

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 33 of 2008

In the matter of
Approval of Deviations taken in Request for Proposal (RFP) documents issued to
bidders, from Standard Bidding Documents issued by Ministry of Power, for
Development of Dhopave Project under International Competitive Bidding
Process (Case-2 Bidding)

Shri. A. Velayutham, Member

Shri. S.B.Kulkarni, Member

ORDER

Dated: October 14, 2008

The Maharashtra State Electricity Distribution Company Limited (MSEDCL) filed a Petition under affidavit before the Commission on May 23, 2008, seeking approval of deviations taken in Request for Proposal (RFP) documents issued to bidders, from Standard Bidding Documents issued by the Ministry of Power (MoP), for development of Dhopave Project under International Competitive Bidding Process under Case-2 bidding.

2. The main prayers in the Petition filed by MSEDCL are as follows:
- § *“Examine the concerns expressed by the Petitioner for a favourable dispensation as detailed in the petition.*
 - § *Condone any inadvertent omissions/errors/shortcomings and permit MSEDCL to add/change/modify/alter this filing and make further submissions as may be required at a future date.*
 - § *Pass such further and other orders, as the Hon’ble Commission may deem fit and proper keeping in view the facts and circumstances of the case.”*



3. MSEDCL made the following submissions in its Petition:
- a) MSEDCL has taken the initiative for development of imported coal based power project at Dhopave, District Ratnagiri, Maharashtra, under Case-2 of the Competitive Bidding Guidelines (CBG) issued by the Ministry of Power (MoP), Govt. of India (GoI) and has appointed the Maharashtra State Power Generation Company Ltd. (MSPGCL) as the authorised representative of MSEDCL, the Procurer.
 - b) A Special Purpose Vehicle (SPV) by the name of 'Dhopave Coastal Power Limited' has been incorporated, which will own and operate the generation plant.
 - c) MSEDCL has completed the Stage-I of the Bidding Process (RFQ stage) and based on RFQ bids received, MSEDCL has short-listed 10 Parties for the Request for Proposal (RFP) stage.
 - d) Subsequent to completion of RFQ stage, RFP Bid Documents have been issued to the qualified bidders. A pre-bid conference was held on January 25, 2008 for which, the short listed bidders were invited. The prospective bidders submitted their queries/requests for clarifications. MSEDCL has considered the same and after internal deliberation, has prepared revised RFP Bid Documents, along with a document enumerating the amendments and clarifications on the queries raised.
 - e) The Default Escrow Agreement, Agreement to hypothecate cum deed of hypothecation and Share Purchase Agreement, which also form part of the RFP Project Documents, are also required to be issued to the bidders. As no standard draft for these documents are available from MoP, the documents issued under Ultra Mega Power Project (UMPP) have been adopted for the project.
4. The Commission scheduled the Technical Validation Session (TVS) in the matter on July 16, 2008, and directed MSEDCL to serve a copy of its Petition to the four authorised Consumer Representatives.



5. The Technical Validation Session in the matter was held at the Commission's office on July 16, 2008. No Consumer Representative was present during the Technical Validation Session.

6. During the Technical Validation Session, MSEDCL made a presentation on the matter highlighting the salient features of the proposed Bid Documents, as detailed below:

a) Bidding Process:

MSEDCL submitted that it had commenced the RFQ bidding process for long-term procurement of 1600 MW (minus 10%) power under Case-2 Bidding Route stipulated in the Competitive Bidding Guidelines (CBG). MSEDCL also submitted that the price bid submission is scheduled after 30 days from the approval of RFP Bid Documents by the Commission and intimation of the Transfer Price to the short-listed bidders.

