

Introduction to Law on Electricity
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Lecture 29
Tariff - Competitive Bidding

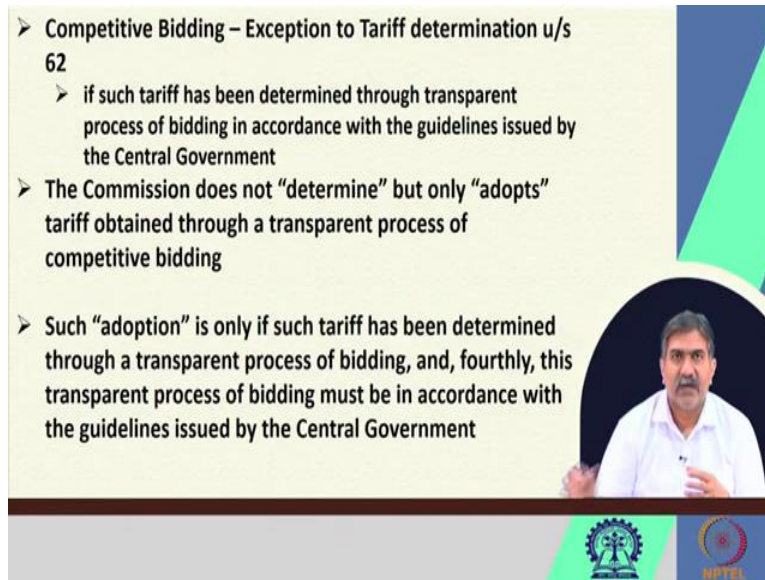
Welcome to all of you. We have been discussing about tariff. What are the powers of the appropriate commission to decide on the regulations on tariff. How the appropriate commission determines tariff under section 62 and in the 2003 Act , the law makers have also given a choice to the buyer and seller to decide on tariff with mutual agreement. So, one way of deciding that tariff is to look for the notification through the appropriate commission under section 62 and other is to go for competitive bidding.

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So, in today's session, we will discuss that what are the laws with regard to competitive bidding, what is power purchase agreement, and what is the legislative scheme. And also, we will look into the some of the cases that how the court has decided, the court has said on the section 63 of the Act.

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- Competitive Bidding – Exception to Tariff determination u/s 62
 - if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government
- The Commission does not “determine” but only “adopts” tariff obtained through a transparent process of competitive bidding
- Such “adoption” is only if such tariff has been determined through a transparent process of bidding, and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government

Now, if you look at the language of section 63, which allows determination of tariff through a bidding process, it starts with a non-obstinate clause. It says notwithstanding anything provided under section 62. So, this is very clear that the lawmakers have given an alternate route, it has suggested an alternate route for determining tariff apart from what appropriate commission would suggest or would determine.

So, it is an exception. Exception from what? Exception from the very general power which is given to the appropriate commission to determine tariff under section 62. So, section 63 says that tariff determination is possible through competitive bidding, but then point to be noted here and as a law student, we need to be very careful when you read the provisions of the Act.

It says notwithstanding anything under section 62. Meaning thereby that the exception which has been carved out under section 63 is only in relation to section 62, not in general. So, even if the parties are allowed to mutually decide on tariff, when I say mutually decide on tariff, I do not mean MOU. Mutually decide on tariff, I mean through the competitive bidding process, where there is a bid going on. That is what I clarify very vehemently.

