

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 61 of 2008

In the matter of
Maharashtra State Electricity Distribution Company Limited's Petition for
Approval of Deviations taken in Bidding Documents issued to bidders, for
procurement of 2000 MW power on Long Term Basis under International
Competitive Bidding Process (Case-I).

Shri. A. Velayutham, Member
Shri. S. B. Kulkarni, Member

ORDER

Dated: November 14, 2008

The Maharashtra State Electricity Distribution Company Limited (MSEDCL) filed a Petition under affidavit before the Commission on August 1, 2008, seeking approval of deviations taken in Bidding Documents issued to bidders, for procurement of 2000 MW power on Long Term Basis under International Competitive Bidding Process (Case-I), i.e., LTPP-Stage II.

2. The main prayers in the Petition filed by MSEDCL are:

- § *“Examine the concerns expressed by the Petitioner for a favourable dispensation as detailed in the petition in view of severe power shortage in the state which necessitates long term availability approach at the earliest;*
- § *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.*
- § *Allow MSEDCL to resubmit the Revised RFP Project Documents, in case required based on the deviations proposed during the process of Approval.*



§ *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 to procure power on long-term basis for 2000 MW under Case-I route of competitive bidding, wherein the selected bidder is responsible for ensuring the supply of power to MSEDCL as per the terms of the Request of Proposal (RFP) Project Documents;
- b) MSEDCL submitted that the Ministry of Power (MoP) has issued the Standard Bidding Documents (SBD) for competitive bidding process for procurement of power by Distribution Licensees under the Case-II route. In such cases, tariff is not required to be approved by the Commission, and the Commission has to adopt the tariff discovered through the competitive bidding process, however, if any deviations are undertaken from the SBD, the approval for such deviations needs to be taken from the appropriate Regulatory Commission. The relevant Clauses from Competitive Bidding Guidelines issued by the MoP are as given below:

“2.3. Unless explicitly specified in these guidelines, the provisions of these guidelines shall be binding on the procurer. The process to be adopted in event of any deviation proposed from these guidelines is specified later in these guidelines under para 5.16.”

“Deviation from process defined in the guidelines 5.16 In case there is any deviation from these guidelines, the same shall be subject to approval by the Appropriate Commission. The Appropriate Commission shall approve or require modification to the Bid Documents within a reasonable time not exceeding 90 days.”



- c) MSEDCL submitted that as the Bidding Documents for Long Term Power Procurement under Case-I route for earlier Case-I competitive bidding process undertaken by MSEDCL, have already been approved by the Commission vide its Order dated January 24, 2008 in Case No. 38 of 2007 and SBD for Long Term Power Procurement under Case-I bidding is yet to be issued, the Bid Documents for Case-I Projects have been prepared in compliance with the Bidding Documents for Case-I approved by the Commission for Long Term Power Procurement for 2000 MW package concluded earlier, with modifications in response to the suggestions of the bidders.
- d) The original Request for Qualification (RFQ) Document was issued to bidders on October 25, 2007 and subsequently, revised RFQ Document based on the suggestions of bidders was issued on January 16, 2008. The bidders submitted their response to RFQ Document by February 11, 2008. The RFQ process for the project has been completed, and twenty-six (26) bidders, including three traders, have qualified at the RFQ Stage.
- e) MSEDCL submitted that, RFP Project Documents have already been issued in April 2008 to bidders who have qualified at RFQ stage. Subsequent to this, queries in writing were invited from the bidders on RFP Project Documents, and Pre-Bid Conference was held on June 26, 2008 for discussion on various queries raised by the bidders on RFP Project Documents. Based on the discussions in the Pre-Bid Conference, MSEDCL incorporated certain changes in RFP Project Documents.

4. The Commission scheduled the Technical Validation Session (TVS) in the matter, on September 17, 2008, and directed MSEDCL to serve a copy of its Petition to the four authorised Consumer Representatives. The Technical Validation Session in the matter was held at the Commission's office on September 17, 2008, and one authorised Consumer Representative, viz., Shri. Shantanu Dixit of Prayas, was also present.