b) Summary of the Deviations as proposed in the RFP Document

- MSEDCL included the definition of 'Affiliate' for better clarity as the same was included in the RFQ Documents.
- MSEDCL included the definition of the 'Closing Date' as the same is included in the draft Share Purchase Agreement.
- MSEDCL included the definition of 'Parent Company' for better clarity.
- MSEDCL included the definition of 'Project' for better clarity as the same was included in the RFQ Documents.
- MSEDCL submitted that the original Standard RFQ and RFP Project documents issued on January 31, 2007 by MoP effectively imposed equity lock-in of 26% for a period of 12 years from the Commercial Operation Date (COD) of the Plant. However, the revised Standard RFQ and RFP Project documents issued on September 21, 2007 by MoP effectively imposed equity lock-in of 26% for a period of 5 years from the CoD of the Plant. Hence, MSEDCL has revised the Clause relating to equity lock-in in line with the revised Standard Bidding Documents (SBD) issued on September 21, 2007 by MoP.
- MSEDCL has fixed the cost of the RFP Documents as Rs 5 Lakh.
- MSEDCL has specified that the sum total of the Contracted Capacities of all the Units shall not be less than 1340 MW while the Installed Capacity shall be in the range of 1600MW (minus 10%) with the maximum number of Units restricted to 3 Units.



c) Summary of the Deviations as proposed in the Power Purchase Agreement (PPA)

- MSEDCL has customised the definition of 'Project' including 'jetty, conveyor system for transportation of coal to the plant site, if required, and other associated facilities' based on the project specific requirements.
- MSEDCL has customised the definition of Unscheduled Interchange in line with the MERC's Regulations.
- MSEDCL has included the following provision with respect to change in Unit configuration and advancement of schedule '*....the Revised Scheduled COD of any Unit shall not be earlier than Thirty One (31) months from the NTP*' in Clause 3.1.2 (viii) (b) based on the customisation allowed in the Standard Bidding Documents.
- MSEDCL has included the following activities in Clause 3.1.2A (Conditions Subsequent) as these activities are not expected to be completed before timelines for issue of Letter of Intent (LoI).
 - § Right of Way or land acquisition for pipelines from water source, within 12 months from the date of issue of LoI;
 - § Possession of Land for Project including land for Jetty, within 12 months from the date of issue of LoI;
 - § Environment Clearance, within 12 months from the date of issue of LOI.
- MSEDCL has included a provision that the entire Installed Capacity of the Power Station and all Units shall at all times be for the exclusive benefit of the Procurer to retain control of Procurer on any additional capacity over and above Contracted Capacity generated by the Developer of the Project.
- MSEDCL has included a provision of non-extension of the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act by the Government of India, upto the Scheduled Commercial Operation Date of the Power Station, as a Change in Law based on the queries raised by the bidders.
- MSEDCL has customised the compensation amount in case of Change in Law to 0.267% of the Non-Escalable Capacity charges for every cumulative increase/decrease of Rs 20 Crore in the Capital cost over the term of the Agreement.
- MSEDCL has customised the indemnity claims in a Contract Year to Rs 8 Crore based on the customisation allowed by the Standard Bidding Documents.



7. The Commission observed that the definition of Unsheduled Interchange charge needs to be modified and customised as per the principles explained in the Commission's Order on introduction of Intra-State Availability Based Tariff regime in Maharashtra and other related issues.

8. The Commission suggested that the mechanism for treatment of the income tax liability in case the Government of India does not extend the income tax holiday for infrastructure projects under Section 80 IA of the Income Tax Act, should be clearly enunciated in the Bid Documents.

9. Shri. Palaniappan M., Regulatory Expert of the Commission, detailed the additional information required and MSEDCL agreed to submit the replies to the queries raised by the Commission and the additional information within one week. MSEDCL was informed that once replies on queries raised during TVS were submitted, the Petition would be admitted, and the Notice for the Public Hearing would be issued.

8. Subsequently, MSEDCL submitted the replies to the queries raised during TVS vide its letter dated July 25, 2008, received on July 28, 2008.. The queries raised by the Commission during TVS and the replies submitted by the MSEDCL are summarised below:

(a) Relevant Terminology

Clause 1.2.2 of Schedule 7 of Draft PPA stipulates:

“CAA is the cumulative Availability, as per SLDC Energy Accounts, from the first day of the Contract Year “n” in which month “m” occurs upto and including Month “m”;

AA is the Availability, as per SLDC Energy Accounts, in the relevant Settlement Period (expressed as a percentage of Contracted Capacity in such Settlement Period);”

During TVS, MSEDCL was asked to consider the terminology for ‘SLDC Energy Accounts’ as defined in the relevant Order of the Commission.



