

Rajasthan Electricity Regulatory Commission

Petition No. RERC-2138/2023

Petition for seeking approval of deviations, along with justifications in the Model Bidding Document for procurement of 160 MW RTC power for 5 years on the basis of the Model Bidding documents viz Request for Qualification (RFQ), Request for Proposal (RFP) and Agreement for Procurement of Power (APP) issued under MoP, Gol Guidelines dated 29th January 2019 and amendments thereon for medium term Procurement of Electricity from Thermal Power Stations set up on Finance, Own and Operate (FOO) basis for meeting the power requirement of Rajasthan Discoms.

Coram:

Dr. B.N. Sharma, Chairman
Sh. Hemant Kumar Jain, Member
Dr. Rajesh Sharma, Member

Petitioner : Rajasthan Urja Vikas Nigam Ltd.

Date of hearings : 22.08.2023

Present : Sh. Kartik Seth, Advocate for Petitioner.

Order Date:

23.08.2023

ORDER

1. Petitioner RUVNL has filed this petition on 28.06.2023 for for seeking approval of deviations, along with justifications in the Model Bidding Document for procurement of 160 MW RTC power for 5 years on the basis of the Model Bidding documents viz Request for Qualification (RFQ), Request for Proposal (RFP) and Agreement for Procurement of Power (APP)

issued under MoP, Gol Guidelines dated 29th January 2019 and amendments thereon for medium term Procurement of Electricity from Thermal Power Stations set up on Finance, Own and Operate (FOO) basis for meeting the power requirement of Rajasthan Discoms.

2. Matter was listed for the hearing on 22.08.2023 Sh. Kartik Seth, Advocate appeared for Petitioner.
3. Petitioner in its petition and during the hearing has submitted that:
 - 3.1 The Commission in Petition No. 2097/2023 filed by the Petitioner herein, vide judgment dated 31.03.2023, approved 160 MW power procurement for a period of 5 years on medium-term basis as per power procurement guidelines issued by Ministry of Power.
 - 3.2 Subsequent to the grant of approval by the Commission, the Petitioner on 24.05.2023, initiated tender for procurement of 160 MW power on medium term basis (with lump-sum tariff) on DEEP portal and uploaded the bidding document {i.e. Request for Qualification (RFQ), Request for Proposal (RFP) and Agreement for Procurement of Power (APP)} prepared in line with the Model Bidding Document issued by Ministry of Power on 29.01.2019 for procurement of power on FOO basis.
 - 3.3 Pre-bid meeting was held on 09.05.2023 and last date of submission of bid was 26.05.2023. During the pre-bid meeting, the prospective bidders raised their queries and suggested modification of various provisions of the bid document such as relaxation in technical capacity qualification criteria; tariff inclusive of all taxes and duties, etc.
 - 3.4 In the meantime, on 12.05.2023, the Ministry of Power notified amendment in the model APP for procurement of power on FOO basis issued on

19.12.2022. This amended model APP was uploaded by the Petitioner on DEEP portal for reference of the bidders.

- 3.5 Considering the suggestion/queries of the bidders on RFQ, RFP and revised APP, it was found prudent and crucial to amend certain clauses of the model bidding document to ensure increased participation and discovery of competitive tariff as otherwise, certain prospective bidders are likely to opt out of the bidding process due to the small quantum (160 MW) of power procurement.

Deviation-1:

- 3.6 As per clause 2.2.2 of the Request for Qualification only those bidders are eligible to participate in the bid that own and operate power generating station(s) having an installed capacity equivalent to at least twice the capacity for which the Bidder is willing to bid.
- 3.7 Prospective bidders in the pre-bid meeting suggested/submitted that RUVNL needs upto 160 MW power to meet its requirements. Hence, Bidders that have available capacity upto the offered capacity may also be allowed to participate in the bid process. There are many small power plants which have surplus capacity upto offered capacity but could not participate as these small capacity plants cannot meet criteria of twice the offered capacity.
- 3.8 Further, RUVNL'S power requirement will be fulfilled from the offered capacity only, and once bids are submitted RUVNL will not have control over the project capacity beyond offered capacity. Hence, it is prudent that for meeting technical criteria only offered capacity shall be considered and requirement of capacity twice the offered capacity be relaxed to increase participation and discovery of competitive tariff. Based on the suggestion of prospective bidders, the Petitioner also feels

that by incorporating this deviation, participation from the bidders will increase in the bid process which will lead to discovery of the most competitive tariff, and therefore, the deviation is being sought that the bidders should own and operate power generating station(s) having installed capacity at least equivalent to the capacity for which bidder is willing to bid.

