, the extant notified price of CIL (price of domestic coal) for the non-regulated sectors for the corresponding GCV bands will be taken into account for computing NPV. However, floor price shall not be less than Rs. 150/- per tonne. The resultant bid price (Rs/tonne) shall be considered as base for the year of bidding with yearly escalation linked to the WPI. The statutory royalty payable on coal will continue to be governed as per extant rules.

2. For fixing Reserve Price for coal mines / blocks to be allotted for power projects to be set up in future on tariff based bidding (Case-2) and For fixing Reserve Price for coal mines / blocks to be allotted to the Government Companies for specified end-uses:

A fixed Reserve Price of Rs.100/- per tonne of coal shall be payable, as per actual production by the successful allottee. The statutory royalty payable on coal will continue to be governed as per extant rules. This would ensure that there is no adverse impact on power tariff. The successful allottee shall have to pay upfront payment, as may be prescribed in the tender / allotment document. There is no bidding on coal under these two categories. The 'Reserve Price' may be escalated using a pre-

determined formula that is prescribed in now prevailing Standard Bidding Documents for Case-1 bidding as formulated by Ministry of Power for escalation of fuel cost from captive mines. However, for existing generation capacity contracted through tariff bid based PPAs (Case-2), arranging fuel is the responsibility of power procurer. Such Case-2 projects shall not be eligible to participate in the auction process for the coal blocks.

4. For fixing the ceiling price for coal mines / blocks to be auctioned for generation capacity having cost plus PPAs or for generation capacity having tariff bid based PPAs (Case-1)/generation capacity to be contracted through cost plus PPAs or through tariff bid based PPAs (Case-1) in future:

- a. A Ceiling Price of CIL Notified price for each coal block will be fixed and the bidders will be mandated to quote lower than this Ceiling Price. The Ceiling price shall be fixed at Run-of-Mine (ROM) price of equivalent grade, as specified by CIL for the power sector. The bidder quoting the lowest will be the successful bidder. This will be taken for transfer price to the plant from the coal block. The resultant bid price of coal will be escalable in line with a pre-specified escalation formula for the purpose of considering the energy charge. This method will ensure that the benefit of lower bid price is passed through to the consumers.
- b. The bid price of coal shall be considered as base for the year of bidding and it shall be escalable with pre-determined formula that is prescribed in now prevailing Standard Bidding Document for Case-1 bidding as formulated by MoP, for escalation of fuel cost from captive mines.
- c. A fixed Reserve Price of Rs.100/- per tonne of coal shall be payable, as per actual production by the successful allottee. The statutory royalty payable on coal will continue to be governed as per extant rules i.e. at the CIL notified price. Similarly, the reserve

price may also be escalable using the same formula as in 'b' above.

- d. The successful allottee shall have to make upfront payment @ 10 % of the intrinsic value of the coal block in 3 installments of 5%, 2.5% and 2.5%, as prescribed in the bidding document.
- e. To ensure that the benefit of coal is passed on to the consumers, the following conditions has been prescribed:

I. For generation capacity having cost plus PPAs or generation capacity to be contracted through cost plus PPAs in future - For the purpose of determining the fuel cost for cost plus PPAs, the Appropriate Commission will allow bid price of coal along with subsequent escalation as provided in coal block bid document as being equivalent to the Run of Mine (ROM) cost of coal together with other allowable expenses and levies, provided that it shall not lead to higher energy charge throughout the tenure of PPA than that which would have been obtained as per the terms and conditions of the existing PPA.

II. For the generation capacity contracted through tariff bid based PPAs (Case-1) - The Appropriate Commission shall review the quoted energy charge keeping in view that the actual bid price of coal along with subsequent escalation as provided in coal block bid document as being equivalent to Run of Mine (ROM) cost of coal alongwith statutory levies and other permissible components of energy charge, provided that such revision shall not lead to higher energy Charge throughout the tenure of PPA than that which would have been obtained as per the terms and conditions of the existing PPA. For this purpose, the allocation of coal block under the new provisions shall be treated as "Change in Law" to enable the Appropriate Commission to revise the tariff downwards in accordance with the provisions of PPA.

III. For the generation capacity to be contracted through tariff bid based PPAs. (Case-I) in future -

The Appropriate Commission shall while adopting the tariff under Section 63 of the Electricity Act, 2003, ensure that the energy charge is derived based on the actual bid price of coal along with subsequent escalation as provided in coal block bid document as being equivalent to Run of Mine (ROM) cost of coal alongwith statutory levies and other permissible components of energy charge.

IV. For this purpose Ministry of Power will make suitable provisions in the Tariff policy and/or in the bidding guidelines issued under the Electricity Act, 2003.

- f. For power plant having uncontracted capacity, the bidder shall be mandated to cap its merchant capacity at 15 % of the generating capacity linked to the allotted coal block for sale of power outside medium and long term PPAs contracted under Section 62 or Section 63 of the Electricity Act, 2003. Further the bidder shall have to pay an additional reserve price for the quantum of coal used for power sold in the merchant market. The additional reserve price for coal used for merchant sale of power shall be based on intrinsic value of the coal block annuitized over the yearly production in Rs/tonne terms. The intrinsic value can be arrived at with the existing approved methodology for steel/sponge iron/cement sectors/captive power. The additional Reserve Price shall not be less than Rs. 150/- per tonne. Further the resultant additional reserve price (Rs/tonne) shall be considered as base for the year of bidding with yearly escalation linked to the WPI.