MSEDCL Reply

MSEDCL in its reply proposed the amendment to modify the following definitions in the PPA/RFP documents in line with the provisions and terms used in the Commission's Order on Introduction of Availability Based Tariff regime at State Level (Case No. 42 of 2006):

“CAA is the cumulative Availability, as per Energy Account prepared by MSLDC, from the first day of the Contract Year “n” in which month “m” occurs upto and including Month “m”;

AA is the Availability, as per Energy Account prepared by MSLDC, in the relevant Settlement Period (expressed as a percentage of Contracted Capacity in such Settlement Period); “

(b) **Basis for considering the amount towards compensation for Change in Law**

Clause 13.2 (a) of Article 13 of the Draft PPA stipulates:

“For every cumulative increase/decrease of each Rupees Twenty (20) Crores in the Capital Cost over the term of this Agreement, the increase/decrease in Non Escalable Capacity Charges shall be an amount equal to 0.267% of the Non Escalable Capacity Charges. Provided that the Seller provides to the Procurers documentary proof of such increase/decrease in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.

It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of Rs. Twenty (20) Crores”

During TVS, MSEDCL was asked to provide the basis of considering the amount of Rs 20 Crore for computing the compensation payable.

MSEDCL Reply

MSEDCL submitted that an amount of Rs 20 Crore and 0.267% of Non-Escalable capacity charge has been arrived based on the provisions in the PPA, which is a part



of RFP Project Documents for Ultra Mega Power Projects (UMPPs). The UMPP RFP Project Documents provides that for every cumulative increase/decrease of Rs 50 Crore in the capital cost, the increase/decrease in Non-Escalable capacity charges shall be an amount equal to 0.267% of the Non Escalable Capacity Charges. MSEDCL has retained the same principle in the Dhopave RFP Project Documents, however, the quantum of Rs 50 Crore has been proportionately reduced for project with installed capacity of 1600 MW and the same percentage of 0.267% as stipulated in the UMPP RFP Documents for adjustment in the Non Escalable Capacity Charges has been retained.

(c) **Basis for considering the amount towards Indemnity Claims**

Clause 15.2 of Article 15 of Draft PPA stipulates as follows:

“Party” shall be liable to indemnify the other Party (“Indemnified Party”) under this Article 15 for any indemnity claims made in a Contract Year only upto an amount of Rupees Eight (8) Crores.”

During TVS, MSEDCL was asked to provide the basis of considering the amount of Rs 8 Crore towards indemnity claims.

MSEDCL Reply

MSEDCL submitted that the amount of Rs 8 Crore has been arrived at based on the provisions in the PPA , which is a part of UMPP RFP Project Documents. The UMPP RFP Project Documents limits the maximum indemnity claims made in a contract year to Rs 20 Crore. MSEDCL has retained the same principle for Dhopave project, however, the quantum of Rs 20 Crore has been proportionately reduced taking into consideration the lower installed capacity envisaged for Dhopave Project vis-à-vis UMPP.

(d) **Definition of Unscheduled Interchange Charge**

Article 1.1 of Draft PPA stipulates:

“Unscheduled Interchange” or “UI” - shall have the meaning ascribed thereto in Rule 24 of the CERC (Terms and Conditions of tariff) Regulations 2004 as amended or revised from time to time or shall have the meaning ascribed to it under the InSABT Regulation as would be issued by the



Maharashtra State Electricity Regulatory Commission as amended or revised from time to time;”

During TVS, MSEDCL was asked to modify the definition of the Unscheduled Interchange (UI) Charge and directed by the Commission to customise the same in accordance with the principles explained in the Commission’s Order on Introduction of Availability Based tariff regime at State level within Maharashtra and other related issues.

MSEDCL Reply

MSEDCL, in its reply, proposed the amendment to change the definition of the term “UI” in the RFP Project Documents and also make other relevant changes, as prescribed under the Order on Introduction of Availability Based tariff regime at State level within Maharashtra and other related issues and any implications on account of the provisions of the said order shall have to be borne by the Seller.

