

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003
Central Act 36 of 2003)

PRESENT:-

Thiru.S.Kabilan ... Chairman

Thiru.K.Venugopal Member

and

Thiru.S.Nagalsamy Member

I.A. No.1 of 2011 in M.P. No. 48 of 2010

Tamil Nadu Generation and Distribution
Corporation Ltd.
(TANGEDCO)
No. 144, Anna Salai
Chennai – 600 002.

.... Petitioner
(Thiru.P.H. Vinod Pandian, Advocate for Petitioner)

Versus

M/s.Arkay Energy (Rameswaram) Limited
having its plant at
Valuthur Village
Valanthuravai Post
Ramnad District – 623 623.

.. Respondent
(Thiru.Rahul Balaji, Advocate for Respondent)

Dates of hearing: 4-11-2011 and 16-11-2011

Date of Order : 30-11-2011

M.P.No.48 of 2010 and I.A. No. 1 of 2011 in M.P. No. 48 of 2010 came up for final hearing before the Commission on **16-11-2011**. The Commission upon perusing the above petitions and other connected records and after hearing both sides passes the following:-

ORDER

1. Prayer in I.A. No.1 of 2011 in M.P.No. 48 of 2010

The prayer in I.A. No.1 of 2011 in M.P. No. 48 of 2010 is -

- (i) To uphold the action of the Petitioner in fixing the minimum bid capacity as 100 MW in the tender in Phase-1 under Case – 1 bidding floated on 16-6-2011 under Tender No.01/PPMT/2011 and permit the Petitioner to finalise the tender; and
- (ii) To permit the Petitioner to consider to finalise the tender among two bidders viz. M/s.National Energy Trading and Services Limited and M/s. OPG Power Generation Private Limited, in the event of satisfying all other conditions for any quantum less than 450 MW.

Facts of the Case

2. Tamil Nadu Generation and Distribution Corporation Limited, is a wholly owned Government Corporation, incorporated under the Companies Act, 1956 and one of the successor entities of erstwhile TNEB and engaged in the business of generation, distribution etc. and a distribution licensee in the State of Tamil Nadu.

3. The GOI, MOP had issued guidelines for determination of tariff by bidding process for procurement of power by distribution licensee on 19-1-2005 as amended on 21-7-2010 by exercising power under Section 63 of the Electricity Act, 2003 under medium term and also for longer term.

4. TANGEDCO has already floated an open tender Phase-1 (bid specification No. 01/PPMT/2011) under International Competitive Bidding Route (ICB) on 10-6-2011 upon approval of the Commission in M.P. No. 48 of 2010 for deviations sought for by the Petitioner with reference to payment security mechanism for a quantum of 450 MW under Medium Term Open Access for a period of 5 years. As per original schedule, the tender should have been opened on 24-8-2011 (T0 + 75 days) and the PPA should have been signed by 10-10-2011 (T0 + 125).

5. Para 5.5 of the said guidelines inter-alia provides that in case the bidders seek any deviations and the procurer finds that the deviations are reasonable, the procurer shall obtain approval of the appropriate Commission before agreeing to the deviations. The clarification / revised –bidding document shall be distributed to all who had bought the RFP document informing about the deviations and clarifications and intimation shall also be sent to the appropriate Commission. Final PPA shall also be displayed on the website of the procurer. Wherever revised bidding documents / amendments are issued, the procurer shall provide bidders atleast sixty days in case of two stage bidding process and

atleast forty five days in case of a single stage bidding process after issue of such documents for submission of bids. However, a lesser time may be given for submission of RFP bids after any such revision / amendments in the RFP documents, with the written consent of all the pre-qualified bidders who have bought the RFP.

Contentions of the Petitioner:-

6. Only four bidders had sought clarification on bidding documents (RFP & PPA) for procurement of 450 MW RTC firm power – Phase – I (under Case-1 bidding) for the period 10-12-2011 to 9-12-2016 against bid notification Tender No. (Phase-I) 01/PPMT/2011 dated 10-6-2011. The reply to the clarification was furnished to the prospective bidders and hosted in the Petitioner's website. Accordingly a Memorandum Petition was filed before the Commission on 1-8-2011.

7. Based on the request of some of the traders / generators for extension of bid submission time, the Petitioner considered their request and postponed the opening of the tender by 10 days. The revised schedule was hosted in website of the Petitioner and informed to prospective bidders and published in 4 Nos. leading dailies. The revised schedule was submitted before the Commission vide another Memorandum Petition dated 24-8-2011.

8. M/s.OPG Power Generation Private Limited in their letter dated 9-8-2011 sought to amend the minimum bid capacity as 10 MW in the request for proposal for procurement of power for 450 MW on medium term. A reply letter was sent to M/s.OPG Power Generation Private Limited Company on 29-8-2011 from Chief Engineer / Private Power Projects as below:-

“TANGEDCO had already floated tender on 10-6-2011. The due date for submission of written clarification is 25-6-2011. But your request for clarification / comments in respect of Procurement of Power for 450 MW / Base load under Case – 1 bidding procedure is received on 12-8-2011.

TANGEDCO need power urgently to mitigate the demand. Any change in RFP need approval from TNERC which further delay in bidding process. Your request for change in minimum bid capacity will be discussed in high level meeting and if approved, changes will be made in subsequent Case-I bidding tender”.

9. M/s.OPG Power Generation Private Limited filed a case in the Hon’ble High Court of Madras vide Writ Petition No. 20319 of 2011 and on 3-8-2011, the Hon’ble High Court directed TANGEDCO to dispose the representation of M/s.OPG Power Generation Private Limited dated 9-8-2011 taking into account the merits of Section 11 of the Electricity Act, 2003 and dispose of the same on or before 2-9-2011. A reply was furnished to the M/s. OPG Power Generation Private Limited Company on 2-9-2011 in accordance with the High Court’s direction.

10. M/s.Arkay Energy (Rameswaram) Limited filed a Writ Petition No. 9830 of 2011 in Madurai Bench of Madras High Court praying to consider the representation dated 24-8-2011 to reduce the minimum bid capacity from a single source. On 29-8-2011, the Writ Petition No. 9830 of 2011 was heard by Madurai Bench of Madras High Court and an interim order directing the TANGEDCO to accept the bid offer of the Petitioner (M/s.Arkay Energy) and not to reject it was passed until further orders. On 3-9-2011, the Petitioner has received four bids. Only one party who directly purchased RFP document from the Petitioner did not participate in the tender. The following four bidders submitted their bids by the due date i.e. 3-9-2011 and they had downloaded the documents from the website.

Sl. No.	Name of Bidders	Capacity offered
1	Arkay Energy (Rameswaram) Limited	50 MW
2	National Energy Trading and Services Limited	300 MW
3	OPG Energy Private Limited	10 MW
4	OPG Power Generation Private Limited	100 MW

The non-financial bid was opened on same day (3-9-2011). As per RFP the bidders were to submit their bids for the requisitioned capacity of 450 MW (+/- 20%) with a Minimum Bid Capacity of 100 MW. M/s. Arkay had submitted their bid with a copy of the High Court order dated 29-8-2011.

11. On 16-9-2011, the Petitioner informed all the bidders that the opening of financial bid is tentatively scheduled to 19-9-2011 in view of the Writ Petition filed by M/s.ArKay Energy (Rameswaram) Limited in the High Court of Madras (Madurai Bench) and for the revised time schedule for completion of the bidding process in respect of bid specification 01/PPMT/2011 (Phase-I).

12. The Hon'ble High Court by an order dated 13-10-2011 disposed the said petition, in W.P. No. 9830 of 2011 with the following directions:-

- (1) *the Respondent (TANGEDCO) shall proceed with the processing of the bids and the provisional finalization of the same, after taking all the steps prescribed in the Request For Proposal (RFP) dated 10-6-2011.*
- (2) *the Respondent (TANGEDCO) shall within 2 days approach the TNERC along with a copy of High Court order and submit the factual details before the Commission for appropriate directions in view of the urgency that had arisen in this case. The TNERC is requested to issue necessary directions within 3 weeks so that the execution of Power Purchase Agreement (PPA) by Electricity Board is not unduly postponed and the Respondent is able to execute the agreements in time so as to commence the supply by the target dated 10-12-2011.*
- (3) *the execution of Power Purchase Agreement (PPA) shall await the directions to be issued by the TNERC.*
- (4) *since out of four bidders, two are qualified even as per the original tender conditions and the Petitioner alone has approached this Court, out of the*

remaining two, they may also be heard by the TNERC before a direction is issued. It is made clear that persons, who have not responded to the RFP so far, cannot take advantage of this order and seek to implead themselves before the TNERC, in view of the fact that they would be guilty of delay and laches to approach either this Court or the TNERC at this distance of time”.

13. Clause 1.3.1 of the Standard RFP, inter-alia, provides as follows:-

“The Minimum Bid Capacity shall be decided by the procurer / authorized representative, which may generally be the lower of the values; 10% of the requisitioned capacity or 50 MW. However, the procurer / authorized representative shall be free to determine any quantum of power as the Minimum Bid Capacity”.

14. Considering the aforesaid provision, there can be no dispute as to the power of the TANGEDCO to fix the Minimum Bid Capacity (as 100 MW) as also observed by the Hon’ble High Court. By virtue of the said provisions, the Petitioner has fixed the Minimum Bid Capacity as 100 MW in order to attract bigger suppliers who will be able to supply more power at a competitive rate uninterruptedly. Considering the totality of the circumstances including the various options available to the generators like M/s.Arkey Energy (Rameswaram) Limited to supply power in various ways, the fixation of Minimum Bid Capacity in

the tender in question is valid and is in accordance with the Government of India guidelines.

15. If the tender conditions are strictly followed and if there were to be any shortfall in tendered quantity, this Petitioner will either restrict its tender to the quantum power made available by eligible bidders or such shortfall in quantum of power will be carried over in the subsequent tender that may be floated by this Petitioner.

16. At this juncture that the Petitioner has also proposed to procure another 450 MW of power (Phase-II) under Tender No.02/PPMT/2011 under Case-1 bidding route and has filed M.P. No. 24 of 2011 praying to allow certain deviation. Therefore, the energy shortfall that may occur in the case on hand i.e. in Phase-1 power procurement in M.P. No. 48 of 2010 may be partially covered. In fact, in the Phase-II tender, the Minimum Bid Capacity has been fixed at 50 MW and the generators like M/s.Arkey Energy (Rameswaram) Limited have the option to participate in the such tender so that the Phase-1 tender process could be completed without any further delay, which will certainly benefit the general public of the State of Tamil Nadu.

Finding of the Commission:

17. I.A.No.1 of 2011 has been filed by the Petitioner TANGEDCO on 24-10-2011. This application has been moved as per the direction of the Madurai

Bench of Madras High Court issued on 13-10-2011 in W.P. No.(MD) 9380 of 2011. The issue involved in this application is the minimum bid capacity which has been stipulated as 100 MW by TANGEDCO. The Respondent herein namely M/s. Aarkay Energy (Rameswaram) Limited had approached the High Court of Madras by way of Writ Petition for reduction of the bid capacity to 50 MW for which they have participated in the bids invited by the Petitioner TANGEDCO. The High Court had directed the TANGEDCO to approach the TNERC with regard to this matter. The Petitioner reiterates his views regarding retaining the minimum bid capacity as 100 MW. He further argued that they have powers to prescribe the minimum bid capacity under clause 1.3.1 of the Standard RFP which enables the procurer / authorized representative to determine any quantum of power as the minimum bid capacity.

18. The Commission had gone through the judgment of the High Court. Paragraph 20 of the order indicates that at times when there is severe shortage of power, the reduction of the requisite bid capacity, which is not as a result of non-availability of suppliers, but as a result of other suppliers not satisfying the minimum bid capacity, cannot be taken to be sub-serving public interest. The only alternative that may be available for the Respondent in such cases may be to go in for another bid. But that may not also be in public interest, since the solution on hand is much better than the solution that could be found out subsequently. During the hearing, the learned counsel for the Respondent namely M/s. Aarkay Energy (Rameswaram) Limited stated that their lenders are

weary of supply of power to TANGEDCO in view of the pendency of payments over a long period and did not object to the proposal of TANGEDCO for fixing of minimum bid capacity as 100 MW.

Order:-

19. The Phase II of competitive bidding under Section 63 initiated separately by TANGEDCO provides for a minimum bid capacity of 50 MW. Keeping in view the subsequent developments after the judgment of the High Court of Madras and also keeping in view that the Respondent does not object to this Interim Application of TANGEDCO, the Commission approves the minimum bid capacity as 100 MW in the bid documents covered by M.P. No.48 of 2010. I.A. No.1 of 2011 in M.P. No.48 of 2010 is disposed off accordingly.

Appeal:-

20. An appeal against this order lies to the Appellate Tribunal for Electricity as per section 111 of the Electricity Act, 2003 within a period of forty five days.

(Sd.....)
(S. Nagalsamy)
Member

(Sd.....)
(K. Venugopal)
Member

(Sd.....)
(S.Kaliban)
Chairman

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission