



Petition No 964 of 2014

BEFORE

THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

LUCKNOW

Date of Order : 17.11.2014

PRESENT:

1. Hon'ble Sri Desh Deepak Verma, Chairman
2. Hon'ble Smt Meenakshi Singh, Member
3. Hon'ble Sri Indu Bhushan Pandey, Member

IN THE MATTER OF: Extension of bid process timelines of Case – 1 bidding process and procurement of rest of the requisitioned capacity of 6000 MW base load power.

UP Power Corporation Limited,
(Through its Chairman)
7th floor, Shakti Bhawan,
14, Ashok Marg
Lucknow - 226001

The following were present:

1. Sri Srikant Prasad, Director, UPPCL
2. Sri. Prashant Mehrotra, C.E. (Planning), UPPCL
3. Sri Sanjay K. Singh, Director (Commercial), UPPCL
4. Sri Deepak Raizada, E.E. (Planning), UPPCL
5. Sri V.P. Srivastava, S.E. (Planning), UPPCL

Order

(Date of Hearing 14.10.2014)

1. For procurement of 6000 MW base load power on long term basis, the Petitioner UPPCL initiated Case-1 tariff based Competitive Bidding Process in July 2012 as per the Bidding Guidelines of GoI. The bid documents were issued by UPPCL on July 27th 2012



and the last date of submission of RFP Bids was 24th September 2012. Total capacity of 8771.6 MW was offered by the bidders by the due date. After evaluation of financial bids, the Bid Evaluation Committee (BEC) found sixteen (16) bids from eleven (11) bidders (as one bidder offered from five sources and one from two sources) successful who had offered total quantity of 8256.6 MW. The list of bidders with offered quantities in order of ranking is as follows:

Rank	Name of Bidder	Bid Capacity (MW)
L 1	NSL Nagapatnam Power Ltd.	300
L 2	PTC-TRN Energy Ltd.	390
L 3	Lanco (Babandh Project)	423.9
L 4	RKM Powergen Pvt. Ltd.	350
L 5	KSK Mahanadi Power Company Ltd.	1000
L 6	PTC-MB Power (MP) Ltd.	361
L 7	Krishnapatnam Power Corporation Ltd (KPCL)	800
L 8	PTC-DB Power Ltd.	203
L 9	Indiabulls (Nasik)	1200
L 10	Jindal Power Ltd	300
L 11	Indiabulls (Amravati)	600
L 12	Lanco (Amarkantak)	1072.5
L 13	NCC Power Projects Ltd.	200
L 14	Lanco (Vidarbha)	454.2
L 15	PTC - East Coast Energy Pvt. Ltd.	300
L 16	PTC-DB Power (MP) Ltd.	302
	Total	8256.6 MW

- Subsequently, UPPCL filed petition no. 911 of 2013 under Section 63 of the Electricity Act 2003 with prayer to adopt the tariff of the two bidders L2 and L3 and to approve the extended timeframe for the closure of the bid process up to 19th November, 2013. Later on, UPPCL also filed application for adoption of tariff of L5 and L6 bidders stating



that although based on the recommendations of the Bid Evaluation Committee and the Energy Task Force (ETF) constituted by the GoUP, the Letters of Intent (LoI) were issued to L1 to L7 bidders but as L1, L4 and L7 could not have been finalized by that time they had prayed only for the adoption of L2, L3, L5 and L6 tariffs for total quantum of 2175 MW. They had further requested to extend the timelines upto 30th June 2014 to finalize the rest of the bids.