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

a) Deviations proposed in the Bid Documents

MSEDCL submitted that there are basically three types of changes/deviations proposed in the documents:

- (a) Customisation of the Bid Documents based on the SBD approved by MoP for Case-II bidding;
- (b) To have better participation and competition ;
- (c) To have better clarity and understanding on the document.

b) Summary of the Deviations proposed in RFQ Document

- The clauses pertaining to Technical Requirement have been deleted, in order to have better participation and competition, for ensuring competitive tariff for power procurement.
- The clause pertaining to furnishing of Technical Preparedness has been modified to provide clarity to bidders about the extent of information related to technical preparedness they are supposed to furnish.
- MSEDCL has included provisions to allow traders to participate in the bidding process. Further, MSEDCL submitted that as per SBD, the definition of 'Bidder' does not prohibit traders from bidding, provided they meet the qualification criteria. Accordingly, MSEDCL has included the provisions of Board Resolution, Trading Licence, etc., in RFQ Document.
- MSEDCL modified the formats for submission of Financial Qualification requirements as per the revised SBD for Case-II projects issued by MoP.

c) Summary of the Deviations proposed in RFP Document

- MSEDCL has included definition of 'Bidder' as 'Bidding Company or Bidding Consortium including Traders who meet qualification criteria as specified in RFQ Document'.



- MSEDCL has customised the definitions of ‘Change in Ownership’ and ‘Conflict of Interest’ in line with the revised SBD for Case-2 Bidding issued on September 21, 2007.
- MSEDCL has customised the definition of ‘Parent Company’ in line with the revised SBD issued on September 21, 2007.
- MSEDCL has customised the location of generating station, which can be anywhere in India, to provide more clarity.
- MSEDCL has modified the provision of capacity offered under different price bids for better understanding and clarity, by stating that even in case of multiple financial bids, bidders need to submit only set of all other submissions, including but not limited to Board Resolution, etc. MSEDCL has also included the clause that only one bid will be accepted in respect of one power station and bidders may submit multiple bids for different power stations at different locations.
- MSEDCL has also included the provision that Board Resolution for commitment of investment of equity in the projects needs to be given by generating company from whom the trader proposes to supply the power to procurer, as qualifying criteria for traders.
- MSEDCL has deleted the requirement to submit technical credentials.
- MSEDCL has included the provision related to disclosure statement in line with the revised SBD issued on September 21, 2007.
- MSEDCL has modified the provision related to request for change in the Bidding Consortium or formation of consortium by a change from Bidding Company to Bidding Consortium or change in Ownership in line with the revised SBD issued on September 21, 2007.
- MSEDCL has included the following provision with respect to quotes for capacity and energy charge to protect the interest of the Procurer in case the bidder chooses to bid a single part tariff either totally in capacity charges or energy charges:

‘The bidders shall quote only the non - escalable capacity charges and non - escalable energy charges for the contract period, irrespective of the fuel being used for generation of power. In case of Hydro Projects, only escalable capacity charges shall be quoted by the bidder for the contract period.

The Levellised Quoted Energy Charge shall be minimum 40% of total Quoted Levellised Tariff (a sum of Quoted Levellised Capacity Charge and a sum of Quoted Levellised Energy Charge).



- MSEDCL has modified the provision related to evaluation of the bid and specified that the transmission charges shall be escalated at the rate notified by Central Electricity Regulatory Commission (CERC).
- MSEDCL has included the provision related to non-compliance with any of the conditions of Clause 2.8.3.3 and 2.8.3.4 of RFP in accordance with the revised SBD issued on September 21, 2007.
- MSEDCL has included the provisions related to change in the Lead Member in the Consortium in accordance with the revised SBD issued on September 21, 2007.
- MSEDCL has included the provision that the Lead Member of the Consortium or Bidding Company shall compulsorily hold at least 26% of the total paid-up equity share capital of the seller for at least five years post COD of the power station, in accordance with the revised SBD issued on September 21, 2007.
- MSEDCL has included the provision for invoking the Bid Bond by MSEDCL by giving seven days written notice to seller.
- MSEDCL has modified the number of days for return of the bids of all the unsuccessful bidders in accordance with the revised SBD issued on September 21, 2007.
- MSEDCL has customised the amount for Performance Guarantee based on the calculation of Rs 30 Lakh per MW of Contracted Capacity.
- MSEDCL has included the provisions related to responsiveness check in accordance with the revised SBD issued on September 21, 2007.
- MSEDCL has included the following provision