Deviation-2:

- 3.9 Clause 11.8.1 of the Agreement for Procurement of Power (APP) provides that the Tariff shall be inclusive of all taxes and duties, save and except the taxes and duties specified in Clause 11.8.2. Further, it is provided that the Supplier shall pay all taxes and duties, including the taxes and duties specified in Clauses 11.8.2 in accordance with Applicable Laws. Clause 11.8.2 of the APP provides that:-

"The Tariff payable by the Utility under this Article 11 shall be exclusive of Goods and Service Tax, Electricity Duty, Value Added Tax or Goods and Service Tax, Custom Duty on Fuel or any replacement thereof, if applicable, and any Goods and Service Tax, Electricity Duty, Value Added Tax or Goods and Service Tax and Custom Duty on fuel thereon shall be paid by the Supplier and reimbursed by the Utility upon submission of necessary particulars by the Supplier"

- 3.10 The deviation that is being sought in modification of clause 11.8.1 to the extent that "The Parties expressly agree that the Tariff shall be inclusive of all taxes and duties, in accordance with Applicable Laws". After amendment of clause 11.8.1, clause 11.8.2 become redundant and hence, it is proposed to delete the same.

- 3.11 Above mentioned taxes and duties, contains Electricity Duty which is applicable on sale of electricity in some states only. If such state specific taxes and duties are left aside while evaluation of the bids, then it will not lead to level playing field for all the participating bidders. There will not be

uniformity among the bidders and the bidders having power plants in the state where such taxes and duties are applicable will enjoy an advantage over other bidders.

- 3.12 This amendment in clause 11.8.1 shall result in uniformity for all the bidders as tariff quoted by the bidder is proposed to be inclusive of all taxes and duties applicable as per law and existing as of bid due date.

Deviation-3:

- 3.13 Clause 13.1 of the Agreement for Procurement of Power (APP) is being sought to be deleted. Clause 13.1 of the APP reads as under:

"13.1 Default Escrow Account

13.1.1 The Utility and the Supplier shall, prior to the Appointed Date, execute a default escrow agreement with the Utility's bank substantially in the form specified in Schedule-C (the "Default Escrow Agreement") for the establishment and operation of the default escrow account (the "Default Escrow Account") in favour of the Supplier. The Parties agree and acknowledge that the Default Escrow Account shall be established and maintained at a bank where Utility's revenue of at least twice the Monthly Payment are normally deposited (the "Default Escrow Bank"). The Utility expressly agrees and undertakes that throughout the term of the Contract Period, no less than twice the Monthly Payment shall Continue to be deposited at that bank or any substitute thereof that the Parties may by mutual agreement determine and Revenues equivalent to 1.1 times the sum of 1/12th of the applicable annual Capacity Charge for the relevant year and 1/12th of the total amount paid on account of variable charge for the last year (the "Monthly Payment") shall be routed every month through the Default Escrow Account in accordance with the provisions of this Clause 13.1 and the Default Escrow Agreement.

Provided that in the first year of operation, total amount of variable charge shall be assessed by multiplying energy generation at normative availability and applicable variable charge.

13.1.2 *The Utility and the Supplier shall, prior to the Appointed Date, execute a deed of hypothecation substantially in the form specified at of Schedule-D (the "Deed of Hypothecation"), whereby the Utility shall hypothecate to the Supplier an amount equal to Monthly Payment, to be deposited every month in the Default Escrow Account for discharging the liabilities arising out of and in relation to the Secured Obligations.*

13.1.3 *The Parties acknowledge and agree that during the period commencing from the 25th (twenty fifth) day of every month and until discharge of any Monthly Invoice due and payable on or prior to that day, an amount equal to the Monthly Payment shall be withheld in the Default Escrow Account for payment to the Supplier against such Monthly Invoice and the balance remaining shall be available to the Utility for withdrawal or transfer in accordance with the provisions of the Default Escrow Agreement.*

13.1.4 *The Utility shall ensure that the Supplier has the first priority charge on the Revenues deposited into the Default Escrow Account, in accordance with the terms of the Default Escrow Agreement and the Deed of Hypothecation, but not exceeding the Monthly Payment for and in respect of any month."*

- 3.14 Current APP has sufficient provision for payment security to the Supplier. Payment Security mechanism comprising of Letter of Credit ("LC") which will be provided to the generator. Further, in terms of the Electricity (Late Payment Surcharge and related matters) Rules, 2022 ("LPS Rules") notified by Ministry of Power, generators upload their monthly electricity supply invoices on the 'PRAAPTI' portal and failure of Discoms to make payment within stipulated period of 75 days leads to stringent actions.
- 3.15 As per provisions of the escrow agreement and hypothecation agreement, necessary funds are secured so that LC is always available to the generator against power supplied. Section 6 of the LPS Rules, 2022 provides that procurer shall provide and maintain payment security mechanism in the form of Letter of Credit and in case of non-maintenance of payment security mechanism, power supply will be

regulated. Hence, it is amply clear that more stringent and efficient measures are already available to the generators which secures their monthly payment and ensures that LC is always available during the PPA term as compared to PPA provisions. Deletion of such conditions in any way will not impact the interests of the Bidders whose payment is abundantly secured.

3.16 Further, to provide such security mechanism, Discoms will need approvals from their lenders and bankers which again is a very lengthy & time-consuming process. This will lead to delay in fulfilment of PPA Conditions and supply of power under the contract and defeat the purpose of this bid process to avail power urgently to meet the requirements of the Discoms.

