

KERALA STATE ELECTRICITY REGULATORY COMMISSION THIRUVANANTHAPURAM

**Present: Shri. Preman Dinaraj, Chairman
Adv. A.J Wilson, Member (Law)**

OP No : 16/2021

In the matter of : Petition filed by Shankar Conductors Pvt Limited for giving directions to KSEBL for (i) implementing GO(P) No 3/ 2016/SPD/dated 18.2.2016 of Store Purchase Department, Kerala, (ii) treating Kerala State MSME BIS licensee holder of the tendered items as technically qualified in tender No. KSEB/SCM/ eP/ 86/ 2021-21 dated 04.02.2021 inter-alia for 1500km ACSR wolf, 200km Dog etc (iii) giving fair and non-discriminatory treatment to the petitioner.

Petitioner : M/s Shankar Conductors Pvt Limited

Petitioner represented by : Sri. Sanjay Dalmia

Respondents : Kerala State Electricity Board Limited (KSEBL)
KSEB Ltd represented by : Sri. Sanal Kumar, Chief Engineer, Supply Chain Management.
Sri Premkumar P K, Dy. Chief Engineer, TRAC
Sri. Suresh, EE, TRAC

Date of Hearings

First hearing : 23.04.2021

Second hearing : 17.05.2021

Order dated 26.05.2021

1. M/s Shankar Conductors Pvt Ltd, Umayanalloor, Kollam (hereinafter referred to as the petitioner or M/s Shankar Conductors) filed a petition on 23.02.2021 with the following prayers:
 - (i) No EMD or bid submission fee (cost of tender paper) should be required to be paid by MSMEs of Kerala as per the GO (P) No. 03/2016/SPD dated 18.02.2016. Hence, the tender of KSEB Ltd dated 04.02.2021 suitably amended accordingly.
 - (ii) MSMEs of Kerala, who are registered by BIS, should be considered technically qualified and no factory inspection should be required. The tender form should be modified accordingly.

2. Summary of the Petition filed by M/s Shankar Conductors Pvt. Ltd. is given below.

- (1) The petitioner M/s Shankar Conductors Pvt. Ltd. is an MSME, which is duly registered with Industries Department, Government of Kerala. The petitioner is having the license issued by BIS (Bureau of Indian Standards).
- (2) The petitioner has been regularly supplying ACSR conductors, viz, Squirrel, Weasel, Rabbit and Raccoon (80 sq.mm) etc. to KSEB Ltd. for more than last 20 years. The petitioner is solely dependent on KSEB Ltd. for orders of ACSR conductors.
- (3) The petitioner has developed two bigger size ACSR conductors- ACSR Dog (100 sq.mm) and ACSR Wolf (150 sq.mm). BIS has included these two items also in their license.
- (4) KSEB Ltd has issued tender No. KSEB/ SCM eP/ 86/2020-21 dated 04-02-2021 and the tender notice was uploaded in public domain on 12.02.2021, for purchase of 1500 KM ACSR Wolf, 200 KM Dog etc. The probable amount of contract is ₹ 20,44,52,200/-. Due date of tender is 26-02-2021.
- (5) The petitioner, M/s Sankar Conductors intend to submit tender for 10 % quantity of ACSR Wolf and ACSR Dog as New Entrant, in above tender. KSEB Ltd tender conditions require a New Entrant to remit ₹.204460/- as EMD and ₹ 44,250/- as bid submission fee.
- (6) The petitioner pointed out that the Commission, vide Order dated 30.12.2020 in OP 46/2020, filed by KEL has ordered that;

“KSEB Ltd. shall implement the Government of Kerala Order No. G.O (Rt) No.5382/2020/Fin dated 18.09.2020 strictly complying with the provisions of Price Preference and Purchase Preference mentioned therein.”

They therefore submitted that KSEB Ltd be directed to extend the said benefit in their tender dated 04.02.2021.

- (7) Govt. of Kerala vide GO. (P) No. 03/2016/SPD dated 18-02-2016, had extended certain benefits to Micro, Small and Medium Enterprises and exempted MSMEs from payment of EMD, cost of tender forms etc. but the same is not being complied by KSEB Ltd. KSEB Ltd, in the instant tender has specified that new entrants shall pay EMD of Rs 2,04,460/- and Bid submission fee of Rs 44,250.00/-.

The petitioner prayed that as per the above Kerala Govt. GO, MSMEs of Kerala have been exempted from EMD and bid submission fee. Hence the tender should be amended accordingly.

KSEB Ltd in their tender had also specified that, “In the case of New Entrants, factory inspection should be carried out, to assess their capability”.

The petitioner further submitted that, MSME in Kerala registered with BIS should be considered technically qualified and no factory inspection should be required. The tender should be modified accordingly.

3. The Commission admitted the petition as OP 16/2021 and due to the Covid-19 restrictions, conducted the first hearing on 23.04.2021, through video conference. Sri Sanjay Dalmia, Director, presented the matter on behalf of the petitioner. Sri. Premkumar, Dy.CE and Sri. Praseedu Kumar, Senior Assistant presented the remarks of KSEB Ltd. The summary of the deliberations during the hearing is given below.

The petitioner submitted that, M/s Shankar Conductors is a Kerala based MSME. As per GO dated 18.02.2016, they are exempted from payment of EMD and bid submission fee for participating in the tender. But, KSEB Ltd. in the instant tender has specified that, New Entrant shall remit Bid submission fee @10% of the total EMD. Accordingly, the petitioner remitted the Bid Submission fee as specified in the Notice Inviting Tender, to avoid the rejection of their tender. The petitioner submitted that KSEB Ltd's action of requiring MSMEs of Kerala to deposit EMD is against the GO dated 18.02.2016.

The petitioner further submitted that, they had obtained all the required licenses and BIS certification for the manufacture of ACSR Dog (100 sq.mm) and ACSR Wolf (150 sq.mm) conductors. Their MSME, based in Kerala is registered with BIS and since BIS has included these two items also in their license, they should be considered as technically qualified for these items and no factory inspection should be required. They, therefore submitted that the Commission direct KSEB Ltd. to modify their tender accordingly.

The petitioner argued that factory inspection being carried out by KSEB Ltd. is subjective. The petitioner submitted that, if at all factory inspection is to be carried out by KSEB Ltd. then factories of all units including those units located outside the State should be inspected by the same team. The petitioners further expressed apprehension that KSEB Ltd may reject their product on some flimsy grounds in the name of factory inspection.

KSEB Ltd in their arguments before the Commission questioned the maintainability of the petition. KSEB Ltd. submitted that since the petitioner had failed to point out under which provisions of the Electricity Act, 2003 the present petition is filed before the Commission. They further submitted that the Commission in its Order dated 30.12.2020 in OP 46/2020 had specifically stated that it does not normally interfere in any purchase or tender process of its distribution licensees.

Further, KSEB Ltd. argued that the Hon. Supreme Court, in many judgments had held that the State Commission has no authority to entertain individual complaints. In the case of Essar Power, the Hon'ble Supreme Court, while considering the petition had affirmed that only if there is any violation of a statutory obligation of the licensee, can the

affected person approach the Commission for redressal. They maintained that the petitioner has purposefully remitted the EMD, only to find a reason to approach this Commission on that basis. Hence, the petitioner has failed miserably in establishing their locus standi.

Without prejudice to the above arguments, KSEB Ltd. submitted that, in the NiT, it is clearly specified that the MSME with Udyog Aadhar Registration is exempted from remitting EMD and Bid Submission Fee. Two other MSME as New entrant have participated in the tender without remitting EMD and Bid Submission fee. KSEB Ltd further submitted that the same petitioner has filed a petition before the Hon. High Court in the same subject which was rejected.

KSEB Ltd further submitted that as the procurer of the goods, they have the right to ascertain the capability of the bidders who are participating in their tenders as New Entrant. This is to ensure that the manufacturing and supplying of the materials to KSEB Ltd. is as per the required specifications. Hence, factory inspection is being insisted upon for all New Entrants who participate in KSEB Ltd's. tender.

