

**BEFORE THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW**

**Review Petition No.297/2005
in Petition No.257 of 2005**

IN THE MATTER OF: Seeking review of Order dated 19.10.05 passed in the Petition No.257/2005 in the matter of approval of Request for Proposal document for 2X500 MW Anpara 'C' thermal power project for inviting bids for procurement of power U/s 63 of the Electricity Act,2003 and GOI Competitive Bidding Guidelines dated 19.1.05.

AND

IN THE MATTER OF:

UP Rajya Vidyut Utpadan Nigam Ltd.
4-B, Gokhle Marg,
Lucknow

: Petitioner

AND

**Review Petition No.296/2005
in Petition No.257 of 2005**

IN THE MATTER OF:

M/s Essar Power Ltd.
Essar House,
P.O Box-7945
Mahalaxmi
Mumbai-400034

: Petitioner

Vs.

UP Rajya Vidyut Utpadan Nigam Ltd.
4-B, Gokhle Marg,
Lucknow

:Respondent

AND

**Review Petition No.300/2006
in Petition No.257 of 2005**

IN THE MATTER OF:

M/s Reliance Energy Generation Ltd.
Reliance Energy Center,
Santa Cruz (E)
Mumbai-400055

: Petitioner

Vs.

UP Rajya Vidyut Utpadan Nigam Ltd.
4-B, Gokhle Marg,
Lucknow

:Respondent

AND

**Review Petition No.305/2006
in Petition No.257 of 2005**

IN THE MATTER OF:

M/s Lanco Kondapalli Power Pvt. Ltd.
Lanco House,
141, Avenue- 8,
Road No. 2, Banjara Hills,
Hyderabad : Petitioner
Vs.

UP Rajya Vidyut Utpadan Nigam Ltd.
4-B, Gokhle Marg,
Lucknow

:Respondent

The following were present:

1. Sri. R. K Sharma, EE, (UPRVUNL)
2. Sri. R.K Gupta, Director(Technical), UPRVUNL
3. Sri. R.K Katiyar, EE,(UPRVUNL)
4. Sri. Sriram, CGM(PPMM)
5. Sri. Mahendra Singh DGM(PPMM)
6. Sri. Mukund Dhar, Amarchand Managldas
7. Sri. Vineet Chadha, M/s Ernst & Young
8. Sri.S.K Agarwal, Director (Finance), UPPCL
9. Sri. B. Sreedhar, GM, M/s Essar Power Ltd.
10. Sri. Suhas Tuljapurkar, DSK Legal, M/s Essar Power Ltd.
11. Sri. K Rajgopal, Lanco Kondapalli Power Pvt. Ltd.
12. Sri. Ashwani Kumar, Chief Manager, M/s Reliance Energy Ltd.
13. Sri. Alok Mukerjee, Chief Manager, M/s Reliance Energy Ltd.,
14. Sri. Ishidar Shandilya, Addl. Manager, M/s Reliance Energy Ltd.
15. Sri. Sumeet Notaani, Addl. Manager, M/s Reliance Energy Ltd.

ORDER

(Date of Hearing 2.2.06 & 6.2.06)

Proceedings on 2.2.06

(1) The additional submissions made by UP Rajya Vidyut Utpadan Nigam Ltd. (UPRVUNL) for admission of the Petition were heard on 2.2.06. Sri.S.K Agarwal, Director (Finance), UPPCL submitted that the Review of the Commission's order dated 19.10.05 had been sought under section 94 of the Electricity Act,2003 and the provisions of UPERC (Conduct of Business) Regulations,2004 on account of certain gaps left, particularly in respect to condition precedent, sale to third party, sharing of common facilities and change in law, in the said order which might cause difficulties not only in bidding but also in implementation of agreement with the successful bidder. The Commission has considered the submissions made by Sri. Agarwal and admitted the Petition.

M/s Lanco Kondapalli Power Pvt. Ltd.(M/s Lanco) has also sought review of the order dated 19.10.05 so far as it concerns relief under direct and indirect political events. The Petition of M/s Lanco was fixed for hearing on admission on 2.2.06. M/s Lanco has made similar pleas on 2.2.06 for admission of the Petition as made by M/s Essar Power Ltd. and M/s Reliance Energy Generation Ltd. in their petitions. The Commission has admitted the Petition filed by M/s Lanco on 2.2.06 on the grounds considered for admission of Petition of M/s Essar and Reliance on 16.1.06.

(2) The said Petitions filed by these Petitioners are seeking review of order dated 19.10.05 passed in the matter of Petition No.257/2005 as such the issues raised by the Petitioners are being dealt with by this common order.

