

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 126 of 2008

In the matter of
Petition filed by MSEDCL seeking review of Order dated 14.11.2008 passed in
Case No. 61 of 2008.

Shri. V.P. Raja, Chairman
Shri A. Velayutham, Member
Shri S. B. Kulkarni, Member

Maharashtra State Electricity Distribution Co. Ltd
Prakashgad, Bandra (East),
Mumbai 400 051.

... Petitioner

ORDER

Dated: April 9, 2009

Maharashtra State Electricity Distribution Co. Ltd., filed a Petition on 14.1.2009 seeking a review of the Commission's Order dated 14.11.2008 passed in Case No. 61 of 2008 (in the matter of approval of deviations taken in Bidding Documents issued to bidders, for procurement of 2000 MW power on long term basis under international competitive bidding process (Case-I)). In the Petition it is submitted as under:-

(1) That the demand and supply gap in terms of availability of electricity in Maharashtra had been growing rapidly, leading to endemic power shortages. The projections of demand and supply deficits were grounded on the 16th and 17th Electric Power Survey published by the Central Electricity Authority under Section 73 of The Electricity Act, 2003 ("EA 2003"). Since Maharashtra is facing severe deficit of power, the Petitioner has to resort to load shedding in the range of 3-13 hrs, in order to manage within the available resources and also has to resort to high cost power purchases in order to bridge the demand supply gap. Therefore, the consumers in the State of Maharashtra not only suffer from shortage of supply, but are also burdened with the additional tariff to compensate for this higher cost power purchase. In order to have a long term mitigation of power supply deficit situation prevailing in Maharashtra, the State generation and distribution utilities are undertaking various initiatives to alleviate the situation as under:

- a) Generation Capacity addition of about 4000 MW by the State Generation Company - MSPGCL;
- b) Long Term Power Procurement of about 5600 MW already planned and under implementation by the Petitioner;
- c) Various short term power purchase contracts with traders, CPPs and other suppliers to mitigate load shedding requirements;



- d) Efficiency improvements and demand side management measures to reduce the demand for power.

However, despite such significant efforts, the power supply scenario is worsening and immediate efforts are required and efforts should be taken to expedite implementation of the above measures. Further, it is to be noted that there is significant discontent amongst all the citizens due to shortage of power and on number of occasions it has led to law and order situation. The agitating consumers do not spare even the employees of the Petitioner besides causing damage to private and State properties like buildings, vehicles and trains etc.

(2) With reference to the measures mentioned above, the Petitioner had initiated a process on 25.10.2007 of long term power procurement of another 2000MW under Case I. Accordingly the regulatory process for approval of quantum to be procured was initiated by Petitioner under a petition filed on 29.8.2007. While disposing of the said Petition, the Commission had directed under paragraph 10 of its Order dated 2.5.2008 as follows:-

“As the MSEDCL has submitted that as per the amended Competitive Bidding Guidelines, it is not mandatory for MSEDCL to obtain the Commission's approval for initiating the competitive bidding process for long term power procurement, the Commission disposes off MSEDCL 's Petition in Case No.46 of-2007. The Commission directs the MSEDCL to submit a separate Petition for approval of deviations in the bidding documents, if any, in accordance with the provisions of Competitive Bidding Guidelines.”

(3) Based on the above, though there were no deviations from the Competitive Bidding Guidelines issued by the Ministry of Power, the Petitioner had submitted its Petition on 1.8.2008 and amendment therein on 13.8.2008 seeking approval of deviations taken in Bidding Documents (Request for Qualification, Request for Proposal and Power Purchase Agreement) from the earlier approved Bidding Documents for Case I vide Order dated 24.1.2008 made in Case No. 38 of 2007. Subsequently, the Technical Validation Session was held at the office of the Commission on 11.9.2008 wherein deviations undertaken in the Bidding Documents (RFQ, RFP, PPA) were discussed along with the appropriateness of the same. Following are the major deviations taken from the earlier approved RFQ Document:-

- a) Dropping the technical qualification requirement for bidders;
- b) Specifically allowing Traders to participate in the process;

It was further observed that the Petitioner had approached the Commission seeking approval of such deviation when the RFQ Process was already concluded. Hence, the Commission had expressed a concern on the granting of such post facto approval and risk mitigations in case if a ‘Trader’ emerges the successful bidder and the PPA needs to be signed with such Trader. Accordingly, the Commission had directed the Petitioner to submit the justification on the aforementioned concerns.