5. Any further revision of CIL price after the bid due date would not have any impact on the bid price of the blocks already bid as escalation on that price has already been provided for in para 4.(b) above. For future bidding of coal

blocks, the then prevailing CIL price will be considered for determining ceiling price.

6. For auction / allotment of coal blocks for the purpose of sale of coal as provided in Section 4(2) of the Coal Mines (Special Provision) Ordinance, 2014, a separate methodology will be formulated.

This issues with the approval of Competent Authority.

Sd/-
(S.K. SHAHI)
Director
Ph. 23382807

Nominated Authority,
Ministry of Coal

Copy to:-

TD (NIC)- with the request to upload on the website of Ministry of Coal.”

15. It would be evident from the above order dated 26.12.2014 that paragraph 4 deals with the fixing of ceiling price for coal mines / blocks to be auctioned for generation capacity having cost plus PPAs or for generation capacity having tariff bid based PPAs (Case-I) as also for generation capacity to be contracted through cost plus PPAs or through tariff bid based PPAs (Case-I) in future. In other words, the said paragraph 4 was in respect of both existing PPAs and future PPAs. It was also in respect of cost plus PPAs or tariff bid based PPAs (Case-I). The former came under Section 62 while the latter under Section 63. It would be immediately evident that the accepted methodology for the auction of

the coal mines / blocks in respect of the power sector was that a ceiling price of Coal India Limited notified price for each coal block would be fixed and the bidders would be required to quote lower than this ceiling price. The bidder quoting the lowest would be the Successful Bidder. This would also be taken as the transfer price to the plant from the coal block. The resultant bid price of coal would be escalable in line with a pre-specified escalation formula for the purposes of considering the energy charge. It was stated therein that this method would ensure that the benefit of lower bid price is passed through to the consumers, that is, consumers of power. It was also indicated that a fixed reserve price of Rs 100 per tonne of coal would be payable as per actuals by the successful allocatee.

16. It is important to note that paragraph 4(a) of the said order dated 26.12.2014 does not contemplate the situation where the reverse bidding would drop the bid price to zero and consequently, there is no mention of additional premium or the concept of additional premium in the said paragraph. In other words, the said methodology deals with the energy charge component of the power tariff.

17. Para 4(e) of the said order dated 26.12.2014 stipulates certain conditions to ensure that the benefit of a lower coal price is passed on to the consumers. It deals with three situations. The first being with regard to the existing and future cost plus PPAs with which we are not concerned. The second and third situations deals with the tariff bid based PPAs (Case-I) existing and future, respectively. It is clear that these conditions also relate to the energy charge of the power tariff under the Section 63 regime.

18. It may be noted that the order dated 26.12.2014 was issued by the Ministry of Coal. The fact that it mentions the energy charge for the power tariff, which would be a subject matter of the Ministry of Power, shows the nexus between the bid for the coal auction and the bidding for the power tariff. While the coal auctions were under the Coal Mines (Special Provisions) Ordinances and now the Coal Mine (Special Provisions) Act, 2015, the bidding for power was under Section 63 of the Electricity Act, 2003. Although they fall under different regulatory mechanisms, the nexus between the bidding for coal auctions in respect of coal mines for the power sector and the bidding for the power tariff, is clearly established.

19. Since certain queries had been raised with regard to the auction of Schedule-II Coal Mines in connection with the Standard Tender Document of 27.12.2014, particularly pertaining to the power sector, the Nominated Authority, Ministry of Coal, Government of India, published the queries and the responses thereto on to the website on 17.01.2015.

The query at S.No.18 of the said document was as under:-

“In case of reverse auction for power, the entire bid amount including the reserve price is proposed to be factored in the tariff. There is no clarity on how the up-front payment is worked out and how it will be taken care of in the tariff. It is requested that the requirement of upfront payment in case of power be deleted or clarified how it would be taken in tariff or should it be considered as a upfront payment out of the Rs 100/- per MT reserve price liability and the balance of the reserve price shall be annuitized.”

The response to the said query as provided in the said document was as under:-

“Calculated in accordance with the Methodology for fixing Floor/ Reserve Price for auction/ allotment of coal blocks published via notification No. 13016/9/2014-CA-III dated December 26, 2014 by Ministry of Coal; The same may be accessed at the website of Ministry of Coal.

The reserve price of Rs. 100 is a pass through in the energy charges, while the upfront payment is not a pass through. The bidder is expected to bid accordingly.”

20. It is important to note that a reference had been made to the methodology for fixing the Floor / Reserve price which had been published in the order dated 26.12.2014, which we have already extracted above. Furthermore, it was clearly indicated that the reserve price of Rs 100 was a pass through in the energy charges. The upfront payment was not a pass through and that the bidder was expected to bid accordingly. Two points emerge from this response. First of all, the reference was with regard to the energy charges. Secondly, there was no mention of the fixed charge / capacity charge component of the power tariff.

