

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal no. 207 of 2012

Dated: 23rd April, 2014

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member

In the matter of:

1. Nabha Power Limited ...Appellant (s)
SCO-32, Sector - 26D,
Madhya Marg
Chandigarh – 160 019

2. L&T Power Development Ltd.
Powai Campus, Gate no. 1
C Building, 1st Floor
Saki Vihar Road
Mumbai – 400 072

Versus

1. Punjab State Power Corporation Ltd. ...Respondent(s)
PSPCL, Shed No. T-2,
Thermal Design Complex
Patiala – 147 001

2. Punjab State Electricity Regulatory
Commission
SCO No. 220-221, Sector 34-A
Chandigarh

Counsel for the Appellant(s): Mr. Sitesh Mukherjee
Mr. Aniket Prasoon
Mr. Sakya Singha Chaudhuri
Mr. Avijeet Kumar Lala
Ms. Anusha Nagarajan
Ms. Shagun Jain
Ms. Kanika Chug

Counsel for the Respondent(s): Mr. M G Ramachandran
Mr. Anand K. Ganesan
Ms. Swana Seshadri
Ms. Swagatika Sahoo
Mr. Sakesh Kumar

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Nabha Power Ltd. and L&T Power Development Ltd. challenging the order dated 1.10.2012 of Punjab State Electricity Regulatory Commission rejecting the claims of the Appellants for tariff adjustment and extension of time in respect of the 2x700 MW Rajpura Thermal Power Project developed under

Section 63 of the Electricity Act, 2003 pursuant to a competitive bidding process.

2. The brief facts of the case are as under:

- a) The Appellant no.1, Nabha Power Ltd. is a company which is a special purpose vehicle that had been set up initially by the erstwhile Punjab State Electricity Board (“Electricity Board”), for developing Rajpura Thermal Power project under the tariff based competitive bidding. The entire shareholding of Nabha Power Ltd. was subsequently transferred to M/s. L&T Power Development Ltd., the Appellant no.2 herein after having been selected as the successful bidder for the development of the project through Nabha Power Ltd. under a competitive bidding process held by the Electricity Board under Case 2 as per the guidelines for procurement of power by distribution licensees issued

- by the Government of India, hereinafter referred to as “Competitive Bidding Guidelines”.
- b) Punjab State Power Corporation Ltd. (“PSPCL”), the Respondent no.1 herein is the successor entity of erstwhile Electricity Board for generation and distribution business.
 - c) Punjab State Electricity Regulatory Commission (“State Commission”) is the Respondent no.2.
 - d) The erstwhile Electricity Board intending to procure power through tariff based competitive bidding under Section 63 of the Act, decided to invite bids from the project developers to set up a 2x700 MW thermal power project at Rajpura. In terms of the Competitive Bidding Guidelines, the Electricity Board incorporated a special purpose vehicle i.e. Nabha Power Ltd. to act as its authorized representative for carrying out the pre-bid obligations on its behalf. Nabha Power Ltd. acting as an authorized representative of the Electricity Board issued

- Request for Qualification (“RFQ”) and “Request for Proposal” (“RFP”) for selection of a developer through tariff-based competitive bidding process for procurement of power on long term basis from power project to be set up at Rajpura. Nabha Power Ltd. before its acquisition by the Appellant no.2 was only a shell company.
- e) Pursuant to the bidding process, the Appellant no.2 was selected as the successful bidder. In terms of the bid documents, the Appellant no.2 was called upon by the Electricity Board to acquire 100% share holdings in Nabha Power Ltd. and construct the project and supply electricity therefrom to the Respondent no.1, the Procurer of power. A Power Purchase Agreement (“PPA”) setting out the terms and conditions for construction, operation and maintenance of the project and sale of contracted capacity and supply of electricity by the Appellant no.1, the Seller to the Respondent

- no.1, the Procurer, was signed between the Appellant no.1 and the Respondent no.1 on 18.1.2010.
- f) The RFP document issued at the time of bidding indicated that the project area fell within the Seismic Zone III as per IS:1893-2002 Part I. Further the Feasibility Report, Detailed Project Report and Area Drainage & Hydrology Study Report, 2008 which were made available to the prospective bidders showed the location of the project site in the Seismic Zone III. Subsequently at the project implementation stage, the Appellant found that the project site was located in the Seismic Zone IV. Thereafter, the Appellant no.1 vide its letter dated 17.2.2011 requested the Respondent no.1 to consider its claim for tariff adjustment on account of change in capital cost of the project on account of change in Seismic Zone from Zone III to Zone IV in terms of 'Change in Law' provision under Article 13 of

- the PPA. However, the Appellant no.1 did not receive any favourable response from the Respondent no.1.
- g) Therefore, the Appellants filed a petition before the State Commission agitating their claim for increase in capital cost and extension of time for achievement of the Scheduled Commercial Operation Date (“SCOD”) and such other claims arising on account of the project actually falling under Seismic Zone IV instead of Seismic Zone III on the grounds of ‘Change in Law’ and misrepresentation by the Procurer leading to procurer default under the PPA on the part of the Respondent no.1.
- h) Another claim made by the Appellants in its petition before the State Commission was for increase in capital cost of the project on account of change in approval of Railway authorities in relation to the railway siding. The RFP provided that the land for railway siding and rail lines from nearby Sarai Banjara station of the project

site which framed part of the project, had to be acquired by the selected bidder. The Feasibility Report of December 2008 by M/s. RITES, the consultants, which was made available to the bidders provided essential information regarding location of railway siding and track alignment and estimated cost of railway siding infrastructure including the “In-Principle” approval of railway siding based on the Feasibility Report. Subsequently, at the project implementation stage due to change in the position of the Dedicated Freight Corridor of the Railway one major bridge has to be constructed on the main line and another major bridge has to be constructed to pass through the Dedicated Freight Corridor lines. The Appellants claimed additional capital cost of rail siding infrastructure required on account of Railway’s approval now given to them which was not envisaged in the Feasibility Report of 2008 of M/s. RITES which included “In-Principle”

- approval of railway siding by the Railway authorities, under 'Change in Law' provision of the PPA.
- i) The State Commission by the impugned order dated 1.10.2012 rejected the claim of the Appellants regarding change in Seismic Zone on the basis that the Appellants were responsible to verify the correctness of the Seismic Zone of the project site in light of the disclaimers in the RFQ, RFP and PPA. The State Commission also rejected the claim of the Appellants for increase in cost towards the railway siding on the premise that the claim did not qualify under 'Change in Law' clause of the PPA.
 - j) Aggrieved by the above mentioned findings of the State Commission, the Appellants have filed these Appeals.
3. The issues raised in this Appeal which are required to be considered by us are:-

- i) Whether the Appellants are entitled to additional capital cost and extension of time for achieving Scheduled Commercial Operation Date of the Project under ‘Change in Law’ provision of the PPA consequent to actual Seismic Zone of the project site being Zone IV when the bidding documents furnished to the prospective bidders at the time of the competitive bidding erroneously indicated location of the project site in Zone III?**
- ii) Whether the Appellants are entitled to recovery of additional capital cost under ‘Change in Law’ provision of the PPA pursuant to additional infrastructure required in the railway siding of the project as a result of change in scope of work in the approval of railway siding scheme by the Railway authorities with respect to the scheme for which the In-principle approval of the Railway authorities was obtained and made available at time of the**

competitive bidding to the prospective bidders in the form of bidding documents?

4. On the above subject we have heard Shri Sitesh Mukherjee, Learned Counsel for the Appellants, Shri M.G. Ramachandran, Learned Counsel for the Respondent no.1 and Shri Sakesh Kumar, Learned Counsel for the State Commission.

5. **Let us take up the first issue regarding change in Seismic Zone.**

6. Shri Sitesh Mukherjee, Learned Counsel for the Appellants, has made the following submissions:

a) The whole scheme of Case 2 procurement under the Competitive Bidding Guidelines is meant to ensure that the developers have certain project specific

- information/details and necessary approvals with it at the time of submissions of the bid so that the bidder can carry fair assessments for the purpose of submission of bids. It is in this light that a legal requirement has been cast on the Procurer to provide various project related data including seismological data and Feasibility Report regarding fuel transportation handling to the bidders. The Respondent no.1 made an express, unambiguous and specific representation in the bidding documents and other relevant documents provided in terms of the RFP that the Project site fell in Seismic Zone III.
- b) It was subsequently discovered that the Respondent no.1 had misrepresented and/or erroneously made such representation since the project site actually falls in Seismic Zone IV. The Seismic Zone data was provided to the bidders in order for them to rely on such information towards preparation of their respective bids, therefore, the sanctity and correctness of such data

- cannot now be disowned by the Respondent no.1 by relying on general disclaimer clauses in the various documents.
- c) The Appellant no.2 was justified in relying on the specific representation made in the bidding documents regarding seismological information of the project site as the DPR of the project was prepared by a specialized body namely the Power Finance Corporation along with its sub-consultant in terms of the Competitive Bidding Guidelines as part of preparatory activities to convince the bidders regarding the irrevocable intention of the Procurer and to reduce information asymmetries, ambiguity and the time taken to materialize the project. Hence, there was no reason for the Appellant no.1 to cross check and verify the information independently on its own before submitting the bid. The intent of requiring the Procurer to provide the relevant information as part of the preparatory

- activities is to save the time of the bidders in redoing the entire exercise on their own.
- d) The Appellant no.2 was not required to conduct due diligence regarding the seismological information of the project site while submitting its bid for the project. The cost of preparation of the reports including the DPR has been passed on by the Respondent no.1 to the Appellant no. 2 as part of the cost of the transfer of the project company. It was not only logical but also legal for the Appellant no.2 to rely on the seismological data provided by the Respondent no.1.
- e) The Appellant no.1 discovered the change in Seismic Zone after the execution of the PPA. Accordingly it approached Department of Earthquake Engineering, IIT Roorkee on 10.8.2010 to verify the applicable zone. IIT, Roorkee in its response confirmed that the site actually fell under Seismic Zone IV.

- f) Having proceeded on the misrepresentation and/or erroneous representation of the Respondent no.2 with respect to the Seismic Zone, the Appellant no.1 had to rework its designs and drawings and as a result has incurred additional capital expenditure to the tune of Rs. 51.38 crores (including IDC @ 12%) plus applicable taxes and duties.
- g) The Respondent no.1 by giving erroneous information has committed Procurer's Event of Default in terms of Article 14.2(iv) and (vi) of the PPA. The Appellant no.1 has suffered a delay of 5 months on account of redesigning the project parameters and consequential delays in ordering of equipment for the project due to change in Seismic Zone. Accordingly, the Appellant no.1 is entitled to extension of Scheduled Commercial Operation Date of the project.
- h) The disclaimer relied upon by the Respondent no.1 could at best be confined to geological risks related to

project site and not to make the Appellants liable for seismological risks.