MSEDCL submitted the amended Clauses in this regard as follows:

Clause 4.4.6 of Article 4 of the Draft PPA:

“The sale under provisions of the Balancing and Settlement Code to be issued under MERC’s order as stipulated under “Introduction of Availability Based Tariff Regime at State Level within Maharashtra and other related issues (Case No. 42 of 2006)”, as amended or revised from time to time, shall not be considered as sale to third party for the purposes of this Agreement.”

Clause 13.1.1 of Article 13 of the Draft PPA:

“but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect under provisions of the Balancing and Settlement Code to be issued under MERC’s order as stipulated under “Introduction of Availability Based Tariff Regime at State Level within Maharashtra and other related issues (Case No. 42 of 2006)”, as amended or revised from time to time, by an Appropriate Commission and its implication on the seller.”



Clause 1.2.6 of Article 7 of the Draft PPA:

“Variation between Scheduled Energy and actual energy at the Delivery Point shall be accounted for in line with provisions of the Balancing and Settlement Code to be issued under MERC’s order as stipulated under “Introduction of Availability Based Tariff Regime at State Level within Maharashtra and other related issues (Case No. 42 of 2006)”, as may be amended or revised from time to time.”

(e) **Income Tax Holiday**

Article 13.1.1 of the Draft PPA stipulates:

“Provided that if the Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law.”

MSEDCL submitted that the above mentioned provision has not been mentioned in the Standard Bidding Documents and it has included the same based on queries raised by various bidders during the Pre Bid conference.

During TVS, MSEDCL was asked to clearly specify a mechanism in the Bid Documents in case the Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, up to the scheduled Commercial Operation Date of the power station.

MSEDCL Reply

MSEDCL submitted that as per the provisions of the Income Tax Act, the benefit of income tax under Section 80-IA is available for projects commissioned upto FY 2011-12 only. MSEDCL submitted that it is improbable that the plant will get commissioned till FY 2011-12. Consequently, the application of Section 80-IA in context of the project is very remote. However, if PPA were to capture the eventuality of continuation of Section 80-IA beyond FY 2011-12 through change in law mechanism, in a similar way, it would need to provide for any new benefits under Income Tax Act which may be introduced in future. Since, it would not be possible either to quantify or provide for any mechanism thereof for such uncertainties through change in law, MSEDCL proposes to withdraw the deviation earlier proposed from Standard Bidding Documents in respect of Section 80-IA benefit.



10. MSEDCL vide its submission dated July 25, 2008 also raised two other issues in addition to the replies to the queries raised by the Commission during TVS.

(a) **Time Frame for Indicating Transfer Price**

Article 1.1.5 of the RFP stipulates:

“The Procurer / Authorized representative will transfer the project site (site details along with the site map enclosed in Annexure 5) to the seller after signing Share Purchase Agreement, at a price which will be indicated 30 days prior to the bid submission deadline.”

Subsequently after TVS, MSEDCL submitted that as per the Competitive Bidding Guidelines, the price at which the project site will be transferred to the bidders can be indicated 30 days prior to the bid submission deadline. However, as per the revised/amended Standard Bidding Guidelines issued by the MoP on September 27, 2007, the same has been revised to “at least 15 days before the due date for submission of RFP bids. The relevant clause stipulates as follows:

“The project site shall be transferred to the successful bidder at a price to be intimated at least 15 days before the due date for submission of RFP bids.”

Further, MSEDCL submitted that the Commission, in its Order regarding approval of deviations taken in RFQ from Standard Bidding Documents issued by MoP for Competitive Bidding under Case-II, for development of Dhopave Project (Case 35 of 2007) has also stated the following:

“The Commission is of the view that the Transfer Price should be informed to short-listed bidders at least two weeks prior to the Technical and Price Bid submission date.”

Accordingly, MSEDCL requested the Commission to modify the period for intimation of the price at which the project site would be transferred to at least 15 days instead of 30 days prior to the due date for submission of RFP bids in line with the revised Competitive Bidding Guidelines.

(b) **Conditions Subsequent**

Clause 3.1.2A of the Draft PPA stipulates:



“Obtaining order of the Appropriate Commission adopting the Tariff under Section 63 of the Electricity Act, 2003, within six months of the Effective Date.”

