

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL

Sub: In the matter of petition under Section 86(1) of the Electricity Act 2003 read with clause 4 of the Guidelines issued by the Government of India Ministry of Power vide resolution dated 6th March,2019 seeking approval of the deviations in Model Bidding Documents for Long Term Procurement of Electricity from Thermal Power Stations set up on Design, Build, Finance, Own and Operate (DBFOO) basis and sourcing fuel as provided under Model Bidding Documents including allocation of coal under B(I), B(III) and B(IV) SHAKTI (Scheme for Harnessing and Allocating Koyala Transparently in India) Policy.

Petition No 36/2019

ORDER

(Date of Hearing: 14th February' 2020)

(Date of Order: 14th February' 2020)

The Managing Director

M.P. Power Management Co. Ltd. (MPPMCL)
Shakti Bhawan, Rampur, Jabalpur – 482 008

- **Petitioner**

Shri Deepak Vyas, Sr. GM appeared on behalf of the petitioner.

The petitioner, MPPMCL had filed the subject petition under Section 86(1) of the Electricity Act, 2003 read with clause 4 of the Guidelines issued by the Government of India, Ministry of Power vide resolution dated 6th March, 2019 for approval of the deviations in Model Bidding Documents for Long Term Procurement of power from Thermal Power Station to be set up on Design, Build, Finance, Own and Operate (DBFOO) basis and sourcing fuel as provided under Model Bidding Documents including allocation of coal under B (I), B(III) and B(IV) of SHAKTI (Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India) Policy.

2. Vide Commission's order dated 24th September' 2019 in the subject petition, the deviations in "Request for Qualification" (RFQ) document from the Model Bidding Document (issued by the Ministry of Power) as filed by the petitioner were approved by the Commission.

3. Vide subsequent orders dated 8th November' 2019 and 27th December' 2019 in the subject petition, the Commission accorded approval, in terms of clause 4 under terms and conditions of the Guidelines issued by the Government of India, Ministry of Power vide resolution dated 6th March, 2019, to the deviations in RFP and PSA from the Model Bidding Documents as filed by the petitioner.

4. The petitioner has now filed additional submissions in the subject matter by an

application on affidavit dated 1st February' 2020 under Section 151 of the Code of Civil Procedure, 1908 with the following submissions and prayer:

- “1. The Petitioner most respectfully submits that in view of the fact that developing a project within the State would generate investment & employment opportunities, generate tax, ED & Cess revenue for the State and avoid transmission cost for the state, State Government of Madhya Pradesh decided setting up of new power project within the State of MP for meeting the future power requirement of the State. Hence, certain deviations were required in the MBD in order to invite a State-specific bid. Accordingly, a petition (No. 36 of 2019) was filed before this Hon'ble Commission for approval of the deviations in the Model Bid Documents. Hon'ble Commission has been kind enough to approve the deviations vide Orders dated 24.09.2019 (**Annex – 1**) in the RfQ and dated 08.11.2019 (**Annex – 2**) in RfP and PSA documents.*
- 2. It is most respectfully submitted that subsequent to approval of the deviations in the RfP and PSA documents and selection of the qualified bidder on the basis of the evaluation of the RfQ bid, the RfP and PSA documents incorporating the deviations as approved by this Hon'ble Commission were issued on DEEP Portal to the qualified bidders on 14.11.2019.*
- 3. It is most respectfully submitted that as per the bid schedule the queries of the bidders were invited by 09.12.2019 and the pre-bid conference was held on 17.12.2019. As per the discussions held in the pre-bid conference and also considering certain suo-moto amendments the Petitioner filed deviations before the Hon'ble Commission for its approval on 20.12.2019.*
- 4. Hon'ble Commission was kind enough to approve those deviation as proposed by the Petitioner vide Order dated 27.12.2019 (**Annex – 3**). Accordingly, a corrigendum was uploaded on the DEEP Portal.*
- 5. In the recent development the bidders have requested the Petitioner to include a provision regarding Default Escrow Account for Payment Security and revision in provision regarding Letter of Credit and Additional Fuel Supply Agreement (AFSA). It is further submitted that inclusion of these provisions are critical for bankability, creditworthiness and overall viability of the Project. These provisions would be*

helpful for the bidders to arrange finances at competitive terms which would in turn be beneficial for the Utility.