During the deliberations on the subject petition, the Commission first addressed the issue of maintainability of the petition. The Commission clarified that as per the provisions of the EA-2003, the petition is maintainable, since the issue under consideration involve investment of public money by the distribution licensee. The cost incurred by the licensee for the procurement of goods and materials for carrying out its distribution business, is ultimately passed on to the consumers through tariff. The distribution licensee KSEB Ltd. is duty bound to implement all orders of the State Government regarding preferences and exemptions granted to the MSMEs of the State.

The Commission also clarified that, it does not intend to interfere in the procedure being followed by its distribution licensees to ascertain the capability of the bidders who participate in the tenders to supply materials and goods as per the requirements specified in the tender.

4. Based on the deliberations during the hearing, the Commission vide Daily Order dated 30.04.2021 issued the following directions to the petitioner and the respondent.

(1) KSEB Ltd shall submit the counter affidavit on the petition, including the copies of the judgement of the Hon'ble High Court in the subject matter, with a copy to the petitioner, latest by 30.04.2021.

KSEB Ltd shall also clarify, whether MSME in Kerala has to get Udyog Aadhar Registration as per the GO dated 18.02.2016, to avail exemption from the payment of EMD and Bid Submission fee.

(2) The petitioner M/s Shankar Conductors Pvt. Ltd. shall submit their additional comments, if any, latest by 12.05.2021.

5. KSEB Ltd vide letter dated 30.4.2021 submitted their detailed comments on the petition filed by the petitioner M/s Shankar Conductors Pvt Ltd. The summary of the arguments of KSEB Ltd. is given below.

- (1) KSEB Ltd submitted that, as per the scheme of the Electricity Act, 2003 and subsequent Rules and Regulations made thereunder, an individual has no locus standi to approach the Commission for redressing their grievances, except when expressly authorized to do so. The petitioner has failed to point out the enabling provisions in the Act or Regulations, authorizing it to approach this Commission to adjudicate a dispute on the terms and conditions of a contract (not related to procurement of power) between the petitioner and the licensee. The Commission's Conduct of Business Regulation also does not provide for the adjudication of a petition like the present one.
- (2) KSEB Ltd further submitted that the adjudicatory functions of the State Commissions are detailed under Section 86(1) of the Electricity Act, 2003. As per clause (f) of subsection (1) of Section 86, the SERCs are authorized to adjudicate only the disputes between the licensees and generating companies. Except for these adjudicatory functions, no other provisions under the Act, Rules, Regulations authorizes the Commission to adjudicate on disputes between the licensee and an individual company. In the absence of any specific provisions or any special enactment to entertain petition/disputes of this nature, the general law will prevail over the special law and the petitioner is required to approach the proper forum as prescribed.
- (3) KSEB Ltd. further submitted that the matter under dispute is only regarding the terms and conditions of the tender process, floated for the procurement of certain materials. Hence, KSEB Ltd. argued that adjudication of such an issue does not come under the regulatory regime. Once, KSEB Ltd has invited a tender, the parties who are interested and eligible to bid can participate in the tender as per the terms and conditions stipulated therein. Even if there is any violation of tender conditions, the State Commission is not the proper forum to adjudicate such disputes.
- (4) Without prejudice to the contentions on the maintainability of the petitions, KSEB Ltd submitted the following on the merits of the case.
 - (i) KSEB Ltd has implemented G.O. (P) No.3/2016/SPD dt 18-02-2016 of Stores Purchase Department. The petitioner in KSEB Ltd's earlier tenders had availed the benefits contained in the said GO. The current petition is filed to mislead the Commission and with malafide intention.

In the e-tender No. KSEB/SCM/ep.86/2020-21 dated 04.02.2021, KSEB Ltd. has exempted Kerala Government PSU and MSME with Udyog Aadhar Registration from remitting EMD and Bid Submission Fee. Being an MSME, the petitioner could have participated in the Tender process without remitting EMD and Bid submission fee. Two other firms with MSME Registration have

participated in the tender as “New entrants” without remitting EMD and Bid Submission fee and their tenders are accepted.