*“FURTHER RESOLVED THAT approval of the Board be and is hereby accorded to contribute such further amount over and above the said percentage limit to the extent becoming necessary towards the total equity share obligatory on the part of the Company pursuant to the terms and conditions contained in the Joint Deed Agreement dated _____ executed by the Company as per the provisions of RfQ. ***

***Applicable only for Bidding Consortium. To be adopted by Lead Member.”*
- MSEDCL has included the provisions related to issue of Letter of Intent to successful bidder(s) only if the tariff quoted by the successful bidder(s) is acceptable to MSEDCL.
- MSEDCL has included the provisions related to Board Resolution and Joint Deed Agreement in accordance with the revised SBD issued on September 21, 2007.



- MSEDCL has included the timelines as computed considering 120 days as completion time for the whole bidding process.
- MSEDCL has included the Bid Submission Deadline as 120 days considering the fact that the bidders should have detailed information about the process and therefore, 120 days is sufficient time for bid submission.

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

- MSEDCL has modified the definition of 'Interconnection Point' or 'Delivery Point'.
- MSEDCL has included the provision for obtaining approval of the Appropriate Commission for adopting the tariff under Section 63 of the Electricity Act, 2003, within six months from the effective date.
- MSEDCL has included the provision related to Procurers Obligation stating that Procurer is responsible for making available the intra-State transmission network
- MSEDCL has included the provision related to 20 days notice period by the Procurer to the Seller for commencement of supply of power at the delivery point
- MSEDCL has customised the provisions related to Operation and Maintenance and Repeat Performance Test. in accordance with the revised SBD issued on September 21, 2007.
- MSEDCL has customised the provisions related to metering in accordance with the revised SBD issued on September 21, 2007.
- MSEDCL has customised the provisions such that dissolution or liquidation of the Seller would not be an event of default, in accordance with the revised SBD issued on September 21, 2007.

6. During the TVS, in the context of deviations to RFQ, viz., removal of Clause pertaining to Technical Requirement and inclusion of traders, the Commission observed that MSEDCL is seeking post-facto approval of the deviations to RFQ Document and directed MSEDCL to submit the reasons and justification for seeking post-facto approval of the deviations to RFQ Document.

7. Shri Shantanu Dixit, Prayas (Authorised Consumer Representative) submitted that in case MSEDCL seeks to withdraw the clause pertaining to technical requirement to have better participation and competition by allowing new players in the sector, a ceiling quantum of capacity to be procured from such bidders should be



imposed. MSEDCL informed that 3 traders have been qualified at RFQ stage, who would not qualify if the Technical Requirements are not withdrawn. Further, MSEDCL submitted that the risk of new players has been mitigated by imposing a higher performance guarantee.

8. Shri Shantanu Dixit enquired of MSEDCL as to what measures have been incorporated in the Bid Documents to protect MSEDCL's interest if the trader goes bankrupt. MSEDCL submitted that there are only financial provisions like performance guarantee to cater to such situations.

9. Shri. Shantanu Dixit enquired about the reasons for seeking bids for only non-escalable tariffs, which may limit the number of bidders. MSEDCL submitted that the said changes have been undertaken based on consultations and suggestions from bidders on this issue. Further, MSEDCL quoted that in the earlier Case-I bidding process undertaken by MSEDCL, it has received sufficient number of bids.