(3) The Petitioners have raised following issues:

(a) Incorporation of changes in the RFP documents:

UPRVUNL has submitted in the Petition that the Commission has not made suitable changes in the RFP document pursuant to the order made in Petition No.257/2005 which would cause lot of uncertainty and ambiguity in interpretation of the order. The

Commission in Order dated 19.10.05 has directed the Petitioner to amend the RFP documents as per observations decisions of the Commission which has not been complied with by UPRVUNL. This is not possible for the Commission to act on behalf of UPRVUNL in this regard. Sri. S.K Agarwal, Director (Finance), UPPCL, designated Nodal Officer in the matter by Chairman, UPPCL vide order No.700/PSCHM/2006 dated 17.1.06, has agreed that the RFP documents would be revised as per the orders of the Commission within 15 days. M/s Lanco submitted that 90 days might be allowed for submission for bids after issue of amended RFP document.

The Petitioner, UPRVUNL, is directed to amend the RFP documents as per order dated 19.10.05 read with this order and issue the same within 15 to the prospective bidders days who shall file bids within next 90 days of date of issue of amended RFP documents.

(b) Condition precedent:

UPRVUNL has submitted that the Commission in its order has held the seller responsible for complying with all condition precedent whereas in the RFP documents envisages condition precedent specific to the buyers and the seller separately.

It is clarified that in Para 10.1 (4.0) of order dated 19.10.05, the project specific clearances i.e. MOEF and FSA with NCL have been made the responsibility of the seller by the Commission. Other conditions precedent specific to seller and buyers remains the same as provided in the RFP documents. However, transfer of land to the successful bidder is the responsibility of UPRVUNL.

M/s Lanco submitted that UPRVUNL should help the successful bidder in transfer of FSA and MOEF clearance. Sri. R.K Gupta, Director (Technical), UPRVUNL informed that a draft FSA provided by NCL had already been submitted before the Commission for approval and UPRVUNL would assist in the transfer of the same

with the approval of the Commission and Ministry of Coal. Regarding MOEF clearance, Sri Gupta has informed that UPRVUNL has already initiated EIA study expected to be complete in 3 to 4 months which would help reduce time in obtaining MOEF clearance. **UPRVUNL agreed to impart all possible help to the successful bidder in transfer of FSA and MOEF clearance.**

The Commission shall take up the issue of approval of FSA separately as this is not a issue under the present review petitions.

(c) Time allowed for fulfilling the condition precedent:

UPRVUNL has stated in the Petition that 12 months time allowed for fulfilling the condition precedent from the date of issue of the letter of acceptance would not be practical because by that time the Special Purpose Vehicle (SPV) would not be in place as such the said period might be set beginning from the date of signing of documents by SPV. M/s Essar, Reliance & Lanco have concurred with the view of the UPRVUNL. **Certainty of time lines is in the prime interest of this project and as such, in consideration of submissions made by the parties to the case, the Commission allows 14 months, from the date of issue of letter of acceptance, for fulfilling the condition precedent including formation of SPV within 2 months. As a consequence, the commissioning dead lines set in para 34 of the Order dated 19.10.2005 shall stand extended to 54 and 58 months from the date of issue of letter of acceptance.**

(d) Right of refusal beyond normative availability and sale of surplus capacity to third party:

UPRVUNL has submitted that direction of the Commission to amend RFP in line with the scheme of trading of electricity provided in ABT would be difficult to implement as the buyers do not have skill to trade power and not allowing sharing of revenue derived by the seller from third party sale shall be against the Competitive Bidding Guidelines of the Central Government. M/s Essar, Reliance & Lanco

have agreed with UPRVUNL for sharing of profit on such sale after a long discussion.

In view of the agreed position between UPRVUNL and the prospective bidders, the Commission allows the sharing of profit between the buyers and the seller as per Para 4.6 of competitive bidding guidelines dated 19.1.05 of the Central Government.

(e) Sharing of common facilities:

UPRVUNL has submitted that first right of the seller made on the sharing of common facility on the basis of normal use would cause reduction in entitlement of availability of shared facilities to UPRVUNL. Sri. S.K Agarwal suggested on behalf of UPRVUNL that the Commission may consider, in the interest of maximization of generation, to direct the seller to assess the availability of shared facilities and in case these are found inadequate, additional capacities may be built during implementation of the project. M/s Essar has expressed its inability to prejudge the adequacy of common facilities, as they have not been allowed the site inspection earlier. M/s Reliance has raised the issue as to how the expenditure made in that regard shall be recovered.

In consideration of arguments of the parties to the case, the Commission directs UPRVUNL to assess the adequacy of the common facilities and refurbish the same, if so required during construction of Anpara-C project. If the common facilities are still found inadequate by the Seller, the seller shall augment the common facilities accordingly and the expenditure so incurred by him shall be compensated in addition to the tariff, subject to the approval of the Commission. After having made the order as above, there is no question left as to the first right of the seller on the usage of the common facilities sofar as it concerns with the adequacy of such facilities.