- (ii) Regarding the second prayer to exempt the petitioner from factory inspection on the basis of BIS License, KSEB Ltd. submitted that their prequalification criteria is not based on BIS License. The provisions for factory inspection become applicable only in the case of bidders who do not qualify in the bid normally. KSEB Ltd further clarified that they had introduced the New Entrant Clause so as to promote industries that are entering the field but lack previous experience to prove their capability. Hence, KSEB Ltd is taking a lenient view to encourage such entrants. They further submitted that such efforts cannot be made at the cost of material quality and hence factory inspection is being included as a pre-condition for New entrant, so as to assess their capability of producing the material as per requisite standards. KSEB Ltd's tender conditions are general in nature and applicable to all parties. Hence, these conditions cannot be changed or altered for the convenience of some parties.

The firm had also participated in three earlier tenders of KSEB Ltd. as New Entrant and KSEB Ltd had conducted factory inspection of the firm three times with teams comprising senior officials of the Board. The three inspecting teams had reported that there was no infrastructure facilities including quality assurance developed by the petitioner. If the firm has since rectified the defects and improved their facilities, then they would qualify and any apprehensions on this count is completely misplaced.

- (iii) KSEB Ltd further submitted that the petitioner had filed a writ petition WP(C) 2571 of 2019(V) before the High Court of Kerala and the Hon'ble High Court had vide their judgment dated 21.06.2019 dismissed the petition. Subsequently, the petitioner filed a Writ Appeal against the judgment before the Division Bench of the Hon'ble High of Kerala vide the petition WA No. 1827 of 2019. The Division Bench of the Hon'ble High Court also, vide their judgment dated 03.09.2019 dismissed the petition. The issues raised in the said petition is similar to the present case.

6. The petitioner M/s Shankar Conductors Pvt. Ltd. vide e-mail dated 12.05.2021 submitted their additional comments and its summary is given below.

- (i) According to Kerala Govt. GO(P) No.03/2016/SPD dt. 18.02.2016, MSME of Kerala having Udyog Aadhar Registration are exempt from submitting EMD and tender cost. But, in KSEB Ltd.'s tender notice, there is no such information that MSMEs of Kerala having Udyog Aadhar Registration will be exempted from submitting EMD which in this tender comes to Rs 2,04,460/- and Bid Submission Fee (cost of tender document), which comes to Rs 44,250/-.

- (ii) The requirement for new entrants to remit EMD and Bid Submission Fee is mentioned at various places in Part I of the tender documents. Further, Page 2 of NIT provides that;

“Kerala Government Public Sector Undertakings are exempted from furnishing EMD. State PSU shall produce Certificate from Industries Department of Government of Kerala. MSME with Udyog Aadhar Registration are exempted from remitting EMD and Bid submission fee on producing valid documents in support of claim. If the bidder is New Entrant, EMD will be 10% of the total EMD amount which shall be remitted as specified in the New Entrant Clause (28) in Annexure-I.”

As per sub para (g) of Clause 28 of Annexure I, “10% EMD need only be remitted by new entrants against the above quantity in the form of NEFT/ RTGS in favour of the Chief Engineer (SCM), payable at Thiruvananthapuram”

Further, in sub para (g) of para 25 of Part-II of Prequalification Bid under heading “Special Instructions to Bidders” it is mentioned that: “10% EMD need only be remitted by new entrants against the above quantity. Difficulty, if any, in remittance shall be resolved in consultation with the office of tendering authority.”

The above references makes it clear that all New Entrants, whether they are MSME of Kerala or not and irrespective of their Udyog Aadhar Registration are required to deposit EMD and Bid Submission Fee. The only concession given to New Entrants by KSEB Ltd. in their tender is that, they are required to give 10% of the normal EMD and full amount of Bid Submission Fee, even if they are MSME with Udyog Aadhar Registration.