10. MSEDCL submitted that it had added certain deviations to the Bid Documents, which were not indicated in the Bid Documents submitted to the Commission for approval. MSEDCL undertook to incorporate the same while submitting the revised Documents for the Commission's approval.

11. Subsequently, MSEDCL submitted the replies to the queries raised during TVS vide its letter dated October 10, 2008, received on October 13, 2008. The relevant replies have been summarised below:

(a) Post Facto Approval to Deviations taken in RFQ

MSEDCL submitted that it had prepared RFQ Document for LTPP under Competitive Bidding Guidelines issued by MoP, and by taking a few deviations from the Documents approved earlier by the Commission for LTPP for 2000 MW, which are primarily with respect to removing the requirement of Technical Qualification and specifically allowing Traders to participate in the bidding process, thus creating more competition, thereby benefiting the consumers of the State of Maharashtra by procurement of cheaper power.



Further, MSEDCL submitted that such bidding process was being undertaken across India and hence, any delay in concluding the process may result in other States contracting the cheaper power sources.

MSEDCL submitted that in order to expedite the process, it was decided to obtain the approval of deviations to RFQ along with other finalised Project Documents.

(b) Ceiling quantum of Capacity to be Procured from Trader

MSEDCL submitted that the RFQ stage is already over and the bidders including Traders have been qualified for the capacity offered by them based on the Qualification Requirements specified in the RFQ. Hence, it is not possible to limit the maximum capacity to be procured from Trader at this stage. MSEDCL submitted that however, at the time of evaluation of RFP responses, it can decide on the proportion of total quantum to be procured from the traders in addition to suitable modifications to PPA for protecting the interest of MSEDCL, so that risk profile of MSEDCL in respect of power procurement is managed.

MSEDCL also submitted that the aforesaid flexibility for deciding upon RFP responses is also ensured through the following provisions available in RFP for acceptance/rejection of any bid:

- i. Clause 2.19.1: *“The Procurer reserve the right to reject all or any of the Bids or cancel RFP without assigning any reasons whatsoever and without any liability.”*
- ii. Clause 3.4.1.1 2nd Para: *“MSEDCL shall select successful Bidder/Bidders to contract for capacity upto its required capacity or such capacity whose tariff is within its acceptable range, both of which shall be determined solely at its own discretion.”*
- iii. Clause 3.4.1.4: MSEDCL, in its own discretion, has the right to reject any or all Bids if the Quoted Tariffs are not aligned to the prevailing market prices.

(c) Adequate Protective Clauses in PPA to protect the interest of MSEDCL, if Trader is selected as Successful Bidder



MSEDCL submitted that the necessary changes pertaining to issues related to power procurement from traders have been made in the revised PPA submitted to the Commission for approval, by incorporating provisions for back-to-back arrangements with traders and generators (from whom the Trader proposes to supply power) to ensure that even if Trader goes bankrupt or its licence gets cancelled, MSEDCL's and its consumers' interests are protected since in such case all the liabilities/obligations/responsibilities under PPA shall vest on Generator from whom the power is supplied. Further, by virtue of signing the tripartite agreement between the Procurer, Trader and Generator, the Trader and Generator shall be jointly and severally liable for the liabilities/obligations/responsibilities arising out of PPA. MSEDCL further submitted that in such agreement, the responsibilities of either Trader and/or Generator have been clearly identified.

Commission's Analysis and Ruling

10. 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 before they are finally issued to the prospective bidders.

11. The various provisions of CBG stipulating activities to be carried out by the procurers in case any deviation is being sought from the CBG and SBD, have been reproduced below:

Para 2.3 of CBG stipulates:

*“Unless explicitly specified in these guidelines, the provisions of these guidelines shall be binding on the procurer. **The process to be adopted in event of any deviation proposed from these guidelines is specified later in these guidelines under para 5.16.**” (emphasis added)*

Para 3.1 of CBG stipulates:

“3.1 To expedite the bid process, the following conditions shall be met by the procurer:



(i)The bid documentation shall be prepared in accordance with these guidelines and the approval of the appropriate Regulatory Commission shall be obtained unless the bid documents are as per the standard bid documents issued by the Central Government. In such cases, an intimation shall be sent by the procurer to the appropriate Regulatory Commission about initiation of the bidding process.