21. On 31.01.2015, Corrigendum No.3 to the Standard Tender Document (Schedule-II Coal Mines) (for Power Sector) was issued. The following were the notable changes brought about by the said Corrigendum No.3:-

- (i) In clause 1.1.7, as it originally appeared in the Tender Document, the word “Bid” had a reference to the binding technical bid, the Initial Price Offer and the Final Price Offer submitted by the bidders in accordance with the Tender Document. The same was

amended through the said Corrigendum to include ‘Additional Premium’;

- (ii) Originally, clause 1.1.6, which defined “Final Price Officer” had a reference to clause 3.3.2(c). After the amendment by the Corrigendum, the expression “Final Price Officer” had reference to clause 3.3.2(c)(i), (ii) and (iii);
- (iii) The expression “Tender Document” as originally defined in clause 1.1.40 was amended to include the said notification dated 26.12.2014 issued by the Ministry of Coal;
- (iv) The “Financial Bid” under the original clause 3.3.1(b) had reference to the “Initial Price Officer” and the “Final Price Offer”. However, after the amendment brought about by the said Corrigendum No.3, the “Financial Bid” was to comprise of (i) the Initial Price Offer; (ii) the Final Price Offer and / or (ii) the Additional Premium, if applicable;
- (v) Clause 3.3.2(c), as it originally stood, was as under:-

“3.3.2(c) **Final Price Offer**

The Applicable Ceiling Price for electronic auction shall be the lowest Initial Price received from the Technically Qualified Bidders. The Qualified Bidders shall be permitted to place their Final Price Offer on the electronic auction platform, which is lower than the Applicable Ceiling Price.

The Qualified Bidder that submits the lowest Price Offer during the electronic auction process shall be declared as the “Preferred Bidder”.

In the event that the Qualified Bidder that submitted the lowest Initial Price Offer i.e. the Applicable Ceiling Price, becomes ineligible to participate in the electronic auction, the next lowest Initial Price Offer shall become the Applicable Ceiling Price.

In case the auction Process is annulled due to non-submission of at least one Final Price Offer on the electronic auction platform, the Bid Security of the Qualified Bidders) who has submitted the lowest Initial Price Offer i.e. the Applicable Ceiling Price, shall be forfeited in accordance with Clause 6.1.6.”

After amendment through the said Corrigendum No.3, the said clause 3.3.2(c) became:-

“Final Price Offer and Additional Premium

The Qualified Bidders shall be entitled to submit the Final Price Offer, subject to the following:

- (i) the Final Price Offer quoted by the Qualified Bidders should not be more than the lowest initial Price Offer submitted by any of the Qualified Bidders (the "Final Price Offer Ceiling"). Provided that in the event that the Qualified Bidder which has submitted the lowest initial Price Offer becomes ineligible to participate in the auction process then the initial Price Offer which is subsequent in ascending

ranking of the Initial Price Offers shall be considered to be the Final Price Offer Ceiling.

- (ii) In the event that the Final Price Offer Ceiling is more than INR 0 (Indian Rupees Zero), and all the Qualified Bidders respectively submit a Final Price Offer which is more than INR 0 (Indian Rupees zero), then the Qualified Bidder that submits the lowest Final Price Offer shall be declared as the "Preferred Bidder".
- (iii) However, in the event that any Qualified Bidders submits a Final Price Offer which is equal to INR 0 (Indian Rupees Zero) then the selection of Preferred Bidder shall be made pursuant to Clause 3.3.2(c)(iv) below.
- (iv) In the event that (A) the Final Price Offer ceiling is equal to INR 0 (Indian Rupees Zero)- in which case the final Offer Price would not be required to be submitted: or (B) any Qualified Bidder has submitted a Final Price Offer which is equal to INR 0 (Indian Rupees Zero), then the Qualified Bidders shall be entitled to quote a per Tonne rate (the "Additional Premium") on the basis of which an amount would be payable in accordance with Clause 3.10.1 on the basis of coal extracted from the Coal Mine in addition to all other payments required to be made. The Qualified Bidder which submits the highest Additional Premium shall be declared as the "Preferred Bidder".
- (v) In the event that the auction process is annulled due to non-submission of at least one Final

Price Offer or at least one offer of an Additional Premium, as the case may be, the Bid Security of the Qualified Bidder(s) who has submitted the lowest initial Price Offer which formed the Final Price Offer Ceiling, shall be forfeited in accordance with clause 6.1.6.”

- (vi) In the original clause 3.10.1, which relates to “Periodic Payments by the Successful Bidders”, though there was a mention of the fixed amount of Rs 100 per tonne, there was no mention of the Additional Premium. In the amended clause 3.10.1, there was a reference to the said amount of Rs 100 per tonne as the Fixed Rate. And, the concept of ‘Additional Premium’ was also introduced;
- (vii) Clause 3.10.2, as it originally stood, was as under:-

“However the aggregate of the Price Offer pursuant to which the successful Bidder has received the Vesting Order; and (ii) **the aforementioned amount of INR 100/Tonne, will be used** for computation of energy charge for the purposes of determination of tariff for electricity.”

After the amendment introduced by the said Corrigendum No.3, clause 3.10.2 became:-

“However the aggregate of (i) the **Final Price Offer** pursuant to which the Successful Bidder has received the Vesting. Order; and (ii) **the aforementioned Fixed Rate, will be the input** for computation of

energy charge for the purposes of determination of tariff for electricity.

