

M/s Kundan Care Products Ltd. Vs. State of H.P. and Ors. alongwith connected matters

CMP No. 11339 of 2024 in CWP No. 7342 of 2022, CMP No. 11335 of 2024 in CWP No. 7612 of 2022 and CMP No. 11336 of 2024 in CWP No. 7613 of 2022

16.07.2024 Present: Mr. Prithu Garg, Ms. Shradha Karol and Mr. Vaibhav Singh Chauhan, Advocates, for the applicant-petitioner, in all the CMPs.

Mr. Anup Rattan, Advocate General with Mr. Pranay Pratap Singh, Additional Advocate General, for the respondents.

**CMP No. 11339/2024 in CWP No. 7342/2022
CMP No. 11335/2024 in CWP No. 7612/2022
CMP No. 11336/2024 in CWP No. 7613/2022**

Heard learned counsel for the applicants and learned Advocate General for respondents no. 1 and 2.

2. In these applications, applicants have sought stay on the decision taken by the respondents to scrap/cancel the tender process issued on 10/11.05.2022, pursuant to letter dt. 27.06.2024 (Annexure A-1 to CMP No. 11339 of 2024).

3. The applicants are Companies incorporated under the provisions of Companies Act, 1956.

4. The 2nd respondent had issued a notice inviting proposal on 10/11 May, 2022, for 27 projects in various areas across the State of Himachal Pradesh. The bid document contains certain terms and conditions including a condition in Clause 4,

which stated that the project developer would be required to provide royalty in the shape of free power from the project to the Government of Himachal Pradesh in lieu of surrender of the potential site @ 12% for the entire agreement period. There was also a condition in the same clause that an additional free power @ 1% from the Hydro Power Projects for the entire project life would be provided and earmarked for a Local Area Development Fund as per the provision contained in *Swaran Jayanti Energy Policy, 2021* of Government of Himachal Pradesh.

5. The applicants allege that at the time when the Writ petition was filed on 11.10.2022, admittedly, they were successful bidders for the Malana-III, Manalsu and Dhanchu Hydropower Projects, but allotment letters were not issued to them inspite of letters addressed by them to the Chief Secretary to the State of Himachal Pradesh.

6. The applicants contend that suddenly the respondents chose to issue another notice inviting proposal on 08.10.2022 without even disclosing the reason, as to why, though the applicants were declared successful bidders in the previous tender dt.10/11 May 2022, there was no allotment in their favor and without informing that the said tender was cancelled. They have also alleged that the respondents had adopted a pick and choose policy and have issued allotment letters for two of these

projects while keeping them in limbo, and their actions in not accepting their bids and issuing a fresh notice inviting proposal on 8.10.2022 is arbitrary, illegal and violative of Art.14 of the Constitution of India.

7. Reply is filed by the respondents in the CWP admitting in para-8, that applicants alongwith other bidders have been found qualified on the basis of the evaluation of technical bids and also price bids; that proposal for allotment of projects were placed before the Council of Minister's meeting held on 28.09.2022; that the Council of Ministers decided to allot two projects, namely, Chhatru (126 MW) and Khauli-II (6 MW) and took a decision to re-advertise four other projects including three projects, referred to above, for re-inviting the bids. It is contended that the respondents reserved the right to amend/modify the bid document or impose additional conditionalities as they may deem fit at any stage; and that there was also right reserved to reject any/all bids/Projects or terminating bidding process at any stage without assigning any reason. It is also contended that the applicants had sought the refund of processing fee which had been rejected on 14.10.2022.

8. While the Writ petition was pending, it appears that the previous decision taken in the cabinet meeting on 28.09.2022 regarding allotment of six projects was reconsidered in a cabinet

meeting held on 18.06.2024.

9. In the Annexure A-1 dt. 27.06.2024 to the CMPs addressed by the 2nd respondent to the applicants adverting to the said decision of the cabinet on 18.6.2024, it is stated that the bidders may be asked to agree to provide free power @ 12% for first 12 years, @18% for next 18 years and @30% for balance 10 years of agreement period as was practice in past; and in case, the bidders refuse to accept the above offer, the bidding process be terminated. It is also stated that the Letters of Intent issued in respect of Chhatru HEP and Khauli-II HEP also be cancelled and the amount of upfront premium deposited against these projects be refunded back without any interest and liability of the State Government.

10. A reading of this letter clearly indicates that the earlier decision of 28.09.2022, on the basis of which, the reply was filed by the respondents, was admittedly superseded and respondents had decided to re-consider the case of the petitioners and other bidders also for issuance of Letters of Intent to them in case they agree to the revised conditions; but in case they refuse to accept the revised proposal as decided by the cabinet in its meeting held on 18.6.2024, then the tender process 10/11 May 2022 would be terminated.

11. Learned counsel for the applicants contends that the insistence on additional free power to be given by petitioners as per the cabinet decision taken on 18.06.2024 is a new condition unilaterally introduced by the respondents in the terms and conditions of the tender dt.10/11 May,2022, that it is contrary to Regulation 76 of the CERC (Terms and Conditions of Tariff) Regulations, 2024, which had come into operation on 01.04.2024 (Annexure A-4) which fixes the free power to be given as 13% or actual whichever is less as can be seen. He contended that these regulations had been framed in exercise of powers conferred under Section 178 of the Electricity Act, 2003, read with Section 61 thereof, by the Central Electricity Regulatory Commission thereof, declaring that they would apply to all cases where tariff for a generating station or a unit thereof and a transmission system or an element thereof is required to be determined by the Commission under Section 62 of the Act read with Section 79 thereof.

12. Learned counsel for the petitioners also placed reliance on a Division Bench judgment of this Court rendered on 28.05.2024 in **CWP No. 7667 of 2023**. In that case, the petitioner therein- also a private hydel power generating company, was sought to be compelled by the respondents therein to pay tariff as per certain Power Purchase agreements entered into, to give more

free power than what was specified/fixed in the CERC Regulations, 2019.

13. A Division Bench of this Court (to which one of us (CJ) was a party) in the judgment rendered in that case considered the provisions of the Electricity Act, 2003 and the regulations made thereunder and held that the State cannot insist, on the basis of PPAs or implementation agreement entered into between the parties, to supply more free power than what was provided in the CERC Regulations, 2019.

14. The provision of the said Tariff Regulations of 2019 dealing with free power is in pari-materia with Section 76 of the 2024 Regulations referred to above.

15. We find force in the contentions of counsel for applicants *prima facie*. We *prima facie* disagree with the submissions of learned Advocate General that the said regulations will apply only if the electricity generated would be supplied to a State Government entity and not to others in view of the specific language contained in Section 62(d) of the Electricity Act, 2003 which empowers the CERC to lay down regulations for determination of tariff even for retail sale of electricity not necessarily to a government entity.

16. We are also *prima facie* of the opinion that once the tender conditions have been imposed and the tender was submitted

by the applicants accepting the condition thereof, unilaterally it is not open to the State Government to change the terms and conditions to the prejudice of the petitioners contrary to the CERC Regulations, 2024, which specifically limit the free power to be given to the home State as only 13% and not more.

17. In this view of the matter, there shall be interim direction, as prayed for in all the CMPs in these CWP's referred to in this order.

18. Replies be filed by the respondents to these applications.

List on **02.09.2024**.

(M.S. Ramachandra Rao)
Chief Justice

(Satyen Vaidya)
Judge

16th July, 2024
(sushma)