MSEDCL submitted that Clause 3.1.2 A of the Standard Bidding Guidelines deals with the Conditions Subsequent to be fulfilled by the Procurer, which states that the Procurer should obtain approval of the Appropriate Commission for adopting the Tariff under Section 63 of the Electricity Act, 2003, within six months of the Effective Date.

MSEDCL submitted that it proposes to amend the above Clause to include the following activities:

- Right of Way or land acquisition for pipelines from water source, within 12 months from the date of issue of LoI;
- Possession of Land for Project including for Jetty, within 12 months from the date of issue of LoI;
- Environment Clearance, within 12 months from the date of issue of LOI.

MSEDCL submitted that as the above mentioned activities are not expected to be completed before the timelines for issue of LoI, –hence, it is proposed to include these activities in PPA in Article 3.1.2A. MSEDCL also submitted that it has been observed in relation to other projects awarded through competitive bidding including UMPPs that land acquisition process and environmental clearances have stretched beyond the bidding time frame and have consequently been kept as Condition Subsequent in the PPA, which has to be fulfilled within a time frame stipulated therein by Procurer.

MSEDCL further submitted that it is interested to ensure timely/early implementation of the project as it would enable MSEDCL to mitigate the deficit in the system to some extent. Keeping this in mind, MSEDCL has permitted the successful Bidder to crash the timelines for implementation of the project and to commission the plant earlier than the timelines proposed under the Standard Bidding Documents, however, not earlier than 31 months from the Notice to Proceed. This limit as envisaged under Standard Bid Documents is 42 months.

MSEDCL requested the Commission to kindly approve the timelines for meeting Conditions Subsequent as proposed by MSEDCL, which are based on the best



estimates of MSEDCL/MSPGCL considering the current status of project development activities like land acquisition, etc.

11. The Commission admitted the Petition (Case No.33 of 2008) on August 1, 2008 and directed MSEDCL to issue a Public Notice for inviting objections, comments and suggestions on the Petition. The Public Notice appeared in various newspapers including Indian Express (English), The Times of India (English), Sakal (Marathi), Lokmat (Marathi) and Navbharat Times (Marathi). The Commission scheduled the Public Hearing in the matter on September 02, 2008 at 15.00 hours at the office of the Commission.

12. The Commission received written objections and comments from a total of two (2) objectors. The list of individuals/organizations who have submitted written objections/comments is provided at **Annexure - 1**. The Public Hearing in the matter was held on September 02, 2008. The list of stakeholders who participated in the Public Hearing is enclosed at **Annexure-2**.

13. During the Public Hearing, MSEDCL discussed the issues raised by M/s Lanco Infratech Limited, which has been discussed in subsequent paragraphs.

14. Subsequent to the public hearing, MSEDCL submitted replies to queries raised by the Bidders vide its letter dated September 11, 2008, received on September 12, 2008.

15. The key issues raised during the regulatory process and MSEDCL's replies on same are discussed below:

(a) Installed Capacity

Article 1.1.3 of the RFP stipulates:

“Minimum contracted capacity of 1340 MW and installed capacity in the range of 1600 MW (minus 10%)”

M/s Lanco Infratech Limited submitted that available configuration for meeting the requirements of the contracted capacity are 3x500 MW or 2x800 MW and suggested that for getting competitive tariff and to provide a choice of technology and suppliers, the range of installed capacity may be kept between 1200 to 1600 MW. Also, such a range is in line with recent Case-2 bidding adopted in other States like 1200 to 1500



MW in Bhaiyathan Project in Chattisgarh. M/s Lanco Infratech Limited also submitted that in the current market scenario, there are few serious 800 MW Boiler Turbine Generator (BTG) suppliers to India and 500 MW sub-critical units shall not be competitive and hence, the provision for 600/660MW Units is required in the interest of competitive tariff for the consumers of Maharashtra.

M/s Reliance Power Limited submitted that the RFP Documents restrict the maximum number of Units to 3 and to ensure wider participation and flexibility to all the bidders, such a restriction may be removed so that the bidders can decide the optimum Unit configuration so as to offer competitive tariff. Reliance Power Limited further submitted that in order to witness competitive tariff, it is requested to grant Mega Power Project status to the project. The necessary activities that are required to be confirmed by the Procurer's grant of this Mega Power Project status to the project may be incorporated in the RFP Documents. Also, the Contracted Capacity may be reduced to 1250 MW so as to offer sizeable capacity outside the State to avail Mega Power Project benefits.

MSEDCL Reply

On the issue of the range of the installed capacity, MSEDCL submitted that the available configuration for meeting the requirements of installed capacity are 3 x 500, 2 x 800 MW and 2 x 660 MW + 1 x 250 MW.

(b) Conditions Subsequent

As regards possession of land, M/s Lanco Infratech Limited submitted that the Procurer should have possession of land prior to issue of LOI. M/s Lanco Infratech Limited also submitted that initial consents should be provided by the Procurer to the Seller within six months from the Effective Date.

M/s Reliance Power Limited submitted that as per the Competitive Bidding Guidelines, the rapid EIA should have been available before the issue of the RFQ and the proposals for environmental clearance should have been submitted before the concerned authority for final approval prior to issue of RFP documents.

MSEDCL's Response

MSEDCL submitted that as the land acquisition is not expected to be completed before the issuance of LOI to the successful bidder as the land acquisition is proposed to be included in the Conditions Subsequent as specified under Article 3.1.2A of PPA



as a part of the Procurer's obligation. Accordingly, MSEDCL submitted that it has not proposed any change in the Bidding Documents.

(c) Project Schedule

As per Project documents, the scheduled Commercial Operation Date (COD) specified is 54 months for the first Unit and 60 months for the power station with maximum difference of 3 months between two successive Units.

M/s Lanco Infratech Limited submitted that time frame for scheduled COD should be increased to 69 months for the first Unit and 75 months for the power station with the gap between two successive Units as 6 months. M/s Lanco Infratech Limited submitted that as of today, the manufacturing capacities of all Original Equipment Manufacturers (OEMs) is fully booked and thus, it is not feasible to achieve the COD before 69 months. M/s Lanco Infratech Limited submitted that the scheduled COD as suggested by it is in line with the scheduled COD quoted in UMPPs, which also seek Units of 660 MW and 800 MW capacity. It was also submitted that the option of quoting lower schedule for COD may be left to the bidders as was discovered in Mundra (63 months for Unit-1 COD) and Krishnapatnam UMPP (68 months for Unit-1 COD).

M/s Reliance Power Limited submitted that keeping in view the status of the project development activities and considering the fact that it takes at least 12 months for the developer to achieve the financial closure, the scheduled COD of the power station should be modified from the existing 54 months to 60 months. M/s Reliance Power Limited added that in line with the other Case-2 bids, early commissioning incentive may be permitted to the bidders for commissioning the Units/plant earlier than the schedule committed at the time of bid.

MSEDCL Reply

MSEDCL, in its reply, submitted that the maximum number of months between COD of two Units shall not exceed 3 months, irrespective of number of Units. Hence, the total number of months for COD of the Station will be 57 months from Effective Date in case of 2 Units and 60 months in case of 3 Units.

(d) Shifting of 33 kV Transmission Lines

M/s Lanco Infratech Limited submitted that the transmission lines from the site should be shifted by the Procurer within 6 months from issue of LOI.



MSEDCL's Response

MSEDCL, in its reply, submitted that the land will be transferred to the successful bidder free from such transmission lines as per the timelines provided in Conditions Subsequent specified in Article 3.1.2A of PPA.

(e) Cost of Letter of Credit

Clause 11.4.1.6 of the Draft PPA stipulates:

“All costs relating to opening and maintenance of the Letter of Credit shall be borne by the Procurer, however, Letter of Credit negotiation charges shall be borne and paid by the Seller”

M/s Lanco Infratech Limited submitted that the Letter of Credit negotiation charges should be borne by Procurer and requested to amend the Clause as Letter of Credit is part of the payment security mechanism and would be invoked only in case of Procurer's default, hence, all the costs should be borne by the Procurer.

MSEDCL's Response

MSEDCL, in its reply, submitted that the above mentioned provisions are as per the Standard Bidding Documents and accordingly it proposes no change.

Commission's Analysis and Ruling

16. As per the provisions of the Competitive Bidding Guidelines (CBG), the Commission has to approve the deviations from the CBG and the Standard Bidding Documents. Apart from the deviations in the bidding documents from the CBG and SBD, several other issues were raised by short-listed Bidders. The Commission, in accordance with the provisions of CBG, has only analysed the deviations from CBG and SBD and has not dealt with the other issues raised by short-listed Bidders.

(a) Range of Installed Capacity

This issue was also raised by MSEDCL in its Petition for seeking approval of deviations in RFQ document for Dhopave Project. The Commission, in its Order in Case No. 35 of 2007 dated November 23, 2007 opined as follows:

“As per the provisions of the SBD, the Procurer needs to specify minimum and maximum capacity to be procured in the RFQ document. MSEDCL submitted that the RFQ issued to bidders recognizes the gross installed capacity to be



procured as 1600 MW with a relaxation of minus 10% to provide flexibility in plant configuration. MSEDCL submitted that through a separate clarification issued after pre-bid conference the same was clarified and it was decided that the ex-bus generating capacity to be contracted with the bidders will be appropriately defined at the RFP stage.

As the capacity to be contracted with the bidders is to be defined at the RFP stage, the Commission is not in a position to either approve or disapprove this deviation at this stage and the Commission will consider the deviation, if any, while approving the deviations in the RFP stage documents with respect to SBD.” (emphasis added)

The Commission reiterates that as per the provisions of the SBD, the Procurer needs to specify minimum and maximum Contracted Capacity to be procured at the Delivery Point. In this case, MSEDCL has specified the minimum Contracted Capacity of 1340 MW and the maximum Installed Capacity in the range of 1600 (minus 10%), rather than the maximum Contracted Capacity, which is not in accordance with the provisions of SBD.

The Commission is of the view that in order to promote competition, it will be appropriate to adopt the provisions of SBD and specify the minimum and maximum Contracted Capacity rather than specifying minimum Contracted Capacity and maximum Installed Capacity. Further, the other Case-2 Bidding Projects such as Ultra Mega Power Projects also specifies the minimum and maximum Contracted Capacity and not the Installed Capacity. **Therefore, the Commission directs the MSEDCL to specify the minimum and maximum Contracted Capacity to be procured at the Delivery Point.**

Further, MSEDCL has also limited the number of Units that can be developed by the Developer to 3 Units. This is a deviation from the SBD as there is no provision in the SBD for restricting the Units. The Commission is of the view that in order to promote competition, it will be appropriate to provide flexibility to the Bidders to quote the configuration of Project, i.e., Number of Units and Unit Size. **Therefore, the Commission directs the MSEDCL to delete the provision related to maximum number of Units. The Commission also directs MSEDCL to delete the provision reproduced below related to scheduled COD of the first Unit under Important Conditions under Format 3 of Annexure 6 of the draft RFP:**



'The scheduled COD of the first Unit shall not be later than 54 (fifty four) months from the Effective Date as defined in PPA, subject to the provisions of the PPA.'

MSEDCL has also included a provision in the Bidding Documents that the entire Installed Capacity of the Power Station and all Units at all times will be for the exclusive benefit of the Procurer, to retain control of the Procurer on any additional capacity over and above Contracted Capacity generated by the Developer of the Project. As this is a Case-2 Bidding Process, where the Project is being developed by a separate Project Company and some project development activities are being carried out by the Procurer, **the Commission agrees with the views of MSEDCL and approves this provision.**

(b) Relevant Definitions and Intra-State ABT Provisions

As the MSEDCL has proposed amendments to the Bidding Documents to incorporate the revised definitions in PPA/RFP Documents and to modify provisions related to Intra-State ABT mechanism in line with the provisions of Commission's Order on Introduction of Availability Based Tariff regime at State Level, **the Commission approves the same.**

(c) Basis for considering the amount towards compensation for Change in Law

As the MSEDCL has arrived at an amount of Rs 20 Crore for Change in Law based on the provisions in PPA for UMPPs on pro-rata basis and has kept adjustment for change in law equivalent to 0.267% of Non-Escalable capacity charge based on the provisions in PPA for UMPPs, **the Commission approves the same.**

(d) Basis for considering the amount towards Indemnity Claims

As the MSEDCL has arrived at an amount of Rs 8 Crore for Indemnity Claims based on the provisions in PPA for UMPPs on pro-rata basis, **the Commission approves the same.**