6. *The matter was referred to the 91st meeting of Board of Directors of MPPMCL wherein the Board after deliberation on the aforementioned matters has agreed for inclusion / revision of these provisions with suitable modifications.*

7. *The Model Power Supply Agreement Document earlier had the provision in respect of Default Escrow Account for Payment Security. This provision was consciously omitted from the Model Bidding Document as simultaneous to Default Escrow Account there has also been a provision of Letter of Credit and it was considered appropriate that the provision of Letter of Credit is sufficient enough to cover the payment liability of the Petitioner. But the Bidders have requested to include the Default Escrow Account along with the provision of Letter of Credit for Payment Security in the Power Supply Agreement as being critical for bankability, creditworthiness and overall viability of the Project which would enable the bidders to arrange finance for the project at competitive terms. The provisions related to Letter of Credit and AFSA has also been revised. Accordingly, a statement of deviations is prepared and the same has been attached as **Annex-4**. The Corrigendum issued in this regard captioned as "Corrigendum – 5" is annexed as **Annex – 5**.*

8. *It is most respectfully submitted that the Bid Due Date has been schedule on 20.02.2020 therefore, in view of the urgency in the matter, the Corrigendum – 5 has simultaneously been uploaded on the DEEP Portal subject to final decision of the Hon'ble Commission in the matter. It is further submitted that any further amendment as directed by the Hon'ble Commission in the matter shall be incorporated in the document.*

9. *It is submitted that this Hon'ble Commission may therefore in the interest of justice be pleased to take on record the instant additional submissions made in consonance of the petition and may be pleased to pass appropriate orders as prayed for in the petition.*

5. With the above submissions, the petitioner has prayed the following in its additional submission:

- a) *Approve the deviations in the Power Supply Agreement (As per **Annex -4**) along with Corrigendum-5 (As per **Annex - 5**) issued on 05.02.2020 and as requested herein.*
- b) *Allow MPPMCL to file additional submissions at a subsequent stage regarding the deviations in the instant petition as may be required during the course of the hearings.*
- c) *Pass any such orders or directions as this Hon'ble Commission may deem just and proper in the circumstances of the case."*

6. From the contention of petitioner in its above additional submission and in view of the prayer being sought by the petitioner for further approval of certain deviations in PSA and the dates in Schedule of Bidding in the same process of procuring 1320 MW power through competitive bidding route, the Petition No. 36 of 2019 has been reinstated to deal with the issues comprehensively in single petition only. Considering the request of petitioner for urgent hearing in light of schedule of bidding process, the Petition No. 36 of 2019 has been re-instated and fixed for hearing on 14.02.2020. During the hearing, the representative of the petitioner explained the reasons seeking further deviations in PSA from Model Bidding Documents and also for issuing Corrigendum-5 dated 05.02.2020.

7. The Commission has taken on record the following documents in this order:

- (i) Corrigendum-5 re-revised (Bid Stage) dated 05.02.2020 in RFP and PSA filed as **Annexure-5** by the petitioner in its additional submission. The aforesaid Corrigendum with regard to RFP is only for the Scheduled date of Bidding Process.
- (ii) The deviations in "Power Supply Agreement" (PSA) document from Model Bidding Document along with the statement of rationale for each deviation and the revised RFP document with seal and sign of OIC of the petitioner in this matter filed with the additional submission as **Annexure-4**.

Deviations/Changes proposed in PSA Document

8. On perusal of further deviations in PSA document for which the approval is being sought by the petitioner by its affidavit dated 01.02.2020, the Commission has observed that the deviations/ changes proposed in the PSA from Model Bidding Document issued by Ministry of Power are broadly on the following counts:

- (a) Provisions related to Default Escrow Account and Default Escrow Agreement have been incorporated as Payment Security. Accordingly, consequential changes in respective clauses have been done.
- (b) SBD was designed to have multiple power off-takers, however, in the present case, a new plant would be set up in the State of MP and entire generation would be contracted with MPPMCL. Since the contracted capacity is entirely with MPPMCL, and Coal is provided under SHAKTI B (IV) to the Supplier, any Non- Availability arising shall affect the availability of the Plant, which is not the liability of the Supplier alone. Hence the change is made accordingly.
- (c) As the amount covered under Default Escrow Agreement is 100% of average monthly Tariff, hence the term “**Maximum Monthly Payment**” (as in SBD) has been changed to “**Default Escrow Amount**”.
- (d) As the Escrow Mechanism is reinstated as per the SBD, the limit of LC is reduced.
- (e) The Letter of Credit and Default Escrow Account are to be in the same Bank. Hence the clause has been modified accordingly.
- (f) Relevant definitions incorporated such as “**Deed of Hypothecation, Default Escrow Account, Default Escrow Agreement, Default Escrow Amount and Default Escrow Bank.**”
- (g) Draft “Default Escrow Agreement”, Deed of Hypothecation, has been incorporated in Schedule J and K of PSA.

Deviation/changes made in RFP vide Corringendum-5 dated 05.02.2020 issued by the petitioner

9. On perusal of the deviations in RFP vide Corringendum-5 dated 05.02.2020 issued by the petitioner and annexed as **Annexure-5** with its submission by affidavit dated 01.02.2020, it is observed that the deviations/changes in RFP are only to the extent of revision in dates for schedule of bidding process.

10. The Commission has noted that the changes in provisions under existing Power Supply Agreement (PSA) for which the petitioner is seeking approval in its instant additional submission are mainly for inclusion of Default Escrow Agreement, Deed of Hypothecation, Letter of Credit, Payment Security for Termination, Additional Fuel Supply Arrangement, Definitions regarding various components under Default Escrow Mechanism and Secured Obligations. It is further noted that the Schedule-J and Schedule-K in PSA of Model Bidding Document is now restored by the petitioner on account of aforesaid

changes/inclusion of all aforesaid components in PSA. The Commission has observed that the provisions regarding Default Escrow Account/ Agreement and Deed of Hypothecation alongwith other related provisions and the definitions proposed to be included in PSA are already provided in PSA under Model Bidding Documents issued by the Ministry of Power. Further, the Schedule-J and Schedule-K are also provided in the PSA under Model Bidding Documents issued by the Ministry of Power. However, these provisions were earlier omitted by the petitioner considering that the provision for Letter of Credit is sufficient enough to cover the payment liability of the petitioner. The petitioner has now restored these provisions in its PSA document on the request of Bidders that the provisions of Default Escrow Account along with Letter of Credit need to be included in the PSA for Bankability, Credit-worthiness and overall viability of the project to enable bidders to arrange finances for the project at competitive terms which would in turn be beneficial for Utility. Therefore, the inclusion of such provisions which exist in PSA of Model Bidding Document does not fall under deviations. In fact, the petitioner has now restored the provisions under PSA of Model Bidding Document in its existing PSA.

11. On perusal of the changes/revision in PSA filed as **Annexure-4** of the instant additional submission by the petitioner, the Commission has considered the changes/revision in PSA – DBFOO subject to the following:

- (i) Definition of “Utility Account” be also included in Schedule-J of PSA
- (ii) The provision under Clause 22.10.2 of PSA be made as given below:

“In the event the Supplier fails to procure Fuel under an AFSA, the Fixed Charge payable for and in respect of any Non-Availability as a result thereof shall be equal to 70% (seventy per cent) of the Fixed Charge. In case, such AFSA is not approved in full or part by the Utility or the Commission, as the case may be, the Fixed Charge payable for and in respect of any Non-Availability as a result thereof shall be equal to 100% (hundred per cent) of the Fixed Charge.”

12. In view of all aforementioned and considering the reasons explained by the petitioner during hearing in this matter, the Commission in continuation of its earlier orders dated 8th November’ 2019 and 27th December’ 2019 in the subject petition hereby accords approval to the following, in terms of clause 4 under terms and conditions of the Guidelines issued by the Government of India, Ministry of Power vide resolution dated 6th March, 2019:

- (i) The Deviations in PSA from the Model Bidding Documents as filed by the petitioner as **Annexure-4** on 05.02.2020 by affidavit dated 01.02.2020.
- (ii) The changes/revision in Schedule of Bidding Process under RFP made by the

Order in petition No. 36 of 2019
petitioner vide Corringendum-5 dated 05.02.2020 which has been annexed as
Annexure-5 filed on 05.02.2020 by affidavit dated 01.02.2020.

Ordered accordingly.

(Shashi Bhushan Pathak)
Member

(Mukul Dhariwal)
Member