3.17 From the above-mentioned facts and circumstances, it is abundantly clear that the Petitioner is complying with the guidelines issued by the Ministry of Power, Government of India and the proposed power procurement process is absolutely based on and within the ambit of the model bidding documents prescribed by the Ministry of Power, Government of India for medium term (FOO) with certain minor and necessary deviations in order to increase participation of the bidders in the ultimate interest of public. Thus, present case is fit for approval of deviations and clarifications by the Commission owing to the bonafide requirement and deficit assessed for the coming financial year. The Petitioner utility shall suffer enormous burden and the same shall in turn result in rise in electricity charges which will eventually burden the end consumers in the State in case the power crisis is not dealt with.

3.18 In view of above, Petitioner has prayed to approve the deviations taken hereinabove from the model bidding documents for 160 MW power procurement for 5 years on the basis of medium-term power procurement

guidelines issued by the Ministry of Power, Government of India under Section 86 (1) (b) of the Electricity Act, 2003.

Commission's view

4. Commission has considered the submissions of the Petitioner, in light of the documents and facts submitted by them.
5. We observe that the Petitioner is seeking approval of following deviations in the Model Bidding Document for procurement of 160 MW RTC power for 5 years:-
 - (i) Deviation-1:- The deviation sought in clause 2.2.2 of the Request for Qualification (RFQ) is that the bidders should own and operate power generating station(s) having installed capacity at least equivalent to the capacity for which bidder is willing to bid.
 - (ii) Deviation-2:- The deviation that is being sought in modification of clause 11.8.1 of the Agreement for Procurement of Power (APP) to the extent that "The Parties expressly agree that the Tariff shall be inclusive of all taxes and duties, in accordance with Applicable Laws". After amendment of clause 11.8.1, clause 11.8.2 become redundant and hence, it is proposed to delete the same.
 - (iii) Deviation-3:- Clause 13.1 of the Agreement for Procurement of Power (APP) is being sought to be deleted.
6. We have carefully considered the deviations proposed by the Petitioner in the Model Bidding Document issued under MoP, Gol Guidelines dated 29th January 2019 and amendments thereon for medium term Procurement of Electricity from Thermal Power Stations set up on Finance, Own and Operate (FOO) basis.

7. We observe that the Commission in Petition No. 2097/2023 filed by the Petitioner vide judgment dated 31.03.2023, approved 160 MW power procurement for a period of 5 years on medium-term basis as per power procurement guidelines issued by Ministry of Power.
8. The Petitioner thereafter, initiated tender for procurement of 160 MW power on medium term basis. During the pre-bid meeting, the prospective bidders raised their queries and suggested some modifications in the bid documents.
9. On the suggestions of the bidders, the Petitioner is seeking approval of above deviations in the Model Bidding Document for procurement of 160 MW RTC power for 5 years.
10. The only test before the Commission while considering the deviations proposed in the MBDs is, whether or not the deviations proposed are restricting the competition in discovering the most competitive tariff.
11. The first proposed modification in clause 2.2.2 of the Request for Qualification is to allow those bidders that have available capacity equivalent to bid capacity instead of at least twice the capacity of bid.
12. In Commission's considered view requirement of capacity twice the offered capacity may be relaxed to increase participation and discovery of competitive tariff as this will allow small power plants also to participate in the bid which have surplus capacity to offer. Thus this will not adversely affect the competition.
13. The second modification proposed in clause 11.8.1 of the Agreement for Procurement of Power (APP) to quote tariff inclusive of all taxes and duties shall result in uniformity for all the bidders as it will take care of state specific

taxes and duties. Further, this will provide the level playing field for all the bidders from different states. Thus, it does not restrict the competition.

14. The proposed deletion of the Clause 13.1 of the Agreement for Procurement of Power (APP) will also not adversely affect the competition as Payment Security mechanism comprising of Letter of Credit ("LC") will be provided to the generator. Further, generators may upload their monthly electricity supply invoices on the 'PRAAPTI' portal of Ministry of Power, Government of India and failure of Discoms to make payment within stipulated period of 75 days leads to stringent actions.
15. Thus payment security of the suppliers as per APP and the Electricity (Late Payment Surcharge and related matters) Rules, 2022 ("LPS Rules") have sufficient provisions to safeguard the payment security to the Supplier.
16. The deletion of the Clause 13.1 of the APP will save considerable time in procuring the power as per submissions of the Petitioner and in this specific case shall be in the larger interest of consumers.
17. In view of the above mentioned facts and circumstances, we find that no proposed deviation is restricting the competition. Therefore, in the interest of the consumers of the state and to increase the participation in the bid process & discovery of competitive tariff, Commission deems it appropriate to approve the above proposed deviations.
18. The petition is disposed of, accordingly.

(Dr. Rajesh Sharma)
Member

(Hemant Kumar Jain)
Member

(Dr. B.N. Sharma)
Chairman