(4) In view of the above, the Petitioner, vide its Petition dated 10.10.2008, had submitted as follows:-

- a) Deviations sought in RFQ and Post facto approval thereof: The said deviation was taken to allow better participation in the bidding process and to create more competition, thereby benefiting the consumers of the State of Maharashtra with cheaper power.
- b) Participation of Traders and Risk mitigation thereof: It was submitted that Standard Bidding Guidelines and SBD for bid process under Case II are silent on the issue of participation of Trader and does not specifically permit or disallow traders from participating in the bid process. However, on being asked for clarification by bidders during the course of Pre-Bid Conference, Traders were specifically allowed to participate in the process and additional submissions like Trading Licence, Board Resolution etc., were required to be submitted by them for safeguarding the interest of the Petitioner and in turn safeguarding the interest of consumers of the State of Maharashtra. Further, on the concern raised by the Commission, a Tripartite Power Purchase Agreement was framed and submitted to the Commission for approval wherein even a Generator proposing to supply power to the Trader is made party with specific obligations for timely supply of power to the Petitioner as per the terms and conditions specified therein.

(5) However, the Commission vide its Order dated 14.11.2008 in Case No. 61 of 2008 had disposed of the said Petition by passing the ruling as follows:

“The Commission is of the view that it would not be appropriate to grant post-facto approval, since this is clearly against the provisions under the CBG. Hence, the Commission rejects MSEDCL's request for post-facto approval of the deviations taken during RFQ stage, and accordingly, the Commission has not analysed the other deviations as proposed by MSEDCL in RFP Project Documents.”

2. In light of the above, the Petitioner has sought review of the aforesaid Order dated 14.11.2008 on the following grounds:-

- a) In accordance with clauses 2.3, 3.1 and 5.16 of the Competitive Bidding Guidelines, approval from the Commission is required in case if there are any deviations from Standard Bidding Guidelines or Standard Bidding Documents notified by Ministry of Power;
- b) Ministry of Power has not issued Standard Bidding Documents for Power Procurement under Case I so far;
- c) In the absence of Standard Bidding Documents for Power Procurement under Case I under Competitive Bidding Guidelines issued by the Ministry of Power, the Petitioner had adopted the Bidding Documents earlier approved by the Commission vide Order dated 24.1.2008 in Case No. 38 of 2007. Hence, though there were no deviations from Competitive Bidding Guidelines, the Petitioner submitted the Petition for approval of deviations taken from earlier approved Bidding Documents;



- d) The deviations for which post facto approval sought are primarily with the intent of increasing competition and availing better tariff thereby eventually benefiting the consumers of the State of Maharashtra. Further, such deviations are in line with the "Draft Case I Standard Bidding Documents" under discussion and finalisation by Ministry of Power;
- e) Nevertheless, it is to be noted that the Petitioner had made the modifications proposed in the context of the approved RFP Documents under Case No. 38 of 2007, subject to the approval of the Commission and had not agreed with the qualified bidders to such modifications to RFP Documents without approval of the Commission on the same;
- f) It is pertinent to note that similar bidding process is being carried out under Competitive Bidding Guidelines issued by Ministry of Power for Long Term Power Procurement from Dhopave Power Project under Case II route. The process is being carried out by Maharashtra State Power Generation Company Ltd., on behalf of the Petitioner. During the process, the Final RFQ documents were duly finalized and issued to bidders before taking approval of the Commission and the bidders had submitted their response to such RFQ on 6.6.2007. Further, the RFQ qualification results were announced pending the approval of the order on the deviations carried out in the RFQ. The results were announced on 26.10.2007 whereas the final Order was issued on 23.11.2007. Hence in effect, the Commission has granted such post facto approval of deviations proposed in the RFQ document in the past.
- g) Since, the Commission has rejected the Petition on the grounds of post facto approval summarily without going into the merits of the case, if the Petitioner is to obey the captioned order, precious time of more than one year shall stand lost and the Petitioner shall be constrained to re-do the entire process after seeking approval on the same set of bid documents which would lead to enormous delay and repetition of the entire exercise.
- h) Further, keeping in view that bidding processes are being carried out by various licensees across the country, consequent delay in contracting capacity would result in either no power left to be contracted for the State of Maharashtra or costlier power to be contracted. It is pertinent to note that in either case the Petitioner and the consumers of the State of Maharashtra will suffer with no or costlier power.
3. The Petitioner has essentially prayed that the Commission accords a timely post facto approval to the deviations sought in the RFQ document. The Petitioner has also prayed for a timely approval on the RFP Project documents submitted with the Petition filed on 1.8.2008 and as amended on 13.8.2008 and on 10.10.2008 along with the deviations from the previously approved bidding documents.
4. On the delay in filing of the present petition, it has been stated that such delay has happened due to the reason that the Petitioner had approached the Appellate Tribunal for grant of the desired relief, which was however withdrawn from the Appellate Tribunal on



13.1.2009 and hence, thereafter the review petition has been filed before the Commission. It has been prayed that the delay in filing of the Petition be condoned.