In the light of the above, the petitioner as a New Entrant was compelled by the respondent KSEB Ltd to remit EMD @10% of the EMD amount and full amount of Bid Submission Fee, i.e., cost of tender documents, since they were apprehensive that otherwise their bid may be rejected on the grounds of non-remittance of EMD amount and full amount of Bid Submission Fee. Thus, the respondent KSEB Ltd. has clearly flouted, disobeyed and not implemented the Government of Kerala GO(P) No. 03/2016/SPD dated 08.02.2016.

- (iii) The Petitioner further submitted that they are a Kerala registered MSME having Udyog Aadhar with Registration UAM No. KL06B0001868 dated 17.02.2020.
- (iv) The petitioner therefore, vide their additional submission dated 10.05.2021 prayed before the Commission to

‘direct the respondent KSEB Ltd. to refund 10% EMD and full amount of Bid Submission Fee i.e. cost of tender documents, total Rs.2,48,710/- wrongly realized from it, within 10 days from the date of direction’.

7. The second hearing on the petition was conducted on 17.05.2021 through video conference. Sri Sanjay Dalmia presented the matter on behalf of the petitioner and Sri Sanal Kumar, Chief Engineer, SCM, KSEB Ltd. and Sri. Premkumar, Dy.CE, TRAC, KSEB Ltd. presented the counter arguments on behalf of KSEB Ltd. The summary of the deliberations during the hearing is given below:

(i) The petitioner submitted that, in KSEB Ltd's NiT and bid documents, there is no clear statement that New Entrant MSMEs are exempted from remitting EMD and Bid Submission Fee. Therefore, even though the petitioner, M/s Shankar conductors Pvt Limited is having Udyog Aadhar Registration, they have remitted @10% of the total EMD and also the Bid Submission Fee as specified in the tender, to avoid rejection of the tender by KSEB Ltd. on this ground.

The petitioner therefore prayed before the Commission to direct KSEB Ltd. to refund the EMD and Bid Submission Fee wrongly collected from them, within a definite time frame to be specified by the Commission.

(ii) KSEB Ltd. submitted that, once the petitioner formally requests KSEB Ltd, they will take the necessary action to refund the EMD and Bid Submission Fee remitted by the petitioner as per the procedures in force. KSEB Ltd. will comply with the directions issued by the Commission in this regard.

Analysis and Decision of the Commission:

12. The Commission has carefully considered in detail the petition filed by M/ Shankar Conductors Pvt Ltd, the counter affidavit of the respondent KSEB Ltd, arguments and counter arguments presented by both the parties as per the provisions of the Electricity Act, 2003 and the Regulations notified by the Commission and decided the following:

13. The prayers of the Petitioner in the original petition dated 23.02.2021 are the following.

(1) No EMD or Bid Submission Fee (cost of tender paper) should be required to be paid by MSMEs of Kerala as per the GO (P) No. 03/2016/SPD dated 18.02.2016. Hence, the tender of KSEB Ltd dated 04.02.2021 is to be suitably amended.

(2) MSMEs of Kerala, who are registered by BIS should be considered technically qualified and no factory inspection by KSEB Ltd. should be required. The tender form should be modified accordingly.

14. KSEB Ltd, during the deliberations of the subject petition, questioned the maintainability of the petition and also the jurisdiction of the Commission to entertain the petition filed by M/s Shankar Conductors Pvt. Ltd. The Commission examined the argument of KSEB Ltd in detail as per the provisions of the Electricity Act, 2003 and decided as follows.

- (1) KSEB Ltd is a deemed distribution licensee as per Section 14 of the Electricity Act, 2003. KSEB Ltd is also a company owned by the State Government. While carrying out its business, KSEB Ltd. is duty bound to implement the various policies, orders, preferences, exemptions etc. ordered by the Central and State Government which are consistent with the provisions of the Electricity Act, 2003.

All allowable expenditure incurred by KSEB Ltd. is a pass through in tariff. Hence, such expenditure is recovered through the Commission approved tariff from the electricity consumers of the State. The Commission also noted that KSEB Ltd. is required to obtain the approval of this Commission for the Capital Investments made in KSEB Ltd's generation, transmission and distribution business units. While granting the Capital Investment approval, the Commission is duty bound to examine the prudence of the investment and the capital cost, including the cost incurred for procurement of goods and materials.