As regards clause 13.3 of Facilities and Services Agreement, the seller shall have the first right on the common facilities in case of owner's default and in the event of sellers default, the first right shall vest in the owner.

(f) Tariff approval :

UPRVUNL has submitted that 5 Paisa/unit incentive allowed on generation prior to specified date of commissioning of the units shall be excessive because in that event, the seller would be making gains by recovering full fixed cost at reduced IDC.

The Commission provided for such an incentive in view of large gap in demand and supply in the State. It may be appreciated that early commissioning would not be possible without putting extra efforts, which may have some cost to the seller and therefore, we consider that the said incentive is just and proper.

(g) Incentive on availability or PLF:

UPRVUNL has submitted to retain the provision of Competitive Bidding Guidelines for providing incentive to the seller on higher availability. The bidders have expressed consent to the proposal of UPRVUNL.

The Commission in order-dated 19.10.05 has taken a considered view in specifying the mechanism for providing incentive to the seller and does not find any reason to alter the scheme.

The hearing in the matter was adjourned to 6.2.06 for discussion on remaining issues in these review petitions.

Proceedings on 6.2.06

M/s Lanco did not appear for hearing.

(h) Change in Law:

UPRVUNL has suggested, in Para 37 & 38 of the Petition, the mechanism for payment of income tax due to change in Law which is not agreeable to M/s Essar, Reliance & Lanco. UPRVUNL and the bidders were directed by the Commission on 2.2.05 to discuss the matter and bring before the Commission an acceptable mechanism to be discussed on 6.2.06.

UPRVUNL has proposed another mechanism by letter No.196/CGM/PPMM/Anp C/PSP dated 5.2.06. A copy of the said letter was served on M/s Essar and Reliance who considered the proposal of UPRVUNL and accepted the same.

The Commission directs to insert the Paragraph as proposed in the said letter in the RFP document.

(i) Direct and Indirect Political Event:

M/s Essar, Reliance & Lanco in their Petitions have prayed to allow relief under direct and indirect political events as provided in the proposed RFP documents in view of the concerns expressed by financial institutions in financing the project in absence of relief under Indirect Indian Political Event. UPRVUNL has not opposed the prayer of these Petitioners.

The Commission, in its order dated 19.10.05, intended to have a system to avoid misuse of relief under direct Political Event. During hearing UPRVUNL has submitted that adequate checks and balances have been provided in RFP documents to avoid misuse. On enquiry whether indirect political event could be a part of force majeure, the parties to the case present have submitted that the force majeure, being insurable, cannot include Political Event, Direct or Indirect. It is also submitted that Political Events have been split in direct and indirect events in order to mitigate the impact on the consumers arising out relief under such events.

The Commission, in view of above, directs UPRVUNL to retain the original framework proposed in the RFP documents under 'Indian Political Events' and the direction of the

Commission contained in para 10.1(22.0) of Order- dated 19.10.2005 stands modified to that extent.

(j) Land for additional bay for second 765 KV line:

M/s Essar has submitted to provide adequate land to make provision for second 765 KV transmission line in the switchyard of Anpara C project. Sri. R.K Gupta Director(Technical) informed that limited land is available at site and the seller has to accommodate the second line within that space. M/s Essar and Reliance have agreed to make provision for the second line if at all it is technically feasible.

In view of the space constraint at site, the Commission modifies earlier order in this regard that the provision of second line shall be made in the switchyard of Anpara C project if technically feasible.

(k) Inbuilt drawings:

M/s Essar has prayed for all as-built drawings of the project. UPRVUNL has submitted that all possible drawings as deemed necessary at this stage have been made available to the bidders. UPRVUNL has further submitted that additional drawing if available shall be provided to the successful bidder at the time of construction of the project. The bidders expressed no objection to the proposal of UPRVUNL.

(l) Paragraph 10.1(25.0) of order dated 19.10.05:

The figure '60 days' appearing in the 7th line of Para 10.1(25.0) of order dated 19.10.05 shall be read as '4 months' to bring it in conformity with the provision made by the Commission in Para 10.1(34.0) of the said order.

(m) M/s Essar has submitted that Para 1.2 of part 1 of Vo.2 of RFP document be modified to require installation of additional equipment/system though not specifically mentioned with respect to rules/law prevailing 7 days prior to the bid dead line. M/s Reliance and Lanco have concurred with the view expressed by the M/s Essar.

UPRVUNL has , however, agreed to modify the document with respect to rules/law prevailing at the time of bid dead line. The position taken by UPRVUNL is acceptable to the bidders. **The Commission accepts the proposal of UPRVUNL and directs it to modify the RFP documents accordingly.**

(4)The Petitions are disposed of.

(R.D. Gupta)
Member

(P.N Pathak)
Member

(Vijoy Kumar)
Chairman

Lucknow; Dated : 6th Feb, 2006