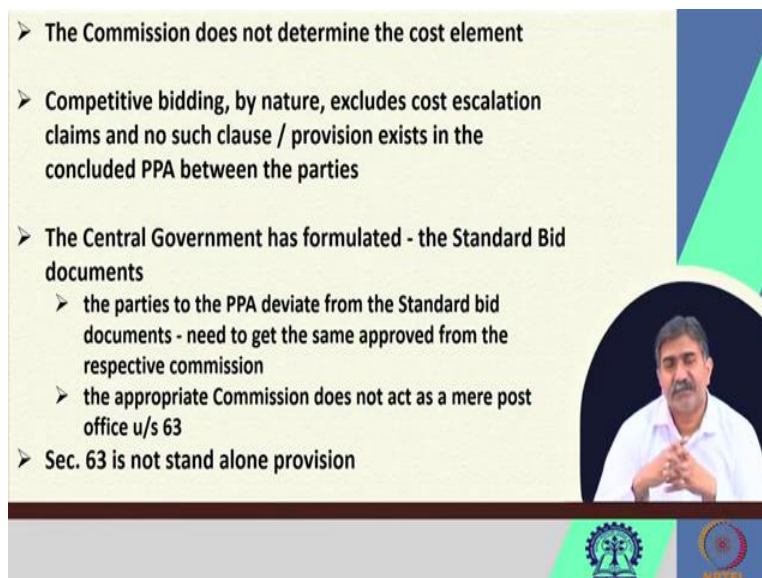
So, if it has been done through a bidding process, then the responsibility of the appropriate commission is to just see that whether the bidding process is carried out in accordance with the guidelines issued by the central government or not. That is what is the responsibility of the appropriate commission.

And please do take note of this fact that it is not a case where there is complete freedom given to the bidder. Complete freedom is not given to the bidder because they have to comply with the guidelines issued by the central government. If you go through the guidelines of the central government, you find that competitiveness is the essence, and reasonable pricing is the essence.

So, it is not a free choice, and that is why again, I reiterate that why this sector is considered as one of the regulated sectors. So, once the appropriate commission satisfies that yes, the whole bidding process has taken place as per the guidelines suggested, and it has been done in a very transparent manner. Then, look at the language, and then what the commission does; it adopts the tariff. It does not determine the tariff.

Determination is under section 62. Under section 62, the appropriate commission determines as per the regulation notified by the commission. But then, under section 63, what it does, it simply approves, it adopts, it simply examines that what has been agreed upon is being done fairly or not. So, appropriate commission has a role, and it has a role to examine that whether transparent process of bidding has been followed or not. And it is also that whether the transparent process has been followed as per the guidelines issued by the central government. That is also important.

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The slide contains the following text:

- The Commission does not determine the cost element
- Competitive bidding, by nature, excludes cost escalation claims and no such clause / provision exists in the concluded PPA between the parties
- The Central Government has formulated - the Standard Bid documents
 - the parties to the PPA deviate from the Standard bid documents - need to get the same approved from the respective commission
 - the appropriate Commission does not act as a mere post office u/s 63
- Sec. 63 is not stand alone provision

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Now, in the bidding process, the commission does not determine the cost element. If you look at it, if you recall, we discussed in the determination of tariff by commission under section 62 that

cost plus is a core of the methodology of determining or fixing the tariff. Here, cost element is not important.

The very nature of competitive bidding is such that where cost escalation claims and no such clauses allow to be operational. So, that is something which one can say relates to the risk factor. Risk factor is there. Whereas under section 62, if you look at it, the risk factor is minimal, because the cost has already been considered there for determining the value.

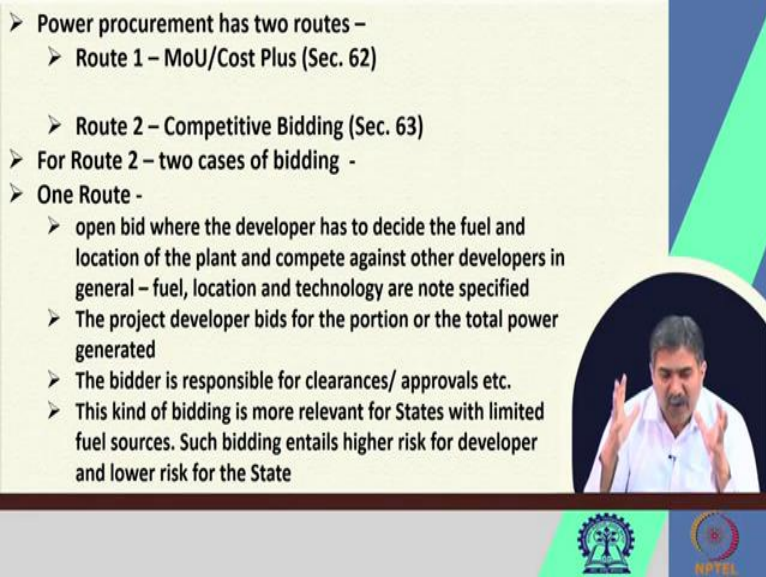
So, when section 63 says that central government has to formulate the guidelines, and the standard bid documents, any deviation from that document would not be permitted unless and until the commission approves the same. So, you can very well visualize a proposition that appropriate commission is not merely acting as a post office. It is not just receiving a document and passing it to the successful bidder.