7. Shri M G Ramachandran in reply to the above contentions of the Appellants has submitted as under:
 - a) Along with the bidding documents, certain preliminary data information, etc., were provided to the prospective bidders, only by way of facilitation and without any legal implication, obligation or responsibility towards the information provided or otherwise creating any right to bidders with regard to any such information being assumed as correct.
 - b) There was a clear and categorical disclaimer in regard to the information given by the Respondent no.1. In terms of the conditions of bid, it was the duty of the prospective bidders to fully inform themselves and make such investigation, analysis, etc., to obtain inputs, information and details as was necessary for the

- purpose of bidding and to fulfil the obligation of the bidder. There was also a specific provision that the successful bidders would not be entitled to make any claim for extension of time or otherwise there would be any financial implications on account of not making sufficient enquiries and not fully informing itself about the project site or any of the conditions affecting the bid.
- c) The information given by the Respondent no.1 are with a specific stipulation of there being no legal liability of the Respondent no.1. In terms of bid conditions the Appellant no.2 was required to verify all the information, data, etc., provided during the bidding process. The Appellant no.2 should have verified the correctness of Seismic Zone of the project site on its own and it had ample opportunity to verify the same.
- d) It is wrong on the part of the Appellant to claim that the verification of Seismic Zone is a time consuming process and it was not possible to verify the same in

the short period of time. This is contrary to the very documents produced by the Appellants. The Appellant no.1 approached IIT, Roorkee for verification of Seismic Zone and on the very same day IIT, Roorkee provided the information to the Appellant no.1.

8. Let us first examine the findings of the State Commission regarding change of Seismic Zone from Zone III to Zone IV in the impugned order dated 1.10.2012. The relevant findings of the State Commission are as under:

“The Commission is of the view that the petitioner ought to have exercised due diligence while submitting its bid for the project especially when there had been specific disclaimers in the RfQ, RfP, PPA as well as the fact that the information in respect of Seismic Zone of an area is readily available. The petitioners have not brought out the circumstances that prompted them to check on the correctness of the Seismic Zone of the project site after signing of the PPA. The check exercised by the petitioners with regard to the same was in fact required before the bidding. No malafide or fraud or willful default or unlawful gain has been attributed to the respondent. The petitioners have argued that the

respondent can not take benefit of the general disclaimers. However, it has not been brought out by the petitioners as to under what circumstances these disclaimers would apply. The Commission finds that the competitive bidding process was initiated by the respondent for procurement of power in accordance with the bidding Guidelines issued by the Government of India (GoI). The RfQ itself stated that the Procurer does not accept any responsibility or liability, whatsoever, in respect of any statements or omissions, or accuracy, completeness or reliability of information in the said RfQ and shall incur no liability as to the same even if any loss or damage is caused by an act or omission on its part. The RfP requires the bidder to make independent enquiry and satisfy itself of all the required information, inputs, conditions and circumstances and factors that may have any effect on his bid. The bidder is deemed to have inspected and examined the site conditions, the laws and regulations in force in the country, the transportation facilities available, grid conditions, conditions of roads, bridges, ports etc. and based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. Further it has been stated in the RfP that on being selected as successful bidder and on acquisition of the Seller, the Seller shall not be relieved from any of its obligations under the RfP Project Documents nor shall the Seller be entitled to any extension of time or financial compensation by reason of the unsuitability of the site for whatever reason. Further the PPA provides that before entering into this Agreement, the Seller had sufficient opportunity to investigate the site and accepts full responsibility for its condition and agrees that it shall

not be relieved from any of its obligations under this Agreement or be entitled to any extension of time or financial compensation by reason of the unsuitability of the site for whatever reason.

In view of the above provisions in the bidding documents, the petitioners were required to exercise due caution while making a commitment at the time of bidding for the project. It is understood that the intention behind the aforementioned clauses in the Standard Bidding Documents RfQ, RfP and the PPA is to discourage the successful bidder, from raking up issues after signing the PPA and should exercise due diligence at the bidding stage itself, to avoid delay in the execution of the project(s).”

“In fact, in this case, there has been no change in law as claimed by the petitioner. The project site has remained factually in the same Seismic Zone both at pre-bid and post-bid stage. It is not a case where the site was actually in a different Seismic Zone prior to the bidding and changed to a different Seismic Zone after signing of the PPA. It appears to be a case of genuine mistake on the part of the Procurer, which the Commission feels, is amply covered by the disclaimers in the RfQ, RfP and PPA as brought out above.”

“In the light of the above, the Commission is not inclined to allow the prayer of the petitioner for allowing any increase in capital cost of project and/or tariff adjustment on this account , extend the SCOD of the project or any amendment to the PPA on account of the purported change of Seismic Zone of the project site.”

9. The reason given for rejecting the claim of the Appellants by the State Commission are as under:
- i) The Appellants ought to have exercised due diligence while submitting the bid especially when there were specific disclaimers in the RFQ, RFP and PPA and the information in respect of Seismic Zone is readily available.
 - ii) No malafide or fraud or willful default or unlawful gain has been attributed to the Respondent.
 - iii) The RFQ stated that the Procurer does not accept any responsibility or liability, whatsoever, in respect of any statements or omissions or accuracy, completeness or reliability of information in the said RFQ and shall incur no liability even if any loss or damage is caused by an act or omissions on its part. The RFQ requires the bidder to make independent enquiry and satisfy itself of all the required information, inputs etc. that may have any effect on his bid.

- iv) The PPA provides that before entering into the agreement, the seller had sufficient opportunity to investigate the site and it accepts full responsibility for its condition and that it shall not be relieved of any of its obligations or entitled for any extension of time or financial compensation by reason of unsuitability of the site for whatever reason as claimed by the Appellant.
- v) There is no change in Law as claimed by the Appellant. The project has remained in the same Seismic Zone at pre-bid and post-bid stage. It appears to be a case of genuine mistake on the part of Procurer which is amply covered by the disclaimers in RFQ, RFP and PPA.

10. Let us now examine the RFP dated 10.6.2010. The RFP has the following disclaimer in the notes at the beginning of the document.

“While this RfP has been prepared in good faith, neither the Procurer, Authorised Representative nor their directors or employees or advisors/consultants make

any representation or warranty, express or implied or accept any responsibility or liability, whatsoever, in respect of any statements or omissions herein, or the accuracy, completeness or reliability of information contained herein, and shall incur no liability under any law, statute, rules or regulations as to the accuracy, reliability or completeness of this RfP, even if any loss or damage is caused to the Bidder by any act or omission on their part.

11. Thus, there is clear disclaimer clause by the Procurer in the RFP regarding responsibility or liability in respect of accuracy and reliability of the information furnished in the RFP and against the consequential loss caused to the Bidder. As per Clause 2.7.2.1 of the RFP the bidder have to make independent inquiry and satisfy itself of all the required information, inputs, conditions and circumstances and factors that may have any effect on his bid. RFQ also has similar disclaimer that the Procurer does not accept any responsibility or liability whatsoever, in respect of any statements or omissions or accuracy, completeness or reliability of information in

- the said RFQ and it shall incur no liability under the law as to the accuracy, reliability or completeness of the RFQ, even if any loss or damage is caused by any act or omission on their part.
12. Annexure 5 of the RFP indicates the longitude and latitude of the project site. It also states that the area falls within Seismic Zone III as per IS:1893-2002 Part I. Vicinity and Site Maps are also enclosed with the RFQ.
 13. Clause 6.4.3 of Feasibility Report of May 2008 prepared by the consultants also indicates that the project site is located in Zone III. The Geotechnical Report of June 2008 and Area Drainage and hydrology Study Report of 2008 which formed part of the bid document also indicate that the project site is in Zone III.

14. Thus, all the documents furnished by the Electricity Board at the time of the bidding indicated that the project site was in Seismic Zone III.

15. Let us now examine the PPA dated 18.1.2010 entered into between the Electricity Board and Nabha Power Ltd. (Appellant no.1), the draft of which formed part of the bidding documents.

16. Article 5.2 of the PPA states as under:

“The Seller acknowledges that, before entering into this Agreement, it has had sufficient opportunity to investigate the Site and accepts full responsibility for its condition (including but no limited to its geological condition, on the Site, the adequacy of the road and rail links to the Site and the availability of adequate supplies of water) and agrees that it shall not be relieved from any of its obligations under this Agreement or be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site for whatever reason.”

17. Thus, the PPA has an acknowledgment by the Appellant that before entering into the PPA it had sufficient time to investigate the project site and that it accepted full responsibility for the condition of the site.

18. Article 13.1.1 of the PPA describes the “Change in Law” as under:

“13.1.1 “Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement, or (iv) any change in the (a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RfP or (c) the cost

of implementing Environmental Management Plan for the Power State (d) Deleted but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.”

19. We do not find any provision in Change in Law clause relating to compensation for additional cost or extension of time due to incorrect information or date relating to the project site provided by the Procurer in the competitive bidding documents. There is a provision for change in any consents, approvals or licenses for the project, otherwise than for default of the Seller to be considered as “Change in Law”. However, change in Seismic Zone of the site due to incorrect information given in the bidding documents will not be covered under this provision as the information on Seismic Zone is not a consent or an approval or a licence and thus not covered under ‘Change in Law’ provision.

20. Article 4.5 of the PPA stipulates conditions for extension of time. The relevant Article 4.5.1 is reproduced as under:

“In the event that:

(a) the Seller is prevented from performing its obligations under Article 4.1.1(b) by the stipulated date, due to Procurer Event of Default; or

(b) a Unit cannot be Commissioned by its Scheduled Commercial Operations Date because of Force Majeure Events.

The Scheduled Commercial Operations Date, the Scheduled Connection Date and the Expiry Date shall be deferred, subject to the limit prescribed in Article 4.5.3, for a reasonable period but not less than ‘day for day’ basis, to permit the Seller through the use of due diligence; to overcome the effects of the Force Majeure Events affecting the Seller or in the case of the Petitioner’s Event of Default, till such time such default is rectified by the Procurer.”

21. The Procurer’s obligations are described in Article 4.2 of the PPA. Failure to provide correct information regarding Seismic Zone of the project site is not

covered as Procurer's Event of Default under the PPA. Thus, the Appellants will not be entitled to claim extension of time under Article 4.5.1 of the PPA due to Procurer's Event of Default.

22. Article 18.17 of the PPA stipulates that the liability of the Seller and the Procurer shall be limited to that explicitly provided in this Agreement. We do not find any provision regarding liability of the Procurer due to failure to provide the correct information regarding Seismic Zone in the PPA.

23. We find that in the present case the project has been developed under Section 63 of the Act through tariff based competition bidding Case 2 (with pre-identified site) in accordance with the Standard Bidding Guidelines issued by the Central Government. The object of the guidelines are as under:

- “1. Promote competitive procurement of electricity by distribution licensees;*
- 2. Facilitate transparency and fairness in procurement processes;*
- 3. Facilitate reduction of information asymmetries for various bidders;*
- 4. Protect consumer interests by facilitating competitive conditions in procurement of electricity;*
- 5. Enhance standardization and reduce ambiguity and hence time for materialization of projects;*
- 6. Provide flexibility to suppliers on internal operations while ensuring certainty on availability of power and tariffs for buyers.”*

24. According to the Standard Bidding Guidelines of Central Government, for the projects for which pre-identified sites are utilized (Case 2), the procurer or authorized representative of the procurer before commencing the bid process has to carry out the following activities:

- Site identification and land acquisition required for the project.
- Fuel linkage, if required.
- Water linkage
- Requisite hydrological, geological, meteorological and seismological data necessary for preparation of DPR.

25. Admittedly, in the present case the requisite information regarding seismological data and other information regarding the Project was provided to the bidders by the Electricity Board in the bidding documents. However, the Seismic Zone of the project site was incorrectly indicated as Zone III instead of Zone IV in the various documents provided to the Appellant no.2 and other prospective bidders. The question arises here for our consideration is whether the Appellants no.1 is

entitled to be compensated in the form of additional capital cost and grant of extension of time for completion of the project due to subsequent discovery of the project site being in Zone IV by the Appellants as against Zone III indicated in the bidding documents? We do not find any provision in RFP, RFQ, PPA or in Standard Bidding Documents of the Central Government for either additional cost or extension of time on account of erroneous information regarding Seismic Zone provided by the Procurer at the time of bidding to the prospective bidders.

26. On the other hand the RFP clearly and categorically states that the bidder shall make independent enquiry and satisfy itself with respect of all the required information, inputs, conditions and circumstances and factors that may have any effect on his bid. The PPA also has similar provision in which the seller

acknowledges that before entering into the agreement, it has had sufficient opportunity to investigate the site and accepting full responsibility for its condition. Thus, the Appellant no.2 in terms of the disclaimer by the bidder regarding accuracy of data in RFQ and RFP and provision in RFP for bidder to make independent enquiry and satisfy itself with respect to information, inputs and factors, etc. that may have any effect on the bid, and Article 5.2 of the PPA was expected to carry out due diligence about the seismic data before submitting the bid.

27. Let us also examine whether the Appellant no. 2 had ample opportunity to verify the data about the Seismic Zone of the project site before submitting the bid.

28. We find that the RFQ and RFP along with DPR was issued by the Electricity Board on 10.6.2009. The bid was submitted by the Appellant no.2 on 9.10.2009.

Thus, about 4 months period was available to the Appellant no. 2 from the date of issuance of RFQ/RFP and submission of bid. The verification of Seismic Zone does not require a detailed study and can be checked from the Seismic Zoning Map. In fact the Appellant approached IIT Roorkee on 10.8.2010 with request to verify the Seismic Zone of the project site and IIT Roorkee on the same very day confirmed the location of the project in Seismic Zone IV as per Seismic Zoning Map of IS:1893(2002). We feel that this simple exercise should have been carried out by the Appellant no.2 before submitting its bid.

29. We find that Indian Standard Criteria for Earthquake Resistant Design of Structures IS 1893 (Part I): 2002 contains a map of India showing Seismic Zones. The map shows Patiala in Zone III very close to the boundary of Zone demarcation line between Zone III

and Zone IV. Rajpura, the project site is in the district of Patiala and is located on the North Eastern part of Patiala i.e. towards the demarcation line between Zone III and Zone IV passing across the State of Punjab. The above map in the Indian Standard has a foot-note stating that the towns falling at the boundary of zone documentation line between two zones shall be considered in high zone. Thus, if a site is falling at the boundary of Zone demarcation line between Zone III and IV, it should be considered in Zone IV. In this case the project site is falling at the boundary of Zone demarcation between Zone III and IV. We fail to understand why the Appellant no.2 could not carry out such simple verification of the Seismic Zone before submitting the bids.

30. We feel that the Appellant no.2 has not been diligent in verifying the Seismic Zone of the project site. Further,

discovery of project being in Zone IV by the Appellant while the bid documents indicated the project site in Zone III would not be covered in the definition of 'Change in Law' as per the PPA. The consumers cannot be penalized by increase in tariff for failure on the part of the Appellant to verify the correctness of the data regarding the Seismic Zone of the project when it had acknowledged sufficient opportunity to investigate the site and taken full responsibility for its condition in the PPA and there was a disclaimer in the RFP/RFQ by the bidder regarding correctness of the data and the responsibility was given to the bidder to make independent enquiry and satisfy itself with respect to the required information, inputs, etc. which may have any effect on the bid. Appellants are, therefore, not entitled to claim additional cost and any extension of time for completion of the project due to change in Seismic Zone.

31. Learned Counsel for the Appellants has contended that the Respondent no.1 had misrepresented and/or erroneously represented by way of providing incorrect seismological information for the project site causing monetary loss and damages on account of cost escalation and time delays in the implementation of the project. We feel that there was no malafide or willful default on the part of the Respondent no. 1 in incorrectly intimating the Seismic Zone. We agree with the findings of the State Commission that it appeared to be a case of genuine mistake on the part of the procurer which is amply covered by the disclaimers in the RFQ and RFP. We also find that erroneous intimation of the Seismic Zone by the Procurer in the bid documents would not be covered in Procurer's Event of Default in terms of the PPA entered into between the Appellant no.1 and the Respondent no.1.

32. We do not agree with the contention of the Appellant that they were not expected to verify the Seismic Zone data before submitting the bid. As already held by us, as per the bid documents and the PPA, the Appellant no.2 had to satisfy itself with the data about the project furnished in the bid documents before submitting the bid.

33. In view of above we reject the claim of the Appellants for enhancement of project cost and extension of time for completion of the Project on account of discovery of Seismic Zone by them in higher Zone with respect to that intimated in the bid documents.

34. The second issue is regarding additional capital cost for the Railway Siding due to change in the

scope of the scheme on final approval of the Railway with respect to the scheme on which In-principle approval of the Railway, as furnished in the bid documents, was obtained.

35. Shri Sitiesh Mukherjee, Learned Counsel for the Appellants has made the following submissions:

- a) RITES Ltd. being the independent consultant to the project and appointed by PFC (Consultants of the Electricity Board/Respondent no.1) carried out fuel transportation study for the project site and prepared a draft feasibility report. This draft feasibility report was submitted for the approval to Northern Railway, Division. The report received an 'In Principle' approval of the Northern Railway on 5.11.2008 and the conditions of the approval were incorporated in the final feasibility report which was issued by RITES Ltd. to the

- Electricity Board in the form of the 2008 RITES Report. The 2008 RITES Report provided information on location of railway siding and track alignment along with cost of railway siding and infrastructure along with railway siding plan which was supplied to the prospective bidders. The approved siding plan was the basis for the computation of capital cost for tariff quoted by the bidders for the project.
- b) The DPR of the project stated that the railway siding at the station will be developed as per the RITES study, clearly indicating that the proposed alignment of the railway siding in 2008 RITES Report duly approved by the Northern Railway was to be relied upon by the bidder for development of the project.
- c) The “In-Principle” approval granted by the Northern Railway on 5.11.2008 is a statutory approval for all intents and purposes.

- d) In terms of the Indian Railways Act, 1989, and Indian Railway Code for Traffic (Commercial) Department issued by the Railway Board, the Appellants could not have undertaken any work in respect of executing the railway siding, which formed part of the project without the approval of the Northern Railway and otherwise than in accordance with the terms of such approval. Since the construction of railway siding could not have been started without the consent/approval of the competent railway authority in terms of the Indian Railway codes/manuals, the said consent/approval by the Northern Railway constitutes as a statutory approval. Therefore, any change in such consent/statutory approval would be covered under Article 13 of the PPA viz. 'Change in Law'..
- e) After the project was handed over to the Appellant no.1 for execution, there was a change in the location of Dedicate Freight Corridor line and related railway

- infrastructures, which led to an alteration/change in the conditions attached to the In-principle approval of the Northern Railway. In March 2010, during discussions with Northern Railway it was made known that the Dedicated Freight Corridor line of the Indian Railways was coming up North of the existing railway line and that the railway alignment planned in 2008 RITES report was to be reassessed.
- f) Thereafter, the Appellant no.1 approached M/s. RITES, the consultants, for reassessment for the railway siding arrangement for the project and a review report was prepared in January 2011 capturing change in scope of work of the project on account of the modifications introduced by Northern Railway.
- g) Accordingly, the change in condition of the In-principle approval on account of the signed minutes of the meeting held on 3.9.2010 falls within the ambit of “Change in Law” provision of the PPA. The “Change in

Law” event involves financial implication as it has resulted in increase in the cost of construction of the project by Rs. 178.11 crores and therefore, requisite steps envisaged under Article 13 are required to be taken to mitigate the effect of such increase in the cost. The 2011 RITES Report has proposed changes requiring greater height clearance, increase in track length, earthwork modification at Sarai Banjara station such as high level platforms, station building and a bridge on account of change in location of the Dedicated Freight Corridor line, etc.

- h) The Appellants are not claiming reimbursement of any cost increase over the estimated cost indicated in the 2008 RITES Report on account of merely executing the work in accordance with the 2008 RITES Report. Instead the Appellants are claiming increase in cost occurred by the change of scope of work on account of

change in the conditions of “In-Principle” approval by the Northern Railway.

36. In reply to the above contentions, Shri M. G. Ramachandran, Learned Counsel for the Respondent no.1 has made the following submissions:

- a) The change in law in Article 13 has to be considered with reference to law as defined in the PPA. The change in approval of a commercial or operating entity will not covered in the change of law as defined in the PPA.
- b) At the time of preparation of the 2008 RITES Report, the Railway had not decided on the final alignment of Dedicated Freight Corridor ('DFC'). The construction of the railway siding of the project was dependent on the final decision taken by the Railway on the DFC. The Feasibility Report which was only a preliminary report

was given as part of the RFP. The finalization of railway siding and the cost of construction based on the final design of the DFC corridor is, therefore, not a fresh approval or change in any approval.

- c) The information made available to the bidders including the cost mentioned in the Feasibility Report was only an estimate and the same was to be taken only as indicative.

37. Let us now examine the findings of the State Commission regarding railway siding. The relevant extracts are reproduced below:

“The Commission has a view that the change in any consent, approval or licence obtained for the project referred to in Article 13.1.1 (iii) refers to the statutory approval or consent or licence and does not refer to any other commercial or operating approval which is not as per statutory requirement. The point becomes more clear from the perusal of the term ‘law’ as defined in PPA which is reproduced below:”

“Law means, in relation to this agreement, all laws including Electricity Laws in force in India and any

statute, ordinance, regulation, notification or code, rule or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission”.

The clause “Change in Law” has to be interpreted with reference to the term “Law” as defined in the PPA and in no other way. Without doubt the “in principle” approval RITES feasibility Report 2008 and Review Report 2011, do not answer to the definition of Law and any change in the “indicative” cost estimate for railway siding having changed/increased in the Review Report of the RITES does not qualify to be covered under “Change in Law” provisions under Article 13 of the PPA.

The Commission, therefore, comes to the conclusion that claim on account of change in the location of railway siding and other related railway infrastructure due to change in the scope of work indicated in the RITES Report 2011 and “in principle” approval of Northern Railway for railway siding and final scope of work as per proposed changes in layout of DFC and consequent increase in cost of railway siding etc. does not merit to be allowed, as the “Change in Law” clause of PPA is not attracted in the case of the petitioners. The claim of the petitioners to allow the increased cost of railway siding or re-determination of tariff fails as the project has been awarded to the petitioner through competitive bidding under Section 63 of the Electricity Act, 2003. The Commission is of the view that any

adjustment of increase/decrease of cost on account of any change in scope of work during detailed engineering of the project and allowing the same in tariff may be possible in cost plus tariff determination under Section 62 of the Act, but certainly does not qualify under Section 63 except in case of “Change in Law” which as discussed above is not applicable in the present case. The Commission, therefore, has no option except to reject it.”

38. Thus, the State Commission rejected the claim of the Appellants for increase in case of railway siding on following accounts:

- i) Change in any consent, approval or licence obtained for the project referred to in Article 13.1.1 (iii) refers to the statutory approval or consent or licence and does not refer to any commercial or operating approval which is not a statutory approval.
- ii) In-principle approval in RITES Report 2008 and Review Report 2011 would not be covered in the definition of law and, therefore, the change in scope of railway siding would not be covered under ‘Change in Law’.

iii) Any increase in cost of the project due to change in scope of work during detailed engineering of the project cannot be allowed under Section 63 except in case of “Change in Law” which is not applicable in the present case.

39. Thus, the only issue that needs to be answered by us is whether the change in scope of works in the approval for the railway siding by the competent Railway authority would constitute “Change in Law” under the provisions of the PPA?

40. Law in the PPA is defined to include all laws in force in India and any Statute, ordinance, regulation, notification or codes, rule or any interpretation of any of them by an Indian Government Instrumentality and having force of law and shall further include all applicable rules,

regulations, orders, notifications by an Indian Government Instrumentality.

41. “Change in Law” under Article 13.1.1 *inter alia* includes “Change in any consents, approvals or licenses available or obtained for the project, otherwise than for default of the seller, which results in any change in any cost.....”

42. Let us examine if any change in the conditions in the approval of Northern Railway regarding railway siding will constitute Change in Law.

43. The Indian Railways Act, 1989 defines ‘railways’ to include “all lines of rails, sidings... used for the purpose of, or in connection with, a railway.” Indian Railway Act, 1989 further mandates that prior approval of appropriate authorities under the Railway Act is

required in terms of Section 21, 22 and 23 for opening of railways including additional lines. Thus, a railway siding of the power project which is proposed to be connected to the main line meant for public carriage, cannot be constructed without the approval of the scheme by appropriate authority of the Indian Railways. In the present case the railway siding from Sarai Banjara station to the project site will connect the main railway line between Ambala and Amritsar and, therefore the railway siding cannot be constructed without the approval of the railway siding scheme by the competent authority in the Railway.

44. The Indian Railway Codes for Traffic (Commercial) Department issued by the Railway Board provides under para 1802 that the applicant for a siding should before sanction is accorded to the construction of the siding by the competent authority, be required to

execute an agreement which should embody the provisions of paras 1824 to 1838 of the Indian Railway Code for the Engineering Department. Indian Railway Code for the Engineering Department also has similar provision for railway sidings. The Engineering Code also provides that the work relating to private and assisted sidings has to be done either by the Railway or by a party under the supervision of Railway, if approved by the Railway administration. We feel that the Indian Railway Act, 1989 and the Codes of the Railway, a Government instrumentality will fall within the definition of Law as per the PPA.

45. Thus, the Appellants could not have undertaken any work related to railway siding of the project without the approval of the scheme by the competent authority of the Railway.

46. The Northern Railway being a Government Instrumentality, any approval granted by the Railway regarding railway siding for connecting the private siding to the main railway line is an approval by the Government Instrumentality under the Law. We find that the 'Change in Law' provision under Article 13 includes any change in the consent and approvals obtained for the project which results in change in cost. Thus, change in conditions of approval resulting in change in scope of the works of the railways siding by the Railway and consequently the cost would be covered in 'Change in Law' as defined under Article 13.1.1 of the PPA.

47. We find that the 2008 RITES study which was furnished to the prospective bidders enclosed the In-principle approval for the railway siding from the Northern Railways vide letter dated 5.11.2008. The extracts of

the above 'In Principle" approval for railway siding is reproduced as under:

"No. 86-T/377/TGP/Nabha

Dated 5th Nov 2008

*Managing Director,
Nabha Power Ltd,
PSEB Building, The Mall
Patiala,
Punjab*

*General Manager/T&E,
RITES,
Plot No.1, Sector -29,
Gurgaon, Haryana*

Sub: "In Principle" Approval for Railway Siding for Thermal Power House, Rajpura, Punjab proposed to be set up by PSEB with connectivity from Sarai Banjara Railway Station.

Ref: Your Feasibility Report submitted vide letter no. 150/NPL dated 12.06.08

"In Principle" approval for a rail siding for Thermal Power House proposed to be set up at Rajpura, Punjab by Nabha Power Ltd, Patiala/PSEB based on Feasibility Report submitted by RITES as referred above and revised plan submitted by RITES vide their letter No.RITES/T&E/PFC/Nabha/2007 dated 17.10.08 is approved subject to the following conditions:

- *Sarai Banjara station to be provided with 2 UP and 2 DN Loop lines at Party's cost. The loop line proposed to be provided outside the Gate Cabin may be dropped.*

.....

.....

- *In case, the station building is required to be shifted on the UP side for accommodating the connectivity and 2 UP Loop lines, the cost for the same will have to be borne by the party including land acquisition, if any.*
- *The proposed loop lines at the station and the pre tipping and post tipping lines inside the plant yard should not be less than 720 m each.*

.....

You are requested to deposit the survey charges @ 2% payable to Northern Railway along with revised Feasibility Report at the earliest.

*(Niraj Sahay)
Dy. Chief Operations Manager/Plg”*

48. By above letter dated 5.11.2008, the Northern Railway granted “In-Principle” approval for railway siding proposed for Rajpura Thermal Power Project based on the Feasibility Report and the plan submitted by RITES, the consultants of the Electricity Board, subject to

certain conditions. The “In Principle” approval dated 5.11.2008 of the Northern Railway formed part of the bid documents furnished to the prospective bidders at the time of the competitive bidding.

49. The 2008 RITES Report envisaged commissioning of the Dedicated Freight Corridor (“DFC”) of the Railway in future and considered the distance from the coal mine to the power project by the existing route and the distance after commissioning of the DFC. However, the railway siding scheme in the Report did not envisage crossing of the future DFC with the up and down railway lines connecting the power plant yard to the main railway line. It is the contention of the Appellant that the DFC alignment as now intimated by the Railway would result in additional works to be undertaken by them at additional cost. The major changes envisaged in the railway siding scheme are an

additional bridge of 45 meters span due to induction of DFC, increase in span of bridge envisaged in the 2008 RITES Report from 18 meters to 30.5 meters due to crossing of DFC and increase in track length.

50. We also find the 2008 RITES Report stipulates as under regarding the alignment with respect to the DFC lines.

“In view of decision of the minutes of the meeting and relevant engineering parameters of Railway Engineering Code, details of Rail connectivity from Sarai Banjara station to plant site shown in the enclosed drawing no. RITES/T&E/PFCL/RTPP-RAJPURA/PLAN-01(R-2), dated: April, 2008. Feasibility of proposed rail flyover on the existing main line and necessary provision for future DFC lines has been considered while designing the proposed alignment. Further provisions for 4 loop lines i.e. 2 DN lines & 2 UP lines at Sarai Banjara station have been proposed for controlling the movement of rakes.”

Thus, the railway siding plan and the cost estimates were prepared in the 2008 RITES Report considering

the alignment of DFC at the time of preparation of the Report. Thus, the induction of the DFC in the railway siding scheme due to the alignment of DFC now proposed by the Railway and consequent requirement of the additional infrastructure is a subsequent development.

51. We find that during the meeting with the Railway in March 2010 by the Appellant it was informed by the Railway officers that the DFC is planned North of the existing railway line which would result in changes in the railway siding scheme and provision of the additional flyover to cater to DFC and making provision in up side flyover for 2 lines of DFC would have to be made. Hence the proposal of rail infrastructure suggested in 2008 RITES Report has undergone inevitable change and revised proposal has been worked out fulfilling Railway requirement.

52. Accordingly, the Appellants have prepared the DPR for railway siding for the project which has been approved by the Northern Railway vide letter dated 19.9.2011.

53. We feel that the change in scope of the railway siding works as a result of change in the conditions in the approval by the competent authority of the Railway leading to change in cost of the Project will be covered under Article 13 "Change in Law" provision under change in consent and approvals obtained for the project under the PPA. Therefore, the Appellant no.1 is entitled to claim the increase in project cost for additional works due to change in scope of work of the railway siding of the project as a result of change in condition of approval by the competent authority of the Railway as per the provisions of the PPA under Article 13 i.e. "Change in Law." However, the Appellant is not

entitled to claim cost escalation, if any, in the works envisaged in the “In-Principle” approval of the Railway.

54. The railway siding scheme as intimated in the bid documents to the prospective bidders cannot be covered under Disclaimer Clause or clause regarding due diligence and verification of the information by the prospective bidder as stipulated in the bidding documents. This is because the railway siding scheme was supported by the “In-Principle” approval of the Northern Railway in the bid documents. The verification or due diligence of the railway siding scheme by the Appellant at the time of submitting the bids would not have resulted in any change in the railway siding scheme as at that time it was not known either to the Procurer of Power or the bidders or the Railway that the alignment of the proposed DFC would be interfering with the railway siding of the project.

55. Accordingly, this issue is decided in favour of the Appellants. The State Commission is directed to examine the proposal of the Appellant No. 1 as a result of change in approval for railway siding granted by the Northern Railway and allow the same after prudence check as per the terms of the PPA.

56. **Summary of our findings:**

- i) **Admittedly, the bid documents erroneously indicated the project site in Seismic Zone III instead of Zone IV. In view of the disclaimer by the procurer in RFQ/RFP about accuracy of data and specific provision in the RFP regarding the bidder making independent enquiry to satisfy itself of the required information that may have any effect on the**

bid, the Appellant was expected to carry out due diligence about the seismic data before submitting the bid. Adequate opportunity was available to the Appellant to verify the Seismic Zone of the project site as the verification of Seismic Zone did not involve a detailed study. This is borne out of the fact that verification of Seismic Zone was confined by IIT, Roorkee on the same day referred to it by the Appellant no.1. We find from the map given in IS 1893 (Part I):2002 that Patiala is in Zone III and is located very close to the boundary of Zone demarcation between Zone III and Zone IV. The project site is in district Patiala and is located on the North Eastern Part of Patiala i.e. towards the line of demarcation of Zone III & IV. The foot note in the above map states that the towns falling at the boundary of Zone

demarcation line between two zones shall be considered in high Zone. Thus, a look at the map would show that the project site has to be considered in Zone IV. We feel that the Appellant has not been diligent in verifying the Seismic Zone of the project site before submitting the bid. There is no provision in the change in law provision in PPA to claim compensation for additional cost or extension of time due to incorrect information relating to project site provided by the procurer in the competitive bidding documents. The incorrect information about the Seismic Zone in the bid documents is also not covered in the Procurer's Event of Default as per the PPA. Accordingly, the claim of the Appellant regarding change of Seismic Zone is rejected.

- ii) **The approval of the Railway siding of the Project by the Railway is an approval by the Government Instrumentality under the law. The change in scope of the Railway Siding as a result of the approval by the competent authority in Railway with respect to the “In-Principle” approval leading to change in cost of the project will be covered under “Change in Law” under the PPA. Therefore, the Appellant is entitled to claim increase in project cost due to change in scope of work of the Railway Siding due to additional works as a result of change in condition of approval by the Railway as per the provisions of the PPA under Article 13. However, the Appellant is not entitled to claim cost escalation, if any, in the works envisaged in the “In-Principle” approval of the**

Railway which formed part of the bid documents.

57. The Appeal is allowed in part and the impugned order is set aside to that extent. No order as to costs. The State Commission is directed to pass consequential order at the earliest preferably within 3 months of receipt of a copy of this judgment.

58. Pronounced in the open court on this **23rd day of April, 2014.**

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

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