

HON'BLE THE ACTING CHIEF JUSTICE DILIP B. BHOSALE
AND
HON'BLE SRI JUSTICE S.V. BHATT
WRIT APPEAL Nos.568 AND 585 OF 2015

ORDER:

Heard Mr.Vineeth Naik, learned senior counsel for appellant and Mr. R.Vinod Reddy, learned standing counsel for respondents.

The writ appeals are directed against the order dated 22.06.2015 in W.P.M.P.No.20964 of 2015 in W.P.No.16122 of 2015 and W.P.M.P.No.23208 of 2015 in W.P.No.17958 of 2015 respectively.

The learned Single Judge through the common order under appeals declined to stay further steps in Request For Qualification (RFQ) dated 18.05.2015 and the operation of approval granted by the Telangana State Electricity Regulatory Commission (TSERC) vide letter No. TSERC/Secy/AAO/F.No.PPA /D.No.519/15 dated 09.06.2015. The appellant in both the writ appeals is a power generating company and the lis in the appeals is in respect of purchasing 1000 MW power through RFQ dated 18.05.2015.

The prayers in writ petition Nos.16122 and 17958 of 2015 are as follows:
W.P.No.16122 of 2015:

- “.....a) declaring the impugned condition requiring the prospective Bidder to be situated in. the Southern region, particularly mentioned in Clause 1.1.1 of the RFQ dated 18.05.2015;
- b) declaring the impugned condition of commencement of supply of Power within a period of 40 days from Bid Due Date, particularly mentioned in Clause 1.1.1 of the RFQ dated 18.05.2015;
- c) declaring the impugned condition that applicant/bidder should have executed Open Access Agreement/Transmission Service Agreement with PGCIL for the quantum of power offered in the Bid and which is co-terminus with the PSA(at least) 8 years from COD, particularly mentioned in Clause 2.2.1 of the RFQ dated 18.05.2015 as illegal, arbitrary and against the principles of natural justice;
- d) and consequently direct the Respondents to allow the petitioner to submit the Application/Bid as per RFQ dated 18.05.2015 and further direct the Respondent to process the Application/Bid of the Petitioner ignoring the impugned conditions....”

W.P.No.17958 of 2015:

- “....a) declaring the approval granted by the Respondent No.1 as conveyed vide Letter Lr. No. TSERC/Secy/AAO/F-No.PPA/D.No.519/15 dated 09.06.2015 for deviation from Model RFC) as non-est, void ab initio, illegal, arbitrary, baseless and unreasonable and set aside the same;
- b) summoning the concerned entire file/records of the Respondent No.1 commission in which deviation from Model RFQ was taken and Letter dated

09.06.2015 issued.....”

The parties are referred to as arrayed in the writ petitions.

The circumstances relevant for disposal of the writ appeals are briefly adverted.

On 10.10.2014, respondent No.1 on behalf of Distribution Companies of the State of Telangana issued, tender notice dated 10.10.2014 and RFQ for procurement of 2000 MW capacity on long term basis under Design, Build, Finance, Own and Operate (DBFOO). The petitioner is one of the tenderers to RFQ dated 10.10.2014. On 11.05.2015, the 1st respondent cancelled RFQ dated 10.10.2014 and communicated to all the participants including petitioner. The petitioner takes exception to the cancellation letter dated 11.05.2015 as without reasons and being arbitrary. The petitioner challenges the changes effected in RFQ dated 18.05.2015 which disentitle petitioner at threshold from participating. Through RFQ No.TSSPDCL/01/DBFOO dated 18.05.2015, the 1st respondent invited bids for procurement of electricity of 1000 MW capacity from generating companies located in South India. The petitioner alleges that the RFQ dated 18.05.2015 is patently illegal, contrary to Model RFQ and the tender process initiated through RFQ dated 18.05.2015 is vitiated as contrary to Section 63 of the Electricity Act, 2003 (for short ‘the Act’). The difference in the Model RFQ and RFQ dated 18.05.2015 is as follows:

Model RFQ (A)	RFQ dated 18.05.2015 (B)
Brief particulars of the Project are as follows: Capacity Required: ***** Period when supply must commence:(36) Months from Bid Due Date	Brief particulars of the Project are as follows: Capacity required: ***** Period when supply must commence: 40 days from Bid Due Date