Appropriate commission in the scheme of section 63 plays a very defined role. What is the defined role? An oversight body to see that whether the process has been done following all the norms as suggested by the central government. And that is why, section 63 is not to be understood as a standalone provision. It is not that section 63, in a way, operates the complete field of competitive bidding and arriving at the tariff for the generating units and the licensees or the procurer.

Section 63 is only subject to section 62 and not subject to section 61 or not subject to other provisions. So, it is notwithstanding. So, section 63 is only notwithstanding in relation to section 62. Meaning thereby that the regulations which are being framed under section 61 is still influences the bidding process that regulation has to be considered in the bidding process. And I will give you one example to substantiate this point, and what is that example?

The example is that if consumer's interest is not catered through that bidding process, even if all the necessary procedural requirements are being followed, the bidding process would be bad in the eyes of law. So, section 63 allows competitive bidding, and it allows tariff fixation between the parties but is not independent from the scheme of the Act. That is what is not allowed, and that is why very rightly said it is not a standalone provision. It is not that when it comes to bidding, you look at only section 63 and try to find out whether it has been done as per the law or not. You have to also look at section 61.

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- Power procurement has two routes –
 - Route 1 – MoU/Cost Plus (Sec. 62)
 - Route 2 – Competitive Bidding (Sec. 63)
- For Route 2 – two cases of bidding -
- One Route -
 - open bid where the developer has to decide the fuel and location of the plant and compete against other developers in general – fuel, location and technology are not specified
 - The project developer bids for the portion or the total power generated
 - The bidder is responsible for clearances/ approvals etc.
 - This kind of bidding is more relevant for States with limited fuel sources. Such bidding entails higher risk for developer and lower risk for the State


So, power procurement, as I said, has been done through two processes. One is section 62, which we have already discussed, where it has been done through MOU, where cost plus methodology is being followed, and the other is competitive bidding. For competitive bidding, what you see there are two situations. One situation is where the developer, the generating unit decide on that what kind of generating units, the developer wants to establish, solar, thermal, and gas; where it wants to establish. And the whole thing would be driven by how it wants to compete in the market with other competitors.

So, fuel, location, and technology are all not specified. That is something which is not the developer which is predetermining. Predetermining in a sense for the purpose of bidding. So, project developer bids for the portion of total power generated. And it is the responsibility of the bidder to take all clearances from the government offices to take the approvals, be it environmental clearances, be it other necessary approvals on the technical fronts.

So, this kind of approach, you would find more where there is a resource constant in terms of fuel. And no doubt, the way it has been structured, one can really make out that such bidding entails the higher risk for developer and lower risk for the state because the state does not have much to lose.

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- **Second Route –**
 - developers are expected to bid on the basis of specific fuel source and location which are provided by the Central/State government/procurer which is calling for bids
 - Governments/Procurer shall assist in securing land, signing of PPA, establishment of fuel linkages
 - Such kind of bidding is more applicable for states where fuel sources are available
 - Such an arrangement entails higher risk for the procurer and lower risk for the developer



The second route is a route where developers are expected to bid on the basis of specified fuel source and location. State suggests, okay, you come forward, install a solar power plant, you come forward, install a thermal power plant, where government or procurer which is calling for the bids, and then it is the government or the procurer, assist the bidder to get the necessary clearances and approvals. And you would find that this kind of bidding process is applicable where there are fuel resources available or in coastal areas where it is possible, where it is very feasible to get the imported fuel. And such arrangements certainly would entail higher risk for the procurer and the lower risk for the developer.