It is clarified that in the event that an ascending forward auction is conducted in accordance with Clause 3.3.2 (c)(iv), only the aforementioned Fixed Rate of INR 100/Tonne, will be the input for computation of energy charge for the purposes of determination of tariff for electricity and the Additional Premium shall not be reckoned for the purposes of determination of tariff for electricity.”

22. The said Corrigendum to the Standard Tender Document, insofar as it related to the auction for Schedule-II Coal Mines, whose end-use was “power”, introduced the concept of Additional Premium which was not there originally. The concept of Additional Premium was set out in clause 3.3.2(c)(iii) and (iv). The concept of Additional Premium came in when it was realised that the reverse bidding methodology, which had been adopted, could possibly reduce the bid price to “zero”. It was then contemplated that if that happens, the bidding would change to a forward bidding where the bidders are required to quote the Additional Premium payable to the State Government where the mine is located, over and above the fixed reserve price of Rs 100 per tonne. It may be pointed out that in the case of Utkal-C, Mandakini and Amelia (North), the reverse bidding did entail a bid price of rupees “zero” and, therefore, there was

subsequent forward bidding in respect of each of these coal mines. The closing prices based on forward bidding (after the reverse bidding) were rupees 770(F), rupees 650(F) and rupees 712 (F) in respect of Utkal-C, Mandakini and Amelia (North) Coal Mines, respectively. What emerges from the amendments brought out by the said Corrigendum No.3 is the realisation of the reverse bidding resulting in a bid price equivalent to Rupees “zero”; the provision for forward bidding to arrive at the Additional Premium amount and the fact that the aggregate of the Final Price Officer pursuant to which the Successful Bidder has received the Vesting Order and the fixed rate (i.e., Rs 100/- per tonne) would be the input for computation of energy charge for the purposes of declaration of tariff for electricity. It was further clarified in the amended clause 3.10.2 that in the event an ascending forward auction was conducted, only the said fixed rate of Rs 100 per tonne would be the input for computation of energy charge for the purposes of determination of the tariff for electricity and the Additional Premium would not be reckoned for the purposes of determination of the tariff electricity.

23. From the above, it is evident that insofar as the input to the energy charge component of the tariff for electricity was concerned, the

Additional Premium was not to be considered as a pass through item. Once again, we emphasise that the Standard Tender Document, as amended by Corrigendum No.3, had a reference only to the energy charge component of the power tariff. There was no reference to the fixed charge / capacity charge component of the power tariff.

24. It is with this understanding and state of affairs that the auctions for the coal blocks were held. The petitioners had participated in the auction on the basis of the Tender Document as amended by Corrigendum No.3. It was clarified that the Additional Premium could not be passed through as a component of energy charge, but, at the same time, there was no mention with regard to the fixed charge / capacity charge component of the power tariff.

25. The petitioners participated in the said auction and were successful bidders as already pointed out above insofar as Utkal-C, Mandakini and Amelia (North) Coal Mines were concerned.

26. Since there were reports in the Media that the Government of India was proposing to put a cap on the fixed charge component of the power tariff *qua* the power generating companies, which had been declared

Successful Bidders of the coal mines, several writ petitions, including WP(C) 3402/2015 by Mandakini Exploration and Mining Limited and Others were filed in this court. One of the pleas taken in those petitions was that there was an apprehension that the Government would be putting a cap on the fixed charge component of the power tariff and that such capping would amount to a retrospective change in the bidding conditions of coal mines for the power sector which was impermissible in law as it would completely alter the playing field. By an order dated 09.04.2015, the court disposed of the said writ petition and directed the Ministry of Power to consider the said petition as a representation and take a decision thereon on or before 15.04.2015.

27. It is consequent thereupon that the impugned decision dated 15.04.2015 has been taken by the Ministry of Power, Government of India. The impugned decision and the consequent Resolution dated 16.04.2015 are set out hereinbelow:-

“No.L-1/2015-IPC
Government of India
Ministry of Power

New Delhi, Dated, 15th April, 2015

Mandakini Explorations and Mining Ltd.,
Through Mr. Amit Jain, Authorised Representative

Plot No.12, Sector B1, Local Shopping Complex,
Vasant Kunj, New Delhi-110070.

Jindal India Thermal Power Limited.,
Through Mr. Punit Gupta, Authorised Representative
Plot No.12, Sector B1, Local Shopping Complex,
Vasant Kunj, New Delhi -110070

Monnet Power Company Ltd.,
Thourgh Mr. Naresh Saini, Authorised Representative
Mandir Hassaud, Raipur-492101

Mr Amit Jain,
Shareholder of Jindal India Thermal Pvt Ltd.,
14, Alipur Road, Civil Lines,
Delhi – 110054.

Subject: Writ petition (C) No.3402/2015 filed by M/s Mandakini Exploration and Mining Ltd & Others in the Hon'ble High Court of Delhi with regard to alleged action of the respondents to cap the fixed charge component of rate of electricity qua the power generating companies that have been declared successful bidders of coal mines.

Sir,

A Writ Petition No.3402/2015 was filed by M/s Mandakini Exploration and Mining Ltd & Others in the Hon'ble High Court of Delhi with regard to the proposed action of Govt. Of India to cap the fixed charge component of the power tariff qua the power generating companies that have been declared successful bidders of coal mines, on the ground that such capping would amount to retrospective change in the bidding conditions of coal mines for power sector.