<u>Clause No.2.2.1(e) of Model RFQ</u> (iv) The applicant has access to an assured supply of Fuel: and (v) Only applicants who agree and undertake to procure the boilers, turbines, and generators of their Projects from manufacturing facilities situate in India and owned and operated in India by an Indian company, a foreign company or a joint venture between an Indian and foreign company shall be eligible hereunder.	- Clause No.2.2.1(e) of RFQ dated 18.05.2015 (iv)The Applicant should have executed Open Access Agreement/Transmission Service Agreement with PGCIL for the quantum of power offered in the Bid and which is co-terminus with the PSA (at least) 8 years from COD/shall submit the copy of same; (v)The Power Station shall be located in one of the five states of Southern India i.e. Telangana, Karnataka, Andhra Pradesh, Kerala and Tamil Nadu; Power Stations located in other parts of the country are not eligible for participation. (vi)The Applicant has access to an assured supply of Fuel and shall submit documentary evidence thereof to the satisfaction of the Authorized Representative.
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The deviations to model RFQ are introduced to restrict competitors and provide opportunity to generating companies from South India. In other words, the deviations in RFQ dated 18.05.2015 exclude the eligible or short listed tenderers in tender notice dated 10.10.2014. The petitioner further submits that the procurement of power, no doubt, can be on short term, medium and long term basis. In the case on hand, the 1st respondent through the RFQ dated 18.05.2015 has imposed the condition of power supply “must commence 40 days from bid due date” and such requirement when the procurement is on long term basis, is selective, artificial and contrary to the principle of DBFOO. The

condition that the applicant should have executed open access agreement/transmission service agreement with Power Grid Corporation of India Limited (PGCIL) for the quantum of power offered in the bid which is co-terminus with the TSA (at least) 8 years from COD and shall submit the copy of same, is contrary to trade practice, for one entering into a power purchase agreement with PGCIL at this stage not possible. The eligibility condition that the power generating company shall be located in one of the five States of Southern India i.e. Telangana, Karnataka, Andhra Pradesh, Kerala and Tamilnadu; excludes Power generating company located in other parts of the country from participation, besides the condition is contrary to open access to power, the scheme and object of the Act, arbitrary and discriminatory. Therefore, the petitioner primarily challenges these conditions and RFQ dated 18.05.2015 in W.P. No.16222 of 2015. In W.P.No.17958 of 2015, the petitioner challenges letter No.TSERC/Secy/AAO/F-No.PPA/D.No.519/15 dated 09.06.2015 of TSERC as illegal and unconstitutional. Through the instant communication, the TSERC accorded approval for the deviations proposed by the DISCOMs to the model RFQ.

Mr. Vineet Naik, learned senior counsel, has made detailed submissions in W.A.No.568 of 2015. He contends that the 1st respondent has issued RFQ dated 10.10.2014 to procure 2000 MW power from various generating companies on long term basis. The conditions stipulated in the RFQ dated 10.10.2014 are in line with the Model RFQ and the petitioner satisfies the eligibility criteria in RFQ dated 10.10.2014. The tender of petitioner was technically qualified and short listed as one of the tenderers. The respondents without assigning reasons and contrary to the public interest, on 11.05.2015 cancelled RFQ dated 10.10.2014. The approval of deviations by the TSERC according to the learned counsel is not in line with the requirement of Section 63 of the Act, for the prior approval of deviations is required and *ex post facto* approval does not meet the requirement of law. The eligibility criteria is tailor made, firstly to favour a few generating companies located in South India and simultaneously eliminate the other eligible tenders in RFQ dated 10.10.2014 from participating. The limited participation by a few generating companies is not in public interest in determining the purchase price of power. The petitioner tries to persuade the Court to consider the alternative prayer to permit the petitioner to submit the application/bid pursuant to RFQ dated 18.05.2015 though the prayer in WPMP No.20964 of 2015 is to stay further process in RFQ dated 18.05.2015,.

Mr. Vinod Reddy, learned standing counsel, contends that the RFQ dated 10.10.2014 was cancelled, as the eligible tenderers are not in a position to immediately evacuate or transmit the power from generating companies to DISCOMs for want of transmission lines or a corridor or that the existing transmission lines are over loaded to accommodate additional load factor. According to him, in the State of Telangana, there is acute power shortage and having regard to development or welfare measures implemented by the Government to various categories of consumers and having regard to the imminent requirement for purchase of power, the DISCOMs were constrained to take up the issue of deviations with the TSERC. The sheet anchor submission of learned counsel is the correspondence on the subject and we find it appropriate to excerpt the same at this stage.

“Lr.No.CGM(Comml)/SE(IPC)/F.L.TTPP/02/2015/D.No.303,dt.14.05.2015.

Sir,

Sub: TSDISCOMs-proposal for procurement of 1000 MW on Long Term basis with Southern Region under Short notice tender- Approval- Requested- Reg.

Ref.1. Lr.No.TSERC/DD (T.Engg)/PP-01 of 2014/Dis.No.169/15 dt.10.02.2015

2. Lr.No.CMD (TSSPDCL/SE(IPC)/F.LT 2014 D.No.3584, dt.09.01.2015.

In the 1st reference cited above, the Hon'ble TSERC has approved Procurement of 2000 MW of Power on Long Term basis in view of acute shortage of Power in the State of Telangana and directed to go ahead with the Procurement process. Accordingly, TSSPDCL, as a lead procurer on behalf of TSDISCOMs, has initiated steps for the bidding process by calling for RFQ (Request for Qualification) from interested bidders on PAN India basis. In response, 24 No bidders have participated in the bidding process and 14 No bidders have been short listed at the Qualification Stage.

However, in view of the transmission corridor constraints from NEW Grid to Southern Region and also delay in approval of deviations to SBD by Ministry of Power, Government of India; the ongoing Long Term bidding process for Procurement of 200 MW on PAN India basis has been canceled.

Subsequently, the power position was discussed in the TSPCC Meeting held on 21.04.2015, and it was decided to go for urgent procurement of 1000 MW under Long Term Procurement valid for a period of 8 years.

The Planning Wing/TSTRANSCO has already projected the peak shortfall in the Telangana State for next 8 years in the range of 2865 MW to 3928 MW even after considering the ongoing Capacity Addition from upcoming projects and also the year on year load growth @ 8 to 12%.

The DISCOMs are anticipating significant growth in energy demand due to the following key reasons:

- A. Ensuring 24x7 Power for all categories (except Agriculture)
- B. Increase in Supply to Agriculture category from the present 6 hours to 9 hours from FY 2016-17

- C. Increase in supply to rural domestic households from the present 15 hours to 24 hours by FY 2016-17
- D. Other major projects including Bayyaram steel plant, Water Grid project and LI schemes.

Owing to the above factors, energy demand is expected to significantly increase and current contemplated sources may not be sufficient to meet such demand and the DISCOMs anticipate power purchase requirement of the order of 1000 MW starting from FY 2015-16 and hence it is prudent to procure power through competitive bidding. Since power is required on urgent basis, the generator shall be required to commence supply of power within one month of Issue of Letter of Award.

However, power supply position is expected to ease by FY 2023-24, by when planned projects of TSGENCO will be commissioned. Hence the power procurement period in the tender has been specified as 8 years.

In view of the transmission corridor constraints from NEW Grid to Southern Region (SR), the tender is restricted to generation plants in Southern Region. Further, transmission evacuation cannot be arranged by TSTRANSCO in such short time, this tender shall be limited to those SR-based power plants which have already obtained long term open access from CTU.

Power plants in the SR region are largely based on blended coal and hence fuel source in the tender has been specified as domestic coal supplemented with imported coal to the extent of 40% maximum.

Hence, the DISCOMs intend to expeditiously initiate the tender process through issue of Request for Qualification (RFQ) based on the Model-RFQ document published by the Ministry of Power. The DISCOMs shall take the approval for the Hon'ble Commission in case of any deviations required from the model documents, after pre-application conference.

The Hon'ble Commission is empowered to issue approval for the proposed 1000 MW on Long Term under DBFOO (Design, Build, Finance, Own and Operate) basis in terms of Section 86(1)(b) of the Electricity Act 2003.

The Hon'ble TSERC is requested to accord in-principle approval to TSDISCOMs for the following:

- a) Procurement of 1000 MW on long term basis from FY 2015-16 for a period of 8 years through DBFOO model notified by the Ministry of Power.
- b) Initiation of tender process for the above procurement through issue of RFQ document with reduced timelines in view of immediate requirement.”

“ **Lr.No.TSERC/Secy/AO/Tariff/T1010/2015 dated 26.05.2015**

Sir,

Sub:TSSPDCL-Proposal for procurement of 1000 MW on Long Term basis within Southern (TSSOPDCL) under Short notice tender-Approval-Requested Reg.

Ref: 1.Lr..No.TSERC DD (T.Engg)/ PP-01 of
2014/D.No.169/15 dt.10.02.2014.

2.Lr.No.GM(Comml)/SE(IPCV)/F.I.T.T.PP/02/2015/D
No.303 DT.14.05.2015

With reference to your letter under reference, I am directed to communicate in principle approval of the Commission on the cautioned subject as given here under:

“The Commission after detailed deliberations on various provisions of the Act including amendments from time to time and powers thereof conferred on it and keeping in view the circumstances stated in the reference 2nd cited and in the interest of public at large decided to approve procurement of 1000 MW of power on long term basis under short notice under as per standard Bidding Documents (SBDs) under Design, Build, Finance, Own and Operate (DBIOO) in exercise of powers conferred on the Commission under Section 86(1) (b) of the Electricity Act, 2003 (the Act) subject to determination of Tariff as per the provisions of the Act.

