

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 32 of 2014

In the Matter of:

Processing of Tender for purchase of Renewable Energy Power for the period from December 2014 to March 2015.

In the Matter of:

Uttarakhand Power Corporation Limited (UPCL) ...Applicant

Coram

Shri Subhash Kumar	Chairman
Shri C.S. Sharma	Member
Shri K.P. Singh	Member

Date of Order: 9th January, 2015

ORDER

Uttarakhand Power Corporation Ltd. (UPCL) has in compliance of Clause 6 of Guidelines for short term procurement of power through tariff based bidding process issued by MoP dated 15.05.2012, filed a Petition dated 12.12.2014 seeking approval of the Commission for processing of tender for purchase of renewable energy power for the period from December 2014 to March 2015.

- UPCL stated that the un-met renewable purchase obligations (RPO) upto FY 2013-14 was 192.206 MUs and therefore, to fulfill the balance un-met renewable purchase obligation (RPO) for FY 2013-14, a tender for purchase of renewable power for the months from October 2014 to March 2015 was published in leading National News Papers and the last date of submission of which was 10.09.2014.

3. As stated by UPCL, on due date of submission, there was only single bidder (M/s Tata Power Trading Company Ltd.) due to which the date of submission of bids was extended for one week. Again, since no other bidder participated, the date of submission of the bid was further extended by 3 weeks i.e. upto 10.10.2014. Still no other bidder participated.
4. UPCL proposes to purchase approximately 20 MUs RE power through this tender.
5. UPCL in compliance of Clause 6 of aforesaid Guidelines has sought Commission's approval to process the tender as the numbers of bidders are less than two. The Clause 6 of the aforesaid guidelines inter-alia state:

"To ensure competitiveness the minimum number of bidders should be at least two other than the Genco(s) owned (51% or more) by State Government of the procuring State. If the number of bidders responding to the RfP is less than two, and procurer still wants to continue with the bidding process, the same may be done with the consent of the Appropriate Commission."

6. Hearing for admissibility of the Petition was held on 18.12.2014 at Commission's Office. In the daily Order passed by the Commission UPCL was required to submit following information by 22.12.2014:
 - (i) *Pre-qualification requirements of the bidders included in the bid documents.*
 - (ii) *Deviations in the bid document with respect to Guidelines for short term issued by MoP, if any. If not a certificate to this effect on affidavit.*
 - (iii) *To submit as to how requirements of the clause 3 of the guidelines of MoP were met.*

7. In compliance to the above Order of the Commission, UPCL has submitted point wise reply in the matter. With regard to point no.(i) of the above directions, UPCL has stated that Annexures A to E alongwith earnest money deposit were the documents required for pre-qualification of the bidders. The details of the Annexures are as given below:

Annexure-A-Bidders Company Data

Annexure-B-Schedule of deviations from General Terms and Conditions

Annexure-C-Details of source of power

Annexure-D-Valid trading license of the trader

Annexure-E-Experience Certificate

8. In respect of point no.(ii) of the above directions with regard to the deviations in the tender document vis-a-vis MoP Guidelines for procurement of short term power, UPCL has submitted that clause 5(vi)(e) pertaining to “Payment of liquidated damages for failure to supply the instructed capacity” has been modified to read as:

“Successful bidder(s) shall pay @ forbearance price of RECs for non-solar energy as the case may be, for the difference in the contracted energy and energy scheduled (as per REA issued by exporting RPC). Alternately, trader may supply RECs to UPCL for balance quantum of energy from market by 31-03-2015. This provision is applicable on quantities of supplies below 100% on monthly energy terms.”

UPCL has submitted the following reason for making above deviations:

“The substitution is done considering that renewable power is not the firm power (i.e. not uniform power during all time blocks in a day) and the scheduling of the power is done on day ahead basis. Further there is a variation in the quantum of power and its actual scheduling.”

9. With regard to clause 3 of the MoP Guidelines which requires distribution licensee to intimate about the initiation of the procurement process to the Commission, UPCL has stated:

“Since UPCL had submitted in its progress report vide letter no. 1121 dated 10.10.2014 & 1242 dated 10.11.2014 (copy enclosed) that balance RPO will be fulfilled by purchase of RE power through open tender. Therefore, it was presumed that the intimation about initiation of the procurement process to the appropriate Commission has been done. However, in future intimation will be submitted in a manner as directed by Hon’ble Commission.”

10. Commission’s View:

- 10.1 On the “first issue” as per para 6 of this Order requiring UPCL to submit “Pre-qualification requirements of the bidders included in the bid documents” the Commission has taken cognisance of the submission made by UPCL.
- 10.2 With regard to the “second issue” as per para 6 of this Order requiring UPCL to intimate about the “Deviations in the bid document with respect to Guidelines for short term issued by MoP, if any” it is pertinent to reproduce clause 5(vi) (e) of the Guidelines which read as:

“Payment of liquidated damages for failure to supply the instructed capacity.

- *Both the parties would ensure that actual scheduling does not deviate by more than 15% of the contracted power as per the approved open access on monthly basis.*
- *In case deviation from Procurer side is more than 15% of contracted energy for which open access has been allocated on monthly basis, Procurer shall pay compensation at 20% of Tariff per kWh for the quantum of shortfall in excess of permitted deviation of 15% while continuing to pay open access charges as per the contract.*
- *In case deviation from Seller side is more than 15% of contracted energy for which open access