(ii) Approval of the Appropriate Commission shall be sought in event of the deviations from the bidding conditions contained in these guidelines, following the process described in para 5.16 of these guidelines.” (emphasis added)

Para 5.5 of CBG stipulates:

“RFP shall be issued to all bidders who have qualified at the RFQ stage. In case the bidders seek any deviations and the procurer finds that the deviations are reasonable, the procurer shall obtain approval of the Appropriate Commission before agreeing to the deviations.....” (emphasis added)

Para 5.16 of CBG stipulates:

Deviation from process defined in the guidelines

In case there is any deviation from these guidelines, the same shall be subject to approval by the Appropriate Commission. The Appropriate Commission shall approve or require modification to the bid documents within a reasonable time not exceeding 90 days. (emphasis added)

12. The Commission has already approved the Bid Documents for procurement of 2000 MW under Stage-I of Case-I bidding process, in absence of notification of SBD by the Government of India for Case-I Projects. Here, in this case, MSEDCL has taken further deviations from the bid documents approved by the Commission, during the RFQ stage for procurement of additional 2000 MW of power under Case-I route and has approached the Commission for post-facto approval. The approach followed by MSEDCL is clearly against the provisions of the CBG notified by the Ministry of Power, Government of India, since the CBG has clearly specified that if the Procurer



seeks any deviation from CBG or SBD it has to intimate the Commission regarding the initiation of the bidding process and obtain the approval of such deviations in the Bidding Documents from the Commission.

13. The Commission would like to highlight that MSEDCL has initiated the RFQ process as early as October 25, 2007, whereas MSEDCL has sought the urgent approval of the deviations in RFQ Document from CBG after around 9 months of initiation of the process. MSEDCL was well aware of the process and requirement of obtaining the Commission's prior approval for the deviations from the CBG, SBD and Bid Documents approved earlier by the Commission, having undergone the same process under Stage I procurement of 2000 MW under Case I route.

14. The Commission, while approving the deviations in Phase-I of Case-I Bidding as well as for Case-II Bidding process has followed due public process. However, MSEDCL has delayed by around 9 months in complying with the statutory provisions of the CBG with respect to obtaining approval of the deviations to the bidding process from the Competitive Bidding Guidelines, and has sought post-facto approval for the deviations to the RFQ Bid Documents, when the CBG clearly stipulates the need for prior approval to the Bid Documents, in case of any deviations. The Commission is of the view that it would not be appropriate to grant post-facto approval, since this is clearly against the provisions under the CBG. Hence, the Commission rejects MSEDCL's request for post-facto approval of the deviations taken during RFQ stage, and accordingly, the Commission has not analysed the other deviations as proposed by MSEDCL in RFP Project Documents.

15. Further, in the context of MSEDCL's request for urgent approval of the deviations to the Bid Documents, the Commission enquired from MSEDCL during the Technical Validation Session whether it has signed PPA with the successful bidders under the earlier Stage-I procurement process of 2000 MW- Case-I bidding, before August 20, 2008, which was the last date of bid validity, and for which MSEDCL had sought the Commission's urgent approval on certain deviations. MSEDCL replied that it has signed PPA with one of the successful bidders on September 8, 2008 and is expected to sign PPA with the other successful bidder soon.



The Commission expressed its concern over the delay on the part of MSEDCL in signing PPA, while at the same time, praying before the Commission to expedite the process and grant urgent approval for any deviations. Moreover, in the present case MSEDCL has initiated the bidding process as early as October 2007 without any intimation to the Commission, as is required under CBG even without any deviation from the CBG.

With this Order, the Commission disposes off MSEDCL's Petition in Case No. 61 of 2008.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member



(Prafulla S. Varhade)
Secretary, MERC