3. In view of the Minutes of Meetings (MoMs) dated 14th March, 2013 and 12th Sept. 2013 by BEC, the undertaking on affidavit dated 17th April 2014 by UPPCL, the certificate on the conformity of the bid process to the Bidding Guidelines dated 17.4.2014 by UPPCL (Procurer) and the submissions, vide order dated 24.06 2014, the Commission adopted the tariffs in case of L2, L3, L5 and L6 and allowed the extension of timelines upto 30th June 2014 to close the bid process.
4. Through this petition filed on 4.7.2014, UPPCL has again requested for extension of bid process timelines upto 31st October, 2014. Further on 5.9.2014, UPPCL filed an application with prayer to allow Snap Bid from responsive bidders as per the recommendations of ETF for fulfilling the rest of the requisitioned capacity. In this petition they have submitted that the BEC has rejected the bids of L8 and above for issuance of LoI as these bids were not aligned to the market price. Two bidders L5 and L6 have submitted their proposals for additional quantum of 300 MW and 375 MW respectively at their own quoted tariffs and L8 (203 MW), L9 (1200 MW), L10 (300 MW), L12 (1072.5 MW) and L13 (200 MW) have suo moto offered their respective quoted quantities at reduced tariff i.e. equal to the L6 tariff.
5. UPPCL has stated that state of UP is facing acute shortage of power and if no time bound arrangements are made to procure power at reasonable rates at this point in time, then the demand supply gap is bound to increase further in future, which may aggravate the existing power crises situation in the State. UPPCL has further added that:



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- i. MoU route is no more available.
 - ii. The fresh bidding as per the new competitive bidding guidelines cannot be initiated as there are practical problems and issues in the new guidelines for which they have already sought clarifications from Ministry of Power, GoI. Considering the issues related to new bid process, the ETF has also agreed that procurement of remaining capacity would not be possible from year 2016 with new bid process.
 - iii. The urgency to procure required quantum of 6000 MW is necessary to ensure 24 hours supply to urban areas/industries and 18 hrs. rural areas from year 2016.
6. As the requisition capacity was not fully met by L2, L3, L5 and L6 bidders, road map was submitted by UPPCL to GoUP having key elements as follows:
- i. The successful bidders to whom the LoI has been issued and whose tariff is less than or equal to the levelized tariff for L6, may be allowed to provide additional quantum at the same rate.
 - ii. In case the requisitioned capacity is not met then L1 to L7 may be asked to submit additional quantum of power at a rate different from rate quoted in the original bid. In addition bids from responsive bidders L8 and above may also be requested to submit the quantum already offered / additional quantum at best reduced rate. Provided that all the bidders shall be required to submit bids at a tariff equal to or less than the levelized tariff of bidder L6.
7. In the event if the bidder is willing to provide additional quantum of power, it shall be required to provide documentary evidence confirming that it was fulfilling the qualification requirements as per clause 2.1 of the RFP for the total quantum (bid quantum and additional quantum). For additional quantum of power, the bidder shall require to submit additional bank guarantee of Rs. 3 lakh per MW as per the provisions of RFP. In this process, UPPCL has also requested to allow the responsive bidders to participate in the process for the same generating source but with different tariff.
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8. The road map submitted by UPPCL is reproduced as below:

"Having stated the factual and legal matrix of the complete situation, in which we are stuck, the way forward is to go for additional quantum of power at quoted tariff in the first go as it does not warrant any change in SBD documents. After completing this process, if the required quantity is still not achieved, it may be considered, based on various judgments of Appellate Tribunal of Electricity as well as Hon'ble Supreme Court, that the Commission may be approached for modification in the process so as to enable the procurer to seek best reduced bids with the ceiling of L6 rates. It is important that the second process follows the first so that the sanctity of process as well as our endeavor to procure maximum power from this process remain intact. Every step in this process and institutions involved in this process have to be cognizant to be issue of public interest, which can only be served by getting maximum power from present process in absence of any other alternative."

The opinion given by law wing of GoUP is as follows:

" प्र0वि0 के द्वारा यह अवगत कराया गया है कि चार मामलों में पी0पी0ए0 निष्पादित किया जा चुका है और रेगुलेटरी कमीशन के द्वारा उनका टैरिफ एडाप्ट किया जा चुका है। इस प्रकार इन चार मामलों में निर्गत, आर0एफ0पी0 के क्रम में सम्बन्धित सफल निविदादाता को contract award किया जा चुका है। contract award कर देने के उपरान्त additional quantum of power at quoted tariff के प्रस्ताव को स्वीकार किया जाना विधि सम्मत नहीं होगा क्योंकि यह Post Bid Benefit की संज्ञा में माना जायेगा।

जहाँ तक प्र0वि0 का अधोअंकित प्रस्ताव है "that the commission may be approached for modification in the process so as to enable the procurer to seek best reduced bids with the ceiling of L6 rates" इस सम्बन्ध में प्र0वि0 द्वारा व्यक्त की गयी परिस्थिति, विधि व्यवस्थाएँ एवं

अंश “क” पर की गयी निश्चयात्मक धारणा को दृष्टिगत रखते हुये उक्त प्रस्ताव में कोई विधिक बाधा प्रतीत नहीं होती है।

The road map along with the opinion of Law Wing of GoUP was sent to Energy Task Force by BEC. The ETF has taken view as below:

“सभी बिन्दुओं पर विचारोपरान्त इनर्जी टास्क फोर्स द्वारा बिड मूल्यांकन समिति की उपरोक्त संस्तुति से सहमत होते हुए विचाराधीन बिडिंग प्रक्रिया की पारदर्शिता के दृष्टिगत सम्पूर्ण रोडमैप जिसमें अतिरिक्त क्वान्टम का आफर देने वाले एल-5 एवं एल-6 बिडर तथा सुओमोटो का आफर देने वाले बिडर भी सम्मिलित होंगे, प्रस्ताव 30प्र0 पावर कारपोरेशन लि0 की ओर से 30प्र0 विद्युत नियामक आयोग को संदर्भित करने पर सहमति प्रदान की गयी। यह भी निर्देश दिये गये कि 30प्र0 विद्युत नियामक आयोग की राय प्राप्त होने के पश्चात पूरा ब्यौरा पुनः इनर्जी टास्क फोर्स के समक्ष अग्रिम आदेशों हेतु प्रस्तुत किया जाए।”

9. Vide letter dated 20.9.2014, regarding the proposed Snap Bid, it was asked by the Commission from UPPCL whether in Snap Bid, there would be any restriction for bidders in quoting tariffs higher than their original quoted tariffs? In reply dated 7.10.2014, UPPCL has submitted that there would not be any such restriction. It means that if Snap Bid is allowed then it may bring higher tariff from the same source. As a result consideration of such option may not fetch the desired result with which the competitive bidding has been envisaged.
10. During the hearing, UPPCL submitted that the 18th EPS report of Government of India has projected the demand of power for the State of UP for the year 2016-17 as 23081 MW. The GoUP has mandated supply of 24 Hrs. to Urban/Industrial and 18 Hrs to Rural areas by the year 2016. UPPCL added that on generation side among the upcoming projects under MoU route only the Lalitpur Power Project has shown the considerable progress which has 1960 MW capacity. As the new bidding guidelines are still to be clarified by the GoI, for the mitigation of shortage of power, they have immediate solution only in the proposed roadmap. UPPCL further propounded that



since Law Wing of GoUP has considered taking additional quantum from the successful bidders, to whom the LoIs have been issued, as 'post bid benefit'. It has also been endorsed by BEC and ETF. However, the option of Snap Bid has been supported by all of them. ETF agreeing with BEC, has also directed them to put complete road map before the Hon'ble Commission for consideration.

11. In view of above, the Commission has considered the urgency and necessity to procure required quantum of 6000 MW to ensure 24 hours supply to urban areas/industries and 18 hrs. rural areas by year 2016. This becomes further imperative in wake of slow pace of addition in generating capacity in State sector or through MoU route. As stated by UPPCL, new guidelines have some issues which are still to be clarified by GoI and therefore, other options have been proposed to procure requisitioned capacity by the year 2016. The two options were proposed in the roadmap but on the opinion of Law Wing of GoUP and endorsement by BEC and ETF, the option for snap bid alongwith the roadmap has been petitioned for the decision of the Commission.
12. In this reference, opinion from Retired Justice S.C.Verma, formerly Lokayukta, Uttar Pradesh and presently Consultant (Legal) for the Commission was taken. The opinion is as follows:

"If we go through the bidding guidelines, it is found that there is no bar on procuring additional capacity from the successful bidders on their quoted tariff on the same terms and conditions. RFP did not prohibit procuring additional capacity from the successful bidders since the terms and conditions including tariff remain the same and there would be no negotiation on the quoted tariff. The action is in conformity with provisions of clause 3.5.9 r/w clause 2.5(g) which only bars negotiations on quoted tariffs during the process of evaluation. It is further made clear that till such time the entire requisition is secured or till such time the UPPCL determines that the bid process should be closed, it cannot be said that the bid process



has been completed or closed. Therefore, procurement of additional capacity from successful bidders on their quoted tariff on the same terms and conditions does not amount to negotiation in terms of provisions of the competitive bidding guidelines of the SBD and such procurement is not in any way prohibited and is fully justified.

The RFP has been issued by the MoP under section 63 of the Electricity Act, 2003 and is therefore a statutory document. The RFP provides that unless specifically prohibited, the procurer can undertake any action it chooses which in the present facts and circumstances mean that UPPCL would be entitled to procure additional capacity on same tariff and same terms and conditions. There is no such explicit prohibition provided in clause 3.5.9 r/w clause 2.5(g) of the RFP on additional procuring capacity. Thus the procurer has declared the successful bidders and having entered in to PPAs with L-2, L-3, L-5 and L-6, any counter offer made by such successful bidders whereby they agree to supply additional quantum of power at the quoted tariffs, such procurement is absolutely according to law and in no way prejudice the rights of the successful and other bidders.

The case of L-1 and L-4 have not been closed instead, they are kept in the category of successful bidders. In these circumstances, UPPCL may first decide the eligibility of cases of procurement of power in respect of L-1 and L-4 and only after the decision in their favour the remaining successful bidders i.e. L-2, L-3, L-5, and L-6 may be required to offer additional capacity on the quoted tariff on the same terms and conditions along with L-1 and L-4.

Further, if the required quantity is still not achieved, the foolproof and fair option would be to invite bids through open bid process including the responsive bidders L-7 to L-13 on same terms and conditions of RFP.”



13. The Commission, after considering the legal opinion, 18th EPS projections, roadmap of UPPCL, opinion of Law Wing of GoUP, recommendations of BEC and ETF, GoUP mandate for supply of power by year 2016, issues in new bidding guidelines and submissions of UPPCL for early procurement of power to mitigate the supply demand gap in the interest of State, is of the opinion that it would be prudent to proceed in the matter in following two stages.

Stage 1: Taking additional quantum from the bidders whose tariffs have been approved by the Commission.

Before initiating this process, UPPCL shall first take final decision on the pending bids of L1 and L4. If the decision is in favour of L1 and/or L4 then additional quantum may be taken from all successful bidders i.e. L2, L3, L5, L6 & L1 and/or L4. In case the decision is not in favour of L1 and L4 then additional quantum may be taken from L2, L3, L5 and L6, the existing successful bidders. This additional quantum may be taken at their quoted tariff or at their quoted tariff with some discount for additional quantity. Such a discount is permissible in view of Hon'ble Aptel order dated 6.5.2010 in appeal no. 44 of 2010 (MPPTCL Vs MPERC) and for this negotiations can be done by the procurer in the larger interest of consumers.

Stage 2: Snap bid among the responsive bidders.

If the entire requisitioned capacity still can not be obtained through the process of Stage 1 then only Stage 2 may be considered. In this stage, UPPCL may invite bids through open bid process including the responsive bidders L-7 to L-13 on same terms and conditions of RFP. In this process, the bidders L-7 to L-13 would require to file only the fresh financial reduced bids.



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14. On completion of the process as above, UPPCL would bring the results of the process to the Commission before issuing LoI. UPPCL vide application dated 30.10.2014 has revised their plea for extension of time for completion of bid process and have now been requested upto 28th February, 2015. The Commission allows the same.
15. It may be clarified that the above process has been suggested in view of UPPCL's averments regarding problems of procurement through new case 1 bidding guidelines and non-receipt of clarifications sought by them from GoI. In the meanwhile, if the clarifications are received, UPPCL would be free to proceed as per the new guidelines.
16. The petition is disposed of.

(Indu Bhushan Pandey)
Member

(Meenakshi Singh)
Member

(Desh Deepak Verma)
Chairman

Place : Lucknow
Dated: 17.11.2014