The Licensees have to follow the SBD strictly as notified by the Ministry of Power GOI (DBFOO). Any deviation by Licensee suo moto is not permissible and prior approval of Commission has to be obtained.”

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“Lr.No.CGM(Comml.)/TSSPDCL/SE/IPC/F-LTP/D.No.556/15, Dt.02.06.2015.

Sir,

Sub:- TSDISCOMs proposal for Long Term Power Procurement of 1000 MW under DBFOO basis in SR-Request for approval of deviations proposed in the model RFQ document-Reg.

Ref:-1) Lr.No.CGM (Comml.)/SE(IPC)/F.LTTPP/02/2015/D.No.303, dated 14.05.2015

2) TSERC/Secy./AO/Tariff/T1010/2015, dated 26.05.2015.

With reference to the subject matter the Hon'ble Commission has given in- principle approval, subject to determination of tariff as per provision of the Electricity Act, 2003. The Hon'ble Commission has also directed the licensees to follow the SBD strictly as notified under DBFOO by Ministry of Power, Govt. of India.

The Hon'ble Commission further directed that for any deviation by the licensee, its prior approval has to be obtained. Stating the above, this Hon'ble Commission has given its approval to go ahead with the Procurement Process.

The following changes are being proposed in the initial RFQ, after examining the queries received through e-mail as well as queries raised by some of the bidders who had participated in the Pre-Application Conference held on 25.05.2015, for kind consideration of the Hon'ble Commission.

- i) Deviation 1: Condensed timelines for bid process and Supply of power.
- ii) Deviation 2: Only those power Stations located in Southern Region shall be eligible to participate.
- iii) Deviation 3: Only those Power Stations that are in advanced stages of commissioning shall be eligible to participate and the applicants shall submit documentary evidence in respect of Power Plant readiness.
- iv) Deviation 4: Indicative fuel charge may be omitted in the RFQ stage and instead be provided in the RFP stage.

The detailed explanation in respect of the above deviations is herewith enclosed as annexure.

In compliance of the directions given to the licensees, the TSDISCOMs

would request the Hon'ble Commission to approve the above deviations from the model RFQ so that the TSDISCOMs may issue the amended RFQ as per the above changes.

The TSDISCOMs will seek the prior approval of this Hon'ble Commission before undertaking any further deviations which are consequential to the above deviations in the model RFQ or otherwise from the model documents."

"Lr.No.TSERC/Secy/AAO/F-No.PPA/D.No.579/15 date.09.06.2015

Sub: TS Discoms proposal for deviations in the model RFQ document-Approved –Reg.

Ref.1.Lr.No.CGM (Comm.) TSSPDCL/SE / IPC/F- LTP /
D.No.556/15, dtd. 02.06.2015.

In reference 1st cited above, the TS Discoms have submitted a proposal for certain deviations in the model, RFQ document for procurement of 1000 MW under DBFOO basis in Southern Region for approval of the Commission on the following grounds:

- i. Non-availability of power from Hinduja Power plant at Vishakapatnam and Damodaram Sanjeevaiah power plant at Krishnapatnam as indicated as availability of power in the Tariff Order 2015-16.
 - ii. There is no corridor for evacuation of power from NEW Grid to Southern Grid. The power has to be procured from the Southern Region.
 - iii. Urgency in requirement of power to mitigate the shortages in power supply.
2. Hon'ble Commission after due consideration of the reasons given by the TS Discoms necessitating the deviations, has accorded approval for the said deviations.
 3. For approval Tariff (Rate) under section 63 of Electricity Act, 2003, the bid documents shall be submitted by the Discoms.
 4. I am directed to inform that the approval now given is limited to the deviations as submitted in the reference 1st cited above only and all other clauses shall be strictly as per the model RFQ document."