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➤ All India Power Engineer Federation v. Sasan Power (2016 – SC)

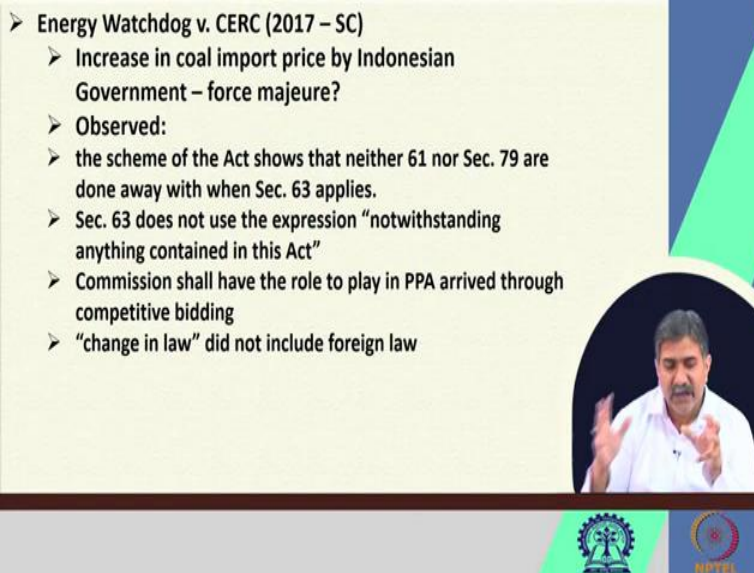
➤ Observed:

➤ If at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest.

Now, in this regard, when you look at it, there are certain observations which are being made. All India Power Engineering Federation versus Sasan Power 2016, where it says that yes, it is true that in the bidding process, tariff is being determined through the identification of L1, through the identification of the successful bidder. But at any latter point of time, situation arises to alter that tariff, and then such alteration would be possible only when it is well within the scheme of power purchase agreement.

Anything which is going beyond that, then the commission will look into it that whether consumer's interest is being catered to or not. Suppose consumer's interest is not being catered to because of the change scenario. In that case, the consumers are going to be asked to pay extra, the burden is shifted to consumer, appropriate commission can very well examine that whether it would be against the scheme of section 61 of the Act or not. So, that is what an important observation that the Supreme Court has made in this case

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➤ Energy Watchdog v. CERC (2017 - SC)

- Increase in coal import price by Indonesian Government – force majeure?
- Observed:
 - the scheme of the Act shows that neither 61 nor Sec. 79 are done away with when Sec. 63 applies.
 - Sec. 63 does not use the expression “notwithstanding anything contained in this Act”
 - Commission shall have the role to play in PPA arrived through competitive bidding
 - “change in law” did not include foreign law

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This is something which is a very important case, Energy Watchdog versus CERC (Central Electricity Regulatory Commission), this decided in the Supreme Court in 2017. Wherein important question was raised with regard to the bidding process and whether the successful bidder can enhance the tariff and increase the tariff in the light of change in the cost of fuel.

And how that change in the cost of fuel is to be seen in terms of power purchase agreement. Should it be seen as a change in law? Should it be seen as a force majeure? Now, what the court has said in this case that section 63 does not completely keep the power of the appropriate commission away from the whole scheme.

It is not that they are completely ruled out. Section 61, which talks about terms and conditions, which talks about terms and regulations are to be considered and section 79, which talks about the commission's function; they are also important to the commission entrusted its tariff fixation. So, section 63 has to be read in the light of section 61 and 79.

And as I said that section 63 does not use this word notwithstanding anything contained in the Act. It says notwithstanding anything in section 62. So, it cannot be argued that commission shall have no role to play in adjustment of pricing. In this case, there was escalation on the pricing, which was to be imported from Indonesia.

The coal was to be imported from Indonesia and there was a price hike done by Indonesia. Because of that price hike, it was becoming unfeasible for the developer to supply the electricity on a price which has been finalized through a bidding process. Therefore, they pleaded for change in the tariff. They indicated that it should be considered as change in law and, therefore, necessary amendment should be allowed to be done in power purchase agreement.

Now, the court in this case has said yes, when you look at the change in price on the important fuel, it has disturbed the whole arrangement, but then that cannot be considered over change in law which is happening in other jurisdiction. However, the court has clarified that the change in the allocation policy of coal blocks in India certainly amounts to change in law. And on this premise, the court has very well indicated that necessary revisiting of the price fixation is allowed that is something which should be considered. So, the idea of the compensatory tariff and all was taken into account. So, an important legal development has been discussed in this case of Energy Watchdog.

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➤ **Essar Power Ltd. v. Uttar Pradesh Electricity Regulatory Commission(2011 – APTEL)**

- The Commission permitted Noida Power Company Limited (a distribution licensee) after conclusion of bidding process and selection of Essar Power as the successful bidder, to procure power from another generating company (not a participant in the bidding process) as the said company had quoted 10% lower tariff

➤ **Held:**

- Tribunal asserted the sanctity of contractual obligation in competitive bidding – set aside the order of the Tribunal
- The Commission cannot bring peculiar procedure through the backdoor explicitly when the procedure is excluded as per Sec. 63
- the process of competitive bidding is to discover tariff in accordance with the market conditions and the same only needs to be adopted by the Commission

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Another important case where the tribunal was asked that whether appropriate commission can compel the procurer to get the electricity from the generating unit, which was not successful in bidding process. In this case, the appropriate commission has asked the distribution licensee to get the electricity from the other company, which has a lower tariff but then which was not a successful bidder under the bidding process.

Now, the court looked into the scheme of section 63, the court said that the scheme of section 63 is very clear. What is that? That appropriate commission adopts the price and adopts the tariff, which has been agreed upon through a bidding process. And therefore, it cannot really make a change which shall amount to a sort of backdoor entry.

So, if Essar Power has become a successful bidder, Noida Power should get electricity from Essar Power and not to get from the other company, which has been offering price on a lower tariff. So, the tribunal has said that the idea of competitive bidding is to discover the tariff, and that is what needs to be adopted. That is what is the essence of section 63.

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➤ **Indiabulls CSEB Bhaiyathan Power Limited v. Chhattisgarh State Electricity Regulatory Commission (2013 – APTEL)**

➤ **Observed:**

- **Tribunal nullified the direction of the Chhattisgarh State Commission to renegotiate the terms of PPA entered through Competitive bidding**
- **The role of the Commission only ensure that the process followed in the competitive bidding is as per law**

And then, you have another case where again the appropriate commission suggested for renegotiation of tariff between the developer and the procurer. And tribunal was asked to examine that this very exercise of power by the commission is as per the law or not. And the tribunal, while examining the scheme of section 63, makes this point very clear, said that under section 63, there is no question of regulatory commission asking the bidder and the generating units to renegotiate the power purchase agreement.

What has been determined through a competitive bidding, that must be respected, that must be honored. So, the role of the commission is only to ensure that the process followed in the competitive bidding is transparent and as per the overall scheme of section 61 or not. If answer is yes, the role of the commission ceases to be in existence for that issue, for that particular point.

And thus, in this case, the tribunal has nullified the direction of the regulatory commission to renegotiate the agreement entered through the competitive bidding between the developer and the bidder.

So, you look at it the way the court has accorded the sanctity to competitive bidding and facilitating it as a successful alternative to tariff determination process. And that is basically is the larger objective of the Act, that let the tariff be fixed through the competitive process so that, ultimately, the consumer will get benefited by getting electricity on a reasonable price. Thank you very much.