(e) Income Tax Holiday

MSEDCL has proposed to withdraw the deviations earlier proposed from Standard Bidding Documents in respect of Section 80-IA benefit. **As the MSEDCL has withdrawn this deviation from SBD, no approval is required.**



(f) **Time Frame for Indicating Transfer Price**

MSEDCL requested the Commission to modify the period for intimation of the price at which the project site would be transferred, to at least 15 days instead of 30 days prior to the due date for submission of RFP bids. **The Commission approves this deviation as this is a customisation done by MSEDCL based on the revised Competitive Bidding Guidelines.**

(g) **Conditions Subsequent**

As per the provisions of Competitive Bidding Guidelines, the land acquisition process and environmental clearances need to be completed along with the bidding process, however, in this case, MSEDCL has included the completion of these activities as Conditions Subsequent to be met by MSEDCL. The Commission agrees with the views of MSEDCL that in some other Case-2 Bidding Projects, these activities have been included as Conditions Subsequent. However, the PPA submitted by MSEDCL also specifies that the Seller has to meet its Conditions Subsequent within 12 months from the Effective Date or 14 months from the date of issuance of LOI, whichever is later. It is important to note some of the Conditions Subsequent to be met by Seller such as Financial Closure, etc., will depend upon the Conditions Subsequent to be achieved by MSEDCL mainly Environment Clearance. Therefore, adequate time frame has to be given to Seller for meeting its Conditions Subsequent after the Conditions Subsequent of MSEDCL are met. The PPA issued for Tilaiya UMPP recently also stipulates that the Conditions Subsequent to be met by Procurers will be completed within 6 months from the Effective Date or 8 months from the date of issue of LoI, whichever is later.

In view of the above, **the Commission in-principle approves the deviation of including the activities proposed by MSEDCL as Conditions Subsequent to be achieved by MSEDCL for optimization of overall project schedule. However, the Commission approves a time frame of 6 months from the Effective Date or 8 months from the date of issue of LOI for Conditions Subsequent to be met by MSEDCL instead of 12 months proposed by MSEDCL. The Commission also directs MSEDCL to expedite the process on best effort basis to get the right of way or land acquisition for pipelines from water sources, possession of land for project including jetty and environment clearance as soon as possible for timely and early commissioning of the Project.**



17. Since the other deviations in the RFP documents proposed by MSEDCL are either customisation in accordance with the Standard Bidding Documents or are included for having more clarity with respect to interpretation of documents, the **Commission approves the same.**

18. The Commission directs MSEDCL to amend the Bidding Documents by complying with the directions given in this Order and issue the Revised Bidding Documents to short-listed Bidders and submit the same to the Commission for record purposes.

With this Order, the Commission disposes off MSEDCL's Petition in Case No. 33 of 2008.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member



(P.B. Patil)
Secretary, MERC



Annexure - 1

List of individuals/organizations who have submitted written objections/comments:

Sl.	Name	Institution
1	Shri Pradeep Lenka	Lanco Infratech Limited
2	Shri Suresh Nagarajan	Reliance Power Limited

Annexure-2

List of stakeholders who participated in the Public Hearing:

Sl.	Name	Institution
1	Shri S. L. Sahare	MSPGCL
2	Shri J. K. Srivastava	MSPGCL
3	Shri V. T. Bapat	MSPGCL
4	Shri G. S. Trimukhe	MSEDCL
5	Shri K.S. Jayaprakash	MSPGCL
6	Shri N. P. Gathe	MSPGCL
7	Shri R.D. Adhyary	MSPGCL
8	Shri D. R. Sangore	MSPGCL
9	Shri Anil Sharma	Essar Power Ltd.
10	Shri R. K. Goel	MSPGCL
11	Shri Ambekar L. N.	MSPGCL
12	Shri Bedekar S.V.	MSPGCL
13	Shri Ritendra	Reliance Power Ltd.
14	Shri Anand Dhawale	Feedback Ventures Ltd.
15	Shri Sameer Darji	Feedback Ventures Ltd.
16	Shri Nilesh Thakur	Feedback Ventures Ltd.