From the above, the learned standing counsel contends that the reason for changing the eligibility criteria is not to favour a power generating company or to exclude the petitioner or similarly situated generating companies in North India, but to ensure without further loss of time quality and consistent power supply to the consumers in the State of Telangana. He further contends that the reason for prescribing period of commencement must be 40 days from bid date is to meet the grave situation of short supply of power in the State, which is not disputed by the petitioner as well. The reason for having 8 years procurement period is to have durable and competitive price with firm commitment on either side. Learned standing counsel further contends that the instant process of procurement of power, even if initiated through RFQ dated 18.05.2015 it can be

finalized only as per the procedure stipulated under the Act and the petitioner though is not in a position to evacuate the power to the DISCOMs on account of lack of transmission lines should not be making any grievance either against the deviations introduced through RFQ dated 18.05.2015 or the grant of permission by the TSERC. The learned counsel submits that the request of petitioner to permit it to submit bid document at this stage cannot be considered, for the petitioner does not satisfy the eligibility criteria and this Court as long as the eligibility criteria in the bid document remains, permission to one generating company is contrary to well settled principles of law.

The learned Single Judge while rejecting the interim prayers for grant of stay of all further proceedings pursuant to RFQ dated 18.05.2015 or suspend the operation of communication dated 09.06.2015, has *prima facie* found that the petitioner is located in northern region and does not have an agreement with the PGCIL to supply power to DISCOMs in the State of Telangana. Learned Judge appreciated for the present the priority and necessity of urgent procurement of power by the DISCOMs in the State of Telangana and thereby, the change of eligibility criteria from Model RFQ supply from 36 months to 40 days in RFQ dated 18.05.2015 is accepted. It is further observed that non-availability of transmission lines/corridor for power flow from northern region which is fully loaded, is taken note in the order impugned in the appeals. It is held that the ex post facto approval granted by the TSERC cannot be held to be bad at this stage of the matter and in other words the objections are to be finally decided in respective WPs.

We have taken note of the submissions of learned senior counsel appearing for the petitioner and the learned standing counsel and perused the material available on record.

The intra-Court writ appeals are directed against order refusing to grant stay of all further proceedings in RFQ dated 18.05.2015 and to stay the operation of communication dated 19.06.2015. *Prima facie*, it appears to us that the DISCOMs in the State of Telangana having realized the difficulty in evacuation of power it purchases from far of places, has cancelled RFQ dated 10.10.2014 vide Letter No. CGM (Comml & RAC) / SE (IPC)/ F.Indiabulls/D.No.268/15 dated 11.05.2015 and thereafter has taken up the issue with TSERC through the letters read above and the TSERC has given approval to the changes in eligibility criteria of DISCOMs.

The contents of the letters are excerpted above and reiterated briefly to appreciate the rival submissions of parties. The contents of the letters would go to show that with a view to ensure 9 hours supply to Farm Sector and as far as possible provide uninterrupted power supply to other consumers, the DISCOMs have requested the TSERC to permit to purchase power from the existing power generating companies with a condition to supply the contracted power within 40 days from the date of price bid. Therefore to utilize the existing facilities, the DISCOMs have not proceeded to follow DBFOO. As a result of securing power from available sources, the other conditions in RFQ dated 18.05.2015 are proposed for amendment and accordingly approved by TSERC. As things stand, the petitioner does not satisfy the eligibility criteria of RFQ dated 18.05.2015. Unless and until the challenge of petitioner to these conditions is accepted, this Court cannot either direct the respondents to receive the bid of petitioner or interdict the RFQ dated 18.05.2015. The law is well settled that this Court cannot at this stage direct consideration of an ineligible applicant to participate in the tender process or re-write the eligibility conditions of tender document. Further the petitioner admits that as on today, it does not have an agreement with PGCIL for evacuation of power generated by it to the DISCOMs in the State of Telangana. The TSERC under the scheme of the Act has defined jurisdiction and role in the matter of tariff fixation and the rate payable by the different categories of consumers etc to DISCOMs. At this preliminary stage, we are not inclined to accept either prayers of the petitioner as it amounts to permitting a tenderer who is not compliant of eligibility conditions. The issues in both the writ petitions require hearing, and grant of any prayer is dependant on the outcome of the writ petitions. We do not want to introduce participation of a tenderer who cannot evacuate/ transmit the power from the source of generation to the DISCOMs in the State of Telangana. We are constrained to record a tentative finding that the respondents instead of DBFOO have preferred to utilize existing facilities, namely, operational generation companies and transmission lines for procurement of power. The necessity of State of Telangana in procuring required power cannot be overlooked compared to the objections raised by the petitioner. The grounds urged by the petitioner are rejected.

The writ appeals are dismissed. The petitioner is given liberty to request the learned Single Judge for expeditious hearing of writ petitions and if such a request is made, we hope and trust that the same is considered favourably the

learned Judge hearing the writ petitions.

Consequently, miscellaneous petitions, if any pending, also stand disposed of.

DILIP B. BHOSALE, ACJ

S.V.BHATT, J

Date:24.07.2015
Stp