- (2) The Commission noted that the issues raised in this petition pertains to the tender floated by KSEB Ltd. for the procurement of conductors, viz. ACSR Wolf, ACSR Moose and ACSR Dog conductors. These conductors are intended for use in the transmission and distribution business of KSEB Ltd. The cost incurred for procuring these materials are reflected in the Capital Investment account of the respective business units of KSEB Ltd. The Commission noted that all such expenditure incurred by KSEB Ltd. is recovered through tariff in the form of interest on loan, depreciation, return on equity etc, and these costs are passed on to the electricity consumers of the State as tariff. While approving the capital investment in transmission and distribution, this Commission is duty bound to examine the prudence of the capital cost including the cost of materials.

The Commission is of the firm view that as a State Government owned Public Sector Undertaking, KSEB Ltd. is also duty bound to implement the Orders on preferences granted to the MSMEs in the State by the Government of Kerala. Any financial liability incurred while implementing the policy directions of the State Government is allowed by the Commission after prudence check.

- (3) **Considering all these facts in detail, the Commission is of the considered view that, as per Section 86 of the Electricity Act, 2003, this Commission has the jurisdiction to entertain the present petition filed by M/s Shankar Conductors Pvt. Ltd. against KSEB Ltd. which is related to the procurement of conductors for its Transmission and Distribution business. Accordingly, the Commission admitted the petition as OP No. 16/2021 and conducted further proceedings on the petition.**

15. Thereafter, the Commission examined the first prayer of the petitioner. The Commission noted that as per Government Order, GO (P) No. 03/2016/SPD dated 18.02.2016, the MSME in the State of Kerala are exempted from remitting

EMD and Bid Submission Fee while participating in the tender floated by the Government departments and Government owned PSUs. However, in the tender floated by KSEB Ltd dated 04.02.2021, it is specified in the NiT and bid documents that, in the case of New Entrant MSME, they have to remit the EMD and Bid Submission Fee, irrespective of whether the New Entrant is a MSME or not. The Commission examined the issue in detail and noted the following.

- (1) KSEB Ltd issued tender No. No. KSEB/ SCM/ eP/ 86/2020-21 dated 04-02-2021 for purchase of 1500 km ACSR Wolf conductors, 200 km ACSR Dog conductors and 13km ACSR Mooze conductors. The probable amount of contract is ₹ 20,44,52,200/-. Due date of tender is 26-02-2021.

In the NiT, KSEB Ltd had specified as follows.

“Kerala Government Public Sector Undertakings are exempted from furnishing EMD. State PSU shall produce Certificate from Industries Department of Government of Kerala. MSME with Udyog Aadhar Registration are exempted from remitting EMD and Bid submission fee on producing valid documents in support of claim. If the bidder is New Entrant, EMD will be 10% of the total EMD amount which shall be remitted as specified in the New Entrant Clause (28) in Annexure-I.”

As per sub para (g) of Clause 28 of Annexure I, “EMD of New Entrants is limited to 10% of the total EMD amount against the above quantity in the form of NEFT/ RTGS in favour of the Chief Engineer (SCM), payable at Thiruvananthapuram”

- (2) The petitioner, M/s Sankar Conductors Pvt. Ltd. submitted that, they intend to submit tender for 10 % quantity of ACSR Wolf and ACSR Dog as New Entrant, for which tenders have been invited. The Petitioner further submitted that, they are a registered MSME of Kerala having Udyog Aadhar with Registration UAM No. KL06B0001868 dated 17.02.2020.

According to the petitioner, as per the NiT and bid documents of the tender floated by KSEB Ltd dated 04.02.2021, irrespective of whether the bidder is a New Entrant MSME or not, the bidder has to deposit EMD and Bid Submission Fee. The only concession given to New Entrants is that, they are required to remit 10% of the normal EMD and full amount of Bid Submission Fee, even if they are MSME with Udyog Aadhar Registration.