2. The prayers of the Petitioners in the Writ Petition are as under:-

“(a) a Writ of mandamus or any other Writ, Order or direction to the Respondents to clarify the issue of capping of the

fixed charges and methodology for the purpose of power purchase bidding process in a time bound manner;

- (b) direct the Respondents to keep in abeyance any demand under the CMDP Agreement along with the existing requirements of furnishing a Bank Guarantee for an amounts of Rs.5,44,97,92,500/- and payment of Rs. 108 Crores (approximately) by the Petitioners till a clarification is issued by the Respondents with respect to capping of fixed charge; and
- (c) any other Order or Orders which this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.”

In their Writ Petition, the petitioners have raised the following issues for clarification:

- a) Proposed action of the Government to cap the fixed charge component of rate of electricity *qua* the power generating company that has been declared successful bidder in the coal mines will amount or ex post facto change in the auction / bidding tender conditions of coal mines for power sector. Such decision is arbitrary, without any basis, and it lacks legal sanctity;
- b) Capping of fixed charges will, make project of addressees unviable and they will not be able to participate in any competitive bidding for future power procurement thereby violating fundamental rights of the addressee enshrined under Article 19(1)(g) of the Constitution of India;
- c) Capping of fixed charges is against the public interest as it would wipe out competition in the power sector.

4. The background relating to those issues is as follows-

Hon'ble Supreme Court vide judgement dated 25th August and order dated 24th September 2014 had cancelled allocation of 204 coal blocks on the grounds of non-transparent mechanism for allocation of blocks. Out of these, 42 coal mines were producing ones which were allowed to operate till 31.03.2015. In order to

address the issues which arose due to cancellation, Government promulgated the Coal Mines (Special Provisions) Ordinance, 2014, on 21.10.2014 (now replaced by an Act) for allocation of coal mines and vesting of the right, title and interest in and over the land and mine infrastructure to successful bidders and allottees with a view to ensuring continuity in coal mining operations and production of coal.

5. The Ministry of Coal had issued an Order on 26.12.2014 specifying the Methodology for fixing floor / reserve price. The Methodology also provides for passing the benefits of lower bid price of coal to the consumers. The intent of the Government is to pass the benefit of cheaper coal to the consumers in the existing and concluded PPAs as well as in the future PPAs.

Para 4(e)(I) of Methodology provides that “For generation capacity having cost plus PPAs or generation capacity to be contracted through cost plus PPAs in future – For the purpose of determining the fuel cost for cost plus PPAs, the Appropriate Commission will allow bid price of coal along with subsequent escalation as provided in coal block bid document as being equivalent to the Run of Mine (ROM) cost of coal together with other allowance expenses and levies, provided that it shall not lead to higher energy charge throughout the tenure of PPA than that which would have been obtained as per the terms and conditions of the existing PPA.”

Para 4(e)(II) of Methodology provides that “For generation capacity contracted through tariff bid based PPAs (Case-I). The Appropriate Commission shall review the quoted energy charge keeping in view that the actual bid price of coal along with subsequent escalation as provided in coal block bid document as being equivalent to Run of Mine (ROM) cost of coal along with statutory levies and other permissible components of energy charge, provided that such revision shall not lead to higher energy charge throughout the tenure of PPA than that which would have been obtained as per the terms and conditions of the existing PPA. For this purpose, the allocation of coal block under the new provisions shall be treated as “Change in Law” to enable the Appropriate Commission to revise the tariff downwards in accordance with the provisions of PPA.

As a follow up, for existing PPAs, Directions are being issued to the Appropriate Commissions by respective Central and State Governments / UTs as authorised under Sections 107 and 108 of the Electricity Act, 2003 to enable the Appropriate Commission to open these PPAs and re-determine the tariff.

6. For the generation capacity to be contracted throughout tariff bid based PPAs (Case-I) in future, Para 4(e)(III) of Methodology provides that “the Appropriate Commission shall while adopting the tariff under section 63 of the Electricity Act, 2003, ensure that the energy charges is derived based on the actual bid price of coal along with subsequent escalation as provided in coal block bid document as being equivalent to Run of Mine (ROM) cost of coal along with statutory levies and other permissible components of energy charge” Further, Para 4(e)(IV) of the Methodology provides that “for this purpose, Ministry of Power will make suitable provisions in the Tariff policy and / or in the bidding guidelines issued under the Electricity Act, 2003.”

In accordance with the above existing provisions of the Methodology prescribed in the Order dated 26.12.2014 of the Government, it is proposed to amend the Guidelines for future procurement of power from Thermal Power Stations by Distribution Licensees under Design, Build, Finance, Own & Operate (DBFOO) (Case-I) bidding so that the power procurers, determine, in advance, in consultation with the Appropriate Commission, an upper ceiling in terms of Rs./Kwh towards the fixed/capacity charges. This shall be indicated in advance to all the prospective bidders while inviting DBFOO (Case-I) bids as part of bid document. This is to ensure that no undue and ineligible cost is loaded on the fixed charge. If this is not done, then the entire process to get the lowest Run of Mine (ROM) price of coal through reverse e-auction will be vitiated because the purported reduction in coal price will be loaded on to the fixed charge component of electricity tariff. This will thus defeat the objective of reverse bidding in the auction of coal mines for the power sector.

