

6.6. TANGEDCO had on 20th December 2021 circulated the Request for Qualification (RFQ) and Request for Proposal (RFP), being the bidding documents for procurement of medium term electricity for a capacity of up to 1500 MW. This bidding process is by way of invitation for e-Tender and e-Reverse Auction for Medium Term Procurement of Electricity on DEEP Portal.

6.7. While the TANGEDCO claimed the bidding process to be in terms of the bidding documents notified by the Government of India, there are however certain crucial amendments that have been unilaterally carried out by TANGEDCO as against the bidding documents notified by the Government of India. In this regard, primarily the following clauses are relevant:

- (a) In clause 2.2.1(b) of the RFQ, the eligibility of the bidder has been prescribed as to be the owner and operator of the power station from where electricity is to be supplied;
- (b) In clause 2.2.2 of the RFQ, the technical capacity has been prescribed for the bidder to be the owner and operator of the power generating station;

6.8. In this regard, TANGEDCO has unilaterally made amendments to the above process to exclude trading licensees from participating in the bidding process. This is specifically contrary to the provisions of the model bidding documents notified by the Government of India, which is required to be adopted by TANGEDCO.

6.9. Under the model bidding documents, the trading licensee is permitted to participate under clause 2.2.1 of the RFQ. Further, the technical capacity is required to be fulfilled by the Developer in case the bidder is a trading licensee as provided in clause 2.2.2 of the RFQ of the model bidding documents.

6.10. The Government of India has clearly permitted the bidders to include both the generating station as well as trading licensees. In terms of Clause 2.2.1 (b) and (c) of the model bidding documents, the only situation where the trading licensees can be excluded from participating the bidding process is when the choice of fuel is allocated coal linkage to be arranged for by the utility. This is specifically provided in the model bidding documents notified by the Government of India.

6.11. There is also a clear rational for the above provisions. The objective of the bidding process is to ensure that competition is encouraged and as many number of bidders are permitted to participate, fulfilling the technical criteria and the qualifications as prescribed by the Government of India. This is in public interest.

6.12. Restricting the number of bidders to participate in the bidding process at the unilateral decision of TANGEDCO would reduce competitive forces operating and would be contrary to public interest also as there is also no rational or justification provided by TANGEDCO for any such restriction to be imposed.

6.13. The bidding documents were circulated by TANGEDCO. Admittedly, there is no judicial order that TANGEDCO has obtained from the Commission seeking any deviation to the bidding documents notified by the Government of India.

6.14. There are only three daily orders of the Commission in public domain, dated 21/12/2021, 15/02/2022 and 22/02/2022. In the order dated 21/12/2021, the Commission had directed TANGEDCO to go ahead with the process of inviting tender for procurement of power.

6.15. However, it appears that TANGEDCO had not highlighted the deviations in the bidding process being undertaken by it, before the Commission. If the same was pointed out, the Commission would have examined the issue and decided the same. This is clearly not the case.

6.16. Any decision of TANGEDCO to deviate from the standard bidding documents has to be based on a clear rational and has to be in public interest. It is not open to TANGEDCO to unilaterally provide for any such deviations, without justifying the same at the touchstone of the consumer interest and public interest.

6.17. By excluding trading licensees, TANGEDCO is in fact excluding a large number of prospective bidders, who would only increase the competition in the bidding process and thereby reduce the tariff for the consumers in the state. It also cannot be the contention of TANGEDCO that permitting trading licensees to participate in the bidding process would result in distortion of the bidding process, as the Government of India has prescribed the qualification criteria which includes trading licensees.

6.18. In any event, trading licensees being bidders in the bidding process would require the identification of a developer being the person owning and operating

the generating station. There are large number of long-term and medium-term PPAs operational in the country, wherein the bids have been placed by trading licensees with identified developers, which PPAs are being duly performed. TANGEDCO itself is currently procuring power from trading licensees under back to back PPAs.

6.19. For any deviation to restrict the qualification criteria for bidders and excluding the trading licensees, TANGEDCO would need to justify a clear rational for such restriction, which on the face of it is restricting competitive forces and is contrary to public interest.

6.20. The Respondents in the present case itself are supplying power under a medium-term tender to BEST, the distribution licensee in the state of Maharashtra. The Respondents are clearly in a position to participate in the bidding process initiated by TANGEDCO , but are being prevented only on account of the wrongful restriction of the trading licensees from participating in the bidding process.

6.21. Even apart from the Respondents herein, many other trading licensees will also be in a position to participate in the bidding process, which would be in the interest of TANGEDCO and the consumers at large. There is therefore no justification whatsoever for TANGEDCO to restrict the qualification criteria in the bidding process as against the qualification criteria provided for by the Government of India in the model bidding documents.

6.22. Even assuming that TANGEDCO has valid justification for such restriction is to be imposed, the deviations if any can only be with the prior approval of the Commission. In the present case, it is evident that the bidding documents have been circulated without any such prior approval that is available in the public record. This by itself vitiates the bidding process being undertaken by TANGEDCO.

6.23. Quite apart from the fact that the bidding documents and guidelines including the qualification criteria have been prescribed by the Government of India under the Electricity Act, 2003, which is sought to be wrongfully restricted by the TANGEDCO contrary to the provisions of the Electricity Act and the guidelines framed thereunder, TANGEDCO being a public utility is also required to act in a just and fair manner and not take arbitrary actions.

6.24. The restriction of trading licensees being disqualified in the bidding process is clearly arbitrary and contrary to public interest, even considered de-hors the mandatory provisions of the bidding guidelines and the model bidding documents. The selection process and the conditions prescribed are required to be fair, just and not arbitrary in nature. The actions of TANGEDCO goes contrary to the basic principles of transparency and fairness which are required to be followed. (Ref: *MaheshVarma&Anr. V. State of Maharashtra AIR 2009 Bom 29, Gharda Chemicals Limited v. Central Warehousing Corpn. 2005 (80) DRJ 542 (DB)*)

6.25. In the facts and circumstances mentioned above, the present objections are being filed by the Respondents to the bidding process being undertaken by TANGEDCO by unilaterally amending the provisions of the model bidding documents and restricting the participation of trading licensees in the bidding process.

6.26. The bidding process including the adoption of tariff being subject to the jurisdiction of the Commission, the present objections may be considered by the Commission. It is submitted that the bidding documents issued by TANGEDCO ought to be revised to bring the same in line with the model bidding documents notified by the Government of India under Section 63 of the Electricity Act as allowed by the participation by the qualified bidders as per the criteria provided for by the Government of India.

6.27. The Respondents herein qualify as eligible bidders in terms of the qualification criteria prescribed by the Government of India under the model bidding documents. It is only because of the restrictions imposed by TANGEDCO that the Respondents are disqualified from participating the bidding process, which is erroneous

6.28. In the facts and circumstances mentioned above, it is respectfully submitted that the Commission ought to direct TANGEDCO to align the bidding documents as per the model bidding documents notified by the Government of India under Section 63 of the Electricity Act. TANGEDCO ought to admit trading licensees to participate in the bidding process, in line with the qualification criteria

as prescribed in the model bidding documents notified by the Government of India.

7. Rejoinder for objections raised by M/s. Manikaran Power Limited (Trading Licensee) and M/s. SaiWardha Power Generation Pvt. Ltd. (Generator) to the bidding terms and conditions notified by the Petitioner:-

(i) Finance, Own and Operate (FOO):-

7.1. The Ministry of Power (MoP) through a Resolution dated 29.01.2019 had issued Standard Bidding Document for Medium Term Procurement of Electricity from Power Stations set up on Finance, Own and Operate (FOO) basis.

(ii) Pilot Scheme-II

7.2. The above FOO Standard Bidding Document (SBD) was modified/amended and approved by Government of India.

7.3. In the modified version some clauses were amended in the FOO SBD for procurement of power through medium contract for a period of three years under Pilot Scheme-II, in which one of the modifications was made in RFQ Article 2 "INSTRUCTION TO BIDDERS" Clause 2.2.1 point (c) wherein the provision for participation in tender by Trading Licensee has been deleted. Based on the modifications, Ministry of Power (MoP) had issued a gazette notification through a Resolution dated 30.01.2019 for procurement of aggregated quantum of 2500 MW RTC power from the generating companies having coal based power plants

which are already commissioned and not having Power Purchase Agreements through a process of open and transparent competitive bidding process through an electronic platform (DEEP e-bidding Portal) for a period of three years through medium term under "Pilot Scheme-II" by appointing M/s.PFC Consulting Ltd being as Nodal Agency and M/s.PTC India Ltd (PTC) as an aggregator for which the guidelines was issued by MoP vide Resolution dated 01.02.2019 .

From the above notification, it is clearly understood that power traders are not allowed. The rate discovered under Pilot Scheme-II was Rs.3.26/Kwh at Interconnection Point.

7.4. Initially TANGEDCO had proposed to procure 500 MW RTC Power through medium term for a period of three years under "Pilot Scheme-II" initiated by Gol/MoP for which the Commission approved the proposal of TANGEDCO vide order dated 09.06.2020 in MP No.12 of 2020. Out of 500 MW, TANGEDCO executed Power Supply Agreement for 400 MW RTC Power on 22.10.2021. TANGEDCO is in receipt of 100 MW from 20.01.2022 and the balance quantum is likely to flow in the coming months.

7.5. TANGEDCO had proposed to procure additional 1000 MW RTC Power through medium term tender for a period of three years under "Pilot Scheme-II" initiated by Gol/MoP for which the Commission approved the proposal of TANGEDCO vide order dated 16.11.2021 in MP No.41 of 2021.

7.6. TANGEDCO could not execute Power Supply Agreement (PSA) for the balance quantum of 1100 MW as M/s.PTC had expressed their inability to execute PSA since the generators did not extend their bid validity.

7.7. Considering the untied quantum of 1100 MW under Pilot Scheme-II and expiry of Pilot Scheme -I Power Supply Agreement (PSA) for 550 MW on 31.03.2022, TANGEDCO proposed to procure 1500 MW RTC power through competitive bidding process on medium term contract in line with Pilot Scheme-II from Power Stations set up on Finance, Own and Operate (FOO) for a period of five years from April 2022 to March 2027 appointing M/s.PTC as an Aggregator.

7.8. MP No.48 of 2021 filed on 15.12.21 before the Commission seeking approval to float a medium term tender under FOO guidelines with the deviations proposed in the Bidding Documents in line with Pilot Scheme -II for purchase of 1500 MW RTC power for a period of 5 years appointing M/s.PTC as an Aggregator. TANGEDCO Board also had approved the above proposal.

7.9. Since TANGEDCO proposed to float medium term tender in line with Pilot Scheme II, approval was sought for many deviations in the Original Model Bidding Documents wherein the deviation in RFQ 2.2 Eligibility of Bidders was one among them.

7.10. TANGEDCO floated medium term tender in DEEP Portal for procurement of 1500 MW RTC power for a period of five years through the Aggregator M/s.PTC India Ltd under FOO (Finance, Own, Operate) Guidelines with the

proposed deviations sought in MP No.48 of 2021 on 20.12.21 in anticipation of approval from the Commission.

7.11. The Commission vide its daily order dated 21.12.21 in MP No.48 of 2021 ordered "to go ahead with the process of inviting tender for procurement of power" and orally directed TANGEDCO to get approval of the Commission before finalizing the price discovered in the tender.

7.12. After Commission's Order dated 21.12.21 in MP No.48 of 2021 TANGEDCO uploaded the tender documents in TANGEDCO website on 21.12.21 @16 Hrs and arrangements made to publish the tender specifications in two leading Tamil and English Newspapers on 22.12.2021.

7.13. The pre-bid meeting for the above tender was held on 03.01.2022 through online and offline to clarify the queries/doubts raised in the Model Bidding Document (MBD) with the generators. 11 Nos. persons came in person for the meeting and around 26 Nos. were participated through online.

7.14. Many generators raised queries In the MBD and sought clarifications through emails apart from pre-bid meeting in which M/s. Manikaran Power Ltd was one among them.

7.15. TANGEDCO had filed additional affidavit No.1 on 07.01.2022 intimating the queries/doubts raised by the generators with respect to terms and conditions in the Model Bid Documents during the pre bid meeting for the above tender held

on 03.01.2022 through online and offline and also TANGEDCO response for the queries. The same was uploaded in the DEEP Portal.

7.16 M/s.SaiWardha Power Generation Pvt. Ltd one the intervenor in MP NoA8 of 2021 had also participated in the pre bid meeting (offline) conducted but not participated in the tender process.

7.17. The complete tender process was carried out through online in DEEP Portal. Any changes in the schedule of bidding process and deviations proposed were uploaded as corrigendum in a transparent manner. All generators/traders were aware of each and every process of the tender.

7.18. The hearing dates of MP NoA8 of 2021 are 21.12.2021, 19.01.2022, 01.02.2022, 15.02.2022, 22.02.2022, 08.03.2022 and 15.03.2022. The objections were raised by M/s. Manikaran Power Ltd and M/s.SaiWardha Power Generation Pvt. Ltd only during the hearing held on 08.03.2022 after knowing that the tender process had reached its finality from the time schedule uploaded in the DEEP Portal and no objections were raised during the previous hearings which clearly indicates the intention of intervenors to delay the power purchase activities of TANGEDCO.

7.19. The only traders were not allowed to participate in the tender but M/s.saiWardha Power Generation Pvt. Ltd being the generator could have very well participated in the tender. It is learnt that M/s.SaiWardha Power Generation Pvt. Ltd located in Maharashtrastate and the plant is connected to State