In the light of the above, the petitioner as a New Entrant was compelled to remit EMD @10% of the normal EMD amount and full amount of Bid Submission Fee, since they were apprehensive that otherwise their bid would be rejected by KSEB Ltd. on the grounds of non-remittance of EMD amount and full amount of Bid Submission Fee.

- (3) KSEB Ltd during the deliberations of the subject petition clarified the following.
- (i) KSEB Ltd has been implementing the GO (P) No. 03/2016/SPD dated 18.02.2016, regarding the preferences and exemptions granted to the MSME in the State of Kerala.
 - (ii) In the tender dated 04.02.2021 also, it is clearly specified in the tender document that, MSMEs in the State with Udyog Aadhar Registration are exempted from remitting EMD and Bid Submission Fee. Hence, all MSME bidders are not required to remit the EMD and Bid submission fee. The provisions of the tender document quoted by the petitioner is the general concessions granted to the New Entrants that, they have to remit only 10% of the normal EMD, so as to encourage such New entrants.

The petitioner themselves had in KSEB Ltd's earlier tenders availed the concessions granted to the MSME in the State of Kerala and their tenders were not rejected on account of non-remittance of EMD and Bid Submission Fee.
 - (iii) In the present tender also, two other firms participated in the tender as New Entrant MSME without remitting EMD and Bid Submission Fee and their tenders were accepted.
 - (iv) KSEB Ltd. further clarified that the tender is yet to be finalised.
- (4) Based on the clarifications given by KSEB Ltd., the petitioner in their additional submission dated 10.05.2021, limited the prayer on this issue as follows.

'direct the respondent KSEB Ltd. to refund 10% EMD and full amount of Bid Submission Fee i.e. cost of tender documents, total Rs.2,48,710/- wrongly realized from it, within 10 days from the date of direction'.

- (5) KSEB Ltd. during the deliberations of the second hearing held on 17.05.2021 clarified that, once the petitioner formally requests KSEB Ltd. to refund the EMD and Bid Submission Fee, already remitted by the petitioner by mistake, KSEB Ltd. may refund the same as per the procedures with the approval of the Board Management. KSEB Ltd. also clarified that, it shall comply with the orders and directions issued by this Commission in this regard.

The Commission noted the arguments of the petitioner M/s Shankar Conductors Pvt. Ltd. and the respondent KSEB Ltd. as above. As per the State Government GO (P) No. 03/2016/SPD dated 18.02.2016, the MSMEs in the State of Kerala are exempted from remitting EMD and Bid Submission Fee while participating in the tenders floated by State Government Departments and Government owned PSUs, irrespective of whether the bidder is a New

Entrant or not. KSEB Ltd. also clarified that, as a State PSU, it has been implementing the Government Order regarding the preferences and exemptions granted to the MSME in the State of Kerala. Even in the tender dated 04.02.2021, KSEB Ltd. had accepted two other tenders of New Entrant MSME, without remitting EMD and Bid submission fee.

After considering the issue holistically, the Commission has arrived at the conclusion that in the present tender, the petitioner being a MSME with Udyog Aadhar Registration is not required to remit the EMD and Bid Submission Fee for participating as a New Entrant. **Hence, KSEB Ltd. shall refund the EMD and Bid Submission Fee amounting to Rs 2,48,710/- within one month from the date on which the petitioner formally requests KSEB Ltd. to refund the amount which they wrongly remitted while participating in the tender.**

16. The second prayer of the petitioner is that, the MSMEs of Kerala, who are registered by BIS should be considered technically qualified to participate in KSEB Ltd's tenders and no factory inspection should be required for such firms. The petitioner had in their petition requested the Commission to direct KSEB Ltd. to modify the bid documents accordingly. In this matter, Commission examined the arguments of the petitioner and the respondent in detail and decided as follows.

(1) The petitioner M/s Shankar Conductors Pvt. Ltd. submitted that, they had obtained all the required licenses and BIS certification for the manufacture of ACSR Dog (100 sq.mm) and ACSR Wolf (150 sq.mm) conductors. BIS gives license only to those factories, who have proper testing machines and testing arrangements. Hence, the MSMEs in Kerala who are registered with BIS should be considered technically qualified to participate in KSEB Ltd's tenders without factory inspection. The petitioner argued that such inspections are highly subjective and KSEB Ltd's team had disqualified the petitioner thrice earlier on flimsy grounds. Hence, the petitioner prayed before the Commission to direct KSEB Ltd. to modify the present tender conditions by exempting MSME with BIS license from factory inspection.

(2) KSEB Ltd. during the deliberations of the subject petition submitted that, in the NiT and bid documents dated 04.02.2021, KSEB Ltd. had specified that, *"in the case of New Entrants, factory inspection should be carried out, to assess their capability"*.

KSEB Ltd. further submitted that, the New Entrant clause was introduced to encourage new industries, with no previous experience to prove their capability, to enter the field. However, KSEB Ltd. cannot also compromise on the product quality and hence had introduced the factory inspection pre-condition for New Entrant, to assess their capability of producing material as per the requisite standards. KSEB Ltd. also clarified that this clause is a general clause applicable to all New Entrants. Further, the pre-qualification criteria, specified in the tender is not based on BIS license.

KSEB Ltd further submitted that, as the procurer KSEB Ltd. has the right to ascertain the capability of the bidders participating as New Entrant for manufacturing and supplying the materials as per the specifications. Hence, the factory inspection is insisted upon for all New Entrants participating in the tender. Further, formulating the tender conditions fall fully in the domain of the tendering authority. Hence, KSEB Ltd submitted that, the tender conditions are general in nature and cannot be changed or altered for the convenience of the parties.

- (3) The Commission during the first hearing itself had clarified that it does not normally interfere in the tender procedures of its licensee. The Commission Chairman clarified that is the general approach of the Commission. However, since Government owned distribution licensees are wholly or substantially funded by public moneys and capital expenditure is generally reflected in the consumer tariff, the Commission reserves the right to intervene in cases involving protection of consumer interest.
- (4) During the second hearing, the petitioner based on the Commission's clarifications did not press on their second prayer.

In view of the foregoing, the Commission is of the considered view that specifying the tender conditions to ensure the quality of the product and materials to be supplied by the bidders fall within the domain of the tendering authority. The tender document is a legally valid document and it cannot be modified to suit the prospective bidder's requirements. ***The Commission will not normally intervene in the licensee's tendering procedures, except when it is of the opinion that consumer interest is compromised or there is malafide intent.***

Under these circumstances, ***the Commission has decided not to intervene in the tender conditions specified by the KSEB Ltd. in the tender dated 04.02.2021 for New Entrants.***

The second prayer in the petition on not being pressed by the petitioner is rejected accordingly.

Order of the Commission

17. The Commission after examining the petition filed by M/s Shankar Conductors Pvt. Ltd., respondent KSEB Ltd's counter affidavit, the deliberations and arguments presented by both parties during the two hearings, the relevant provisions of the Electricity Act, 2003 and other facts and documents placed before it during the proceedings on the subject matter, hereby order the following:
 - (1) KSEB Ltd. shall based on the State Government Order, GO (P) No. 03/2016/SPD dated 18.02.2016, exempt all the MSME in the State of Kerala from remitting EMD and Bid Submission Fee while participating

in the tenders floated by KSEB Ltd, irrespective of whether the bidder is a New Entrant or not.

- (2) KSEB Ltd. shall refund the EMD and Bid Submission Fee, wrongly remitted by the petitioner in the tender No. KSEB/SCM/eP/ 86/2020-21 dated 04.02.2021, amounting to Rs 2,48,710/-, within one month from the date of receipt of a formal request from the petitioner with details to facilitate the refund amount.
- (3) The second prayer of the petitioner that, 'the MSME of Kerala who registered by BIS should be considered as technically qualified and factory inspection should not required' is rejected, due to the reasons discussed under paragraph 16 above.

The petition is disposed off. Ordered accordingly.

Sd/-

**Adv. A.J. Wilson
Member (Law)**

Sd/-

**Preman Dinaraj
Chairman**

Approved for issue

**C R Satheeshchandran
Secretary**