In fact, the Inter-Ministerial Group comprising of representatives of Ministry of Power, Ministry of Coal, Ministry of Environment & Forest, Department of Legal Affairs, Department of Economic Affairs, Central Electricity Authority,

Central Electricity Regulatory Commission and Power Finance Corporation, constituted to recommend the Standard Bidding Documents or any modification therein has already recommended in its meeting held on 03.03.2015 the proposed amendments to the Guidelines for future procurement of power by Distribution Licensees under DBFOO (Case-1) in order to implement the decisions contained in the said Methodology.

7. The Ministry of Power has carefully examined the issue raised by the addressees in their Writ Petition in light of the provisions of the Coal Mines (Special Provisions), Ordinance 2014 (now the Act of 2015), the Coal Mines (Special Provisions), Rules 2014 and the Orders issued thereunder such as the Methodology, Standard Tender Documents, Standard Coal Mine Development and Production Agreement (CMDPA), response to queries raised by the prospective bidders during pre-bid conference meetings, provisions of the Electricity Act, 2003. Tariff Policy and National Electricity Policy etc. While conducting reverse bidding for auction of coal mines earmarked for power sector, bidders were asked to quote lowest Run of Mine (ROM) price of coal. The explicitly stated intent of the Government was to ensure that the benefit of lowest bid price is passed onto the consumers in such a way that the power tariff actually goes down throughout the tenure of existing PPAs and for future PPAs also the benefits are fully passed on to the consumers. All these material information were available to all the prospective bidders prior to bidding.

8. After having carefully examined the issues raised in the Writ Petition, the clarification of Ministry of Power on the issue raised are, therefore, as under:-

Issue (a): The proposal to amend the Guidelines for future procurement of power from Thermal Power Stations by Distribution Licensees under Design, Build, Finance, Own & Operate (DBFOO) (Case-I) is in accordance with the decision of the Government vide Order dated 26.12.2014 as indicated in Para 5 & 6 above. This Order was uploaded on the website of Ministry of Coal and was well within the knowledge of all prospective bidders and, therefore, it is not retrospective. Further, the issue was also clarified in queries and responses to Standard Tender Document (Power Sector Specific Queries) uploaded on website

of Ministry of Coal on 17.01.2015. Therefore, the proposed action is a consequential act in pursuance of the decision already taken by the Government with the explicit objective of ensuring that benefits of auction are passed on to the ultimate consumers. It needs to be noted that in case the proposed action is not undertaken, the tariff of power generated from coal sourced from these mines will not go down as bidders would load the intelligible part of the bid on the capacity charge. In fact, the petitioners have explicitly admitted at Para 3 of the Writ Petition stating that “The bidding for the mine allocated to the Petitioner No.1 was based on the assumption that costs would be factored in the fixed charges.” This itself indicates that the intention of the Petitioners is to load the ineligible costs on the fixed charges. This would defeat the Government’s objective of reducing power tariff by following the reverse auction methodology which was especially designed to capture the efficiency of private sector in mining operations. It also needs to be noted that coal block auction and the resultant allocation has been done under the provisions of the Coal Mines (Special Provisions) Ordinance, 2014, (now replaced by an Act), Rules 2014 and Methodology and none of these provisions are being amended retrospectively.

Indeed, it was clearly indicated in the reply to pre-bid query no.18 of Queries and Responses to Standard Tender Document part-IV (Power Sector Specific queries) uploaded on website of Ministry of Coal on 17.01.2015 that “the upfront payment is not a pass-through. The Bidder is expected to bid accordingly.” Similarly, in Corrigendum No.3 to Standard Tender Document (Schedule II Coal Mines) (for Power Sector) uploaded on 31.01.2015. S.No.13, it was clarified that “in the event that an ascending forward auction is conducted in accordance with Clause 3.3.2(c)(iv), only the aforementioned Fixed Rate of INR 100/Tonne will be the input for computation of energy charge for the purposes of determination of tariff for electricity and the Additional Premium shall not be reckoned for the purposes of determination of tariff for electricity. “Thus if there is no upper ceiling on the fixed charge, then there is every possibility that these ineligible components will be loaded on the fixed charge which will be violative of bid conditions. In fact, as stated above, the petitioners’ intention has been exposed by them in the petition itself. It may be noted that the aforesaid Writ Petition is an afterthought.

It may be further noted that the Standard Bidding Documents (SBDs) and the Guidelines for procurement of power do not derive their authority from the Coal Mines (Special Provisions) Ordinance, 2014, (now replaced by an Act), of Rules 2014 and CMDPA thereunder. These documents are dynamic in nature and evolve with time based on experience. It is always open to Government to amend these documents/ guidelines for future procurement of power. On the other hand, if the contention of the petitioners is accepted, it would imply that the SBDs/guidelines cannot be amended at any time in future. In fact, in past, the Government has brought about changes in these documents/guidelines from time-to-time.