5. Notice was issued to the Petitioner and the four consumer representatives authorised on a standing basis under Section 94(3) of the EA 2003 to represent the interest of consumers in the proceedings before the Commission.

6. On behalf of Prayas (one of the consumer representatives as aforesaid), Shri. Shantunu Dixit submitted his letter dated 10.2.2009. It is stated therein that the Commission should consider the following submissions in this matter:-

- a) Though it is essential to procure additional power for overcoming shortages, care needs to be taken that due process as envisaged in law is not compromised, as this results in setting a wrong precedent and in the long term will severely affect consumers' interest (not just of the Petitioner but other utility's consumers as well);
- b) During the course of Technical Validation Session held on 17.9.2009, the Petitioner explained that over 20 bidders would qualify even if the RFQ approved by the Commission through Order dated 24.1.2008 is considered. Thus, by deviating from established legal process of seeking prior approval, the Petitioner hopes to increase the number of qualified bidders by a handful of traders. When over 20 bidders are anyway likely to qualify, one wonders what will be the specific benefits of qualifying couple of additional traders?
- c) Moreover, the Petitioner has already submitted another Petition for seeking the Commission's approval for the next round of competitive bidding documents. In such a scenario within 3-4 months the Petitioner can complete the next round of RFQ, which would be open for participation by traders. Thus, the Petitioner's argument of losing many months if the review petition is not allowed, does not have any force.
- d) The Petitioner has not justified as to how the present petition meets the requirements of Regulation 85(a) of the MERC (Conduct of Business), Regulations, 2004. The bidding guidelines issued by Central Government allow for deviation from Standard Bidding Documents issued by the Central Government, but the guidelines do not have any provision for post-facto approval of bidding documents.
- e) Any decision regarding procurement of power on long term basis has very large implications for consumers, hence, it is urged that the Commission considers the above submissions.

7. A hearing was held on 10.2.2009. Shri G.S. Trimukhe, Chief Engineer, MSEDCL and Shri Sameer Darzi of Feedback Ventures Pvt. Ltd., appeared for MSEDCL. Dr. S.L. Patil, (an authorised consumer representative) of Thane Belapur Industries Association was present during the hearing.



8. The Petitioner's representative submitted that the case in the impugned Order was that the Petitioner had sought post facto approval of the RFP document that contained certain deviations from the Guidelines issued by the Central Government under Section 63 of the EA 2003. Post facto approval had been sought because the power procurement had to be done within a short span of time and in order to save time and quicken the pace of the tendering process, the Petitioner did not seek prior approval but went ahead with the tendering process and thereafter came to seek a post facto approval of the bidding documents. The Commission observed that the Petitioner did err because it did not seek prior approval although the law required it to. During the hearing the Petitioner could not justify as to how the present petition falls within the scope of review under Regulation 85(a) of the MERC (Conduct of Business) Regulations, 2004. However, it was observed by the Commission that the 'Draft Standard Bidding Documents for Case-I Bidding' as framed by Ministry of Power, Government of India has been put on the website and is in advance stage of being issued formally. It would, therefore, be appropriate for the Petitioners to file a Petition seeking prior approval for deviations in the proposed bidding documents with reference to the said 'Draft Standard Bidding Documents for Case -I'. In fact the Petitioner was directed to file such a Petition within a week from the date of the said hearing.

Dr. S.L. Patil submitted that the Guidelines issued by the Central Government under Section 63 of the EA 2003 do not have any provision for post facto approval. He also submitted that not only the present petition is time barred but also it is not within the ambit of review proceedings.

9. Having heard the Petitioner and Dr. S.L. Patil, and after considering the materials placed on record, the Commission is of the view that there are no allowable grounds in law to grant the review as sought under the present petition. There is neither any error apparent on the face of the record of the impugned Order nor is there any new and important matter or evidence, or any other sufficient reasons, which could justify the grant of review as sought for. If the law requires that any deviations to the 'bidding guidelines'/ documents require approval to be sought from the Commission that approval necessarily has to be a prior approval or else the entire objective of transparent process of bidding as envisaged in Section 63 of the EA 2003, is lost. In view of this position, the present petition is dismissed with liberty to the Petitioner to submit an appropriate Petition before the Commission seeking prior approval in accordance with law on the deviations, if any, that it proposes to implement in the proposed bidding documents with regard to the 'Standard Bidding Documents for Case-I Bidding' as framed by Ministry of Power, Government of India that has been issued recently.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(V.P. Raja)
Chairman



(P.B. Patil)
Secretary, MERC