Issue (b): Capping of fixed charges will make project of addressees unviable: The successful bidder in these cases have participated in the bid process in full knowledge of these provisions. However, the bidders are now trying to circumvent the process for undue gain after having put in an aggressive bid and thereby deprive the ultimate consumers of a lower tariff of electricity. To participate in the bidding process and to quote a specific ROM cost was bidder's own decision, given the fact that all the dimensions of bidding process were clearly indicated in advance.

Issue (c): Capping of fixed charges is against the public interest as it would wipe out competition in the power sector. On the contrary, capping of fixed charges is being done only in public interest because then alone will the benefits of coal block auction pass on to the consumers. In fact, the successful bidders will be able to quote a lower tariff under Case-1 bids due to the nil or very low ROM cost that they have bid in the coal block auctions.

9. In view of the above, the issues raised in the writ petition stand clarified and the representation accordingly stands disposed of.

10. This issues with the approval of the Competent Authority.

Sd/-

(S. Majumdar)

Under Secretary to the Govt of India”

“GOVERNMENT OF INDIA
MINISTRY OF POWER

New Delhi, the 16th April, 2015

RESOLUTION

Amendment to the Guidelines for future Procurement of Power from Thermal Power Stations by Distribution Licensees under DBFOO (EARLIER Case-1) bidding.

No. 23/9/2015-R&R: The Ministry of Coal has issued the Order on 26th December, 2014 in accordance with the provisions of Rule 8(3) of the Coal Mines (Special Provisions), Rules 2014 and Section 8(5) of the Coal Mines (Special Provisions), Ordinance 2014, which Inter-alia specified the methodology for allocation by auction and allotment of coal mines/block.

2. The said Order dated 26th December, 2014 prescribes various conditions to ensure that the benefit of the coal mine allocation or allotment is passed on to the consumers. It further provides that the Ministry of Power will make suitable provisions in this regard.

Accordingly, in order to ensure that the benefits of coal block auction are passed on to the consumers, the following amendments are issued in the Guidelines dated 09.11.2013 for procurement of power under DBFOO (earlier Case-1) bidding to be invited from bidders having domestic captive coal mines under Section 63 of Electricity Act.

I. The bidders will be asked to quote fuel/energy charges and fixed/capacity charges separately as on Bid Due Date. For subsequent years, appropriate escalation will be permitted as per the provisions contained in PPA or in the Standard Tender Document (for Power Sector) for Auction of Coal Mines.

II. While inviting the bids, the power procurer will specify in advance the benchmark rates for the following components of the fuel/energy charges in their composite tariff bids for the bid year:

- a) Cost of transportation long with distance from coal mine to their power plant (Rail, Road and other modes separately)
- b) Washery charges
- c) Crushing charges
- d) Other charges, if any (to be specified in advance by procurer)

These benchmark rates will act as the ceiling and the evaluation of bids and payments will be done on the basis of rates quoted in the bids or the benchmark rates, whichever is lower.

III. While specifying the benchmark rates for each of these components of energy charges, the power procurer shall ensure the following:

- (a) Run of Mine (ROM) price of coal quoted in bid should not exceed the ROM price quoted for the said block during the coal block auction on the basis of which the block has been awarded to the bidder. In addition to this, the bidder will be eligible to recover an amount of Rs. 100 per Metric Tonne as per clause 3.10.2 of Standard Tender Document for Coal Block Auction (for Power Sector). For subsequent years, the ROM price and Rs. 100 per Metric Tonne shall be escalable as per the provisions of the Standard Tender Document for Coal Block Auction (for Power Sector).

However, the quoted Additional Premium, if any, shall not be reckoned for the purpose of the determination of tariff of electricity as per corrigendum 3 to clause 3.10.2 issue on dated 31st January, 2015 of the Standard Tender Document (Power Sector) for coal block auction.

- (b) As far as transportation, washery charges and crushing charges are concerned, the benchmark rates to the specified in advance by procurer should not be more than that of CIL. Railway freight rates, benchmarks

determined, if any, by CERC/SERC or by any other Appropriate Authority. Where there are multiple such benchmarks available, the power procurers will be free to adopt the most appropriate benchmark.

- (c) The GCV as quoted in the coal auction would in normal circumstances be used as reference GCV for the purpose of determining the quantum of coal required for power generation. However, in the event of variation in actual value of GCV of mined coal, if any, claimed by the bidders, such variation may be allowed based on joint sampling and testing of mined coal in accordance with the provisions of PPA.

IV. As far as fixed/capacity charges are concerned, the power procurer shall determine, in advance, in consultation with the Appropriate Commission, an upper ceiling in terms of Rs/Kwh towards the fixed/capacity charges. This shall also be indicated in advance to all the prospective bidders while inviting DBFOO (earlier Case-I) bids as part of bid document.

V. The power procurers may carry out necessary modifications, if any required, in the DBFOO/Case-1 bidding document for giving effect to the above Guidelines with the concurrence of Appropriate Commission.

Sd/-

(Jyoti Arora)

Joint Secretary to the Government of India”

28. What is discernible from the impugned decision dated 15.04.2015 and the Resolution dated 16.04.2015 is that it was proposed to amend the Guidelines for future procurement of power from Thermal Power Stations by distribution lines under Design, Build, Finance, Own and Operate (DBFOO) (Case-I) bidding so that the power procurers could determine, in advance, in consultation with the Appropriate Commission an upper

ceiling in terms of Rs./Kwh towards the fixed / charges. This would be required to be indicated in advance to all the prospective bidders while inviting DBFOO (Case-I) bids as part of the bid document. It was clearly indicated that this was to ensure that no undue and ineligible cost is loaded on the fixed charge. It was also indicated that if this was not done, the entire process to get the lowest ROM price of coal through reverse e-auction would be vitiated because the purported reduction in coal price would be loaded on to the fixed charge component of electricity tariff. It was indicated that this would defeat the very objective of reverse bidding in the auction of coal mines for the power sector. It is also revealed in the decision dated 15.04.2015 that the proposed amendments in the Guidelines for future procurement of power by the DBFOO (Case-I), bidding was recommended in the inter-Ministerial Group meeting held on 03.03.2015.

29. It is also indicated that, while conducting the reverse bidding for auction of coal mines earmarked for the power sector, bidders were asked to quote the lowest ROM price for coal and that the explicitly stated intent of the Government was to ensure that the benefit of the lowest bid price is passed on to the consumers in such a way that the power tariff

actually goes down throughout the tenure of the existing and future PPAs and that the benefits are fully passed on to the consumers. According to the respondents, as indicated in the decision dated 15.04.2015, all the material information was available with the prospective bidders prior to bidding.

30. After examining the factual backdrop and the sequence of events which have taken place in the context of the present petitions, it is evident that the Standard Tender Document published on 27.12.2014 did not at all envisage the situation where, through the methodology of reverse bidding, the price bid could be reduced to rupees “zero”. It is for this reason that there was no concept of Additional Premium in the Standard Tender Document. Subsequently, when it was realised that there was a possibility that the reverse bidding process could be so aggressive as to reduce the price bid to rupees “zero”, the concept of Additional Premium was introduced. This was done through the said Corrigendum No.3 published on 31.01.2015. It was specifically pointed out that where the reverse bidding resulted in a price bid equivalent to rupees “zero”, nothing could be passed through as a component of energy charge other than the fixed rate of Rupees 100 per tonne and other permissible charges.

It was specifically pointed out that the Additional Premium could not be a pass through item for the purposes of power tariff. But, as already observed earlier, all this was in the context of the energy charge. There was no mention whatsoever of the fixed / capacity charge component of the power tariff. When the bidders were bidding for the coal mines, which were earmarked for the power sector, they were obviously calculating their costs and benefits. It is obvious that as their costs would go up, their benefits would reduce. The price bid for coal would, therefore, automatically be dependent, amongst other things, on the ultimate estimation of the tariff of power under the tariff bid regime under Section 63 of the Electricity Act, 2003 that may ultimately result. That power tariff had two components – energy charges and fixed / capacity charges. The Tender Conditions made clear stipulations with regard to energy charges and what could be passed through and what could not. But, the Tender Conditions were silent on fixed / capacity charges. Therefore, it would not be unreasonable to assume that when the petitioners made their bids in the auction, they would not have contemplated that the fixed charges / capacity charges would be subjected to a ceiling or a cap. What that ceiling would be is, of course, not known at the moment, but the fact is that there could be a ceiling. It would,

therefore, not be wrong to observe that had the Tender Condition clearly indicated that there would be or could be a ceiling on fixed charges / capacity charges, the bids might have been entirely different as the economics would have changed.

31. In the course of arguments, it was indicated that the components of fixed charge / capacity charge was a function of depreciation, return on equity, interest on loan, operation and management costs and interest on working capital. It is evident that all the items mentioned above, were referable to actuals, except the item of “return on equity”. It is also clear that these items would be different for different IPPs. Without going into the question as to whether under the Electricity Act, 2003, the Government could or could not put a cap on fixed charges / capacity charges under the Section 63 regime, it is absolutely clear that the decision to do so would have an impact on the bidding for the coal mines and this is what is of material significance insofar as the present petitions are concerned.

32. We are of the view, as already pointed out above, that a decision to put a cap on fixed charges / capacity charges component of the power

tariff would definitely have an impact on the bidding for the coal mines, which were earmarked for the power sector. It is our view that when the petitioners participated in the auction, they were clear that (a) Rs 100 per tonne could be passed through to the energy charge component of the power tariff; and (b) the Additional Premium could not be passed through. The petitioners were, however, not aware that there would be or there could be a cap on the fixed charge / capacity charge component of the power tariff. We do not agree with the submissions made on behalf of the respondents that the bidders were aware that there could be a cap on the fixed charge / capacity charge. Therefore, the bidding proceeded on the basis that there would be no fixed charge / capacity charge. Whether this was ethically or morally correct or not is not the relevant issue. What is important is that the decision to place a cap on fixed charges / capacity charges would have impacted the bidding and consequently, the viability of the coal mines.

33. For these reasons, we are of the view that we need not deal with the first proposition as to whether the respondents could at all put a cap on the fixed charges / capacity charges under the Section 63 regime of the Electricity Act, 2003. However, since the decision to put a cap on fixed

charges / capacity charges would have had an impact on the bidding process and this, in our view, was not known to the petitioners, the petitioners would be entitled to the alternative prayer of withdrawing from the bids and for refund of the bid security without any penalty. The writ petitions are allowed in part as above.

34. The writ petitions and all the pending applications stand disposed of accordingly. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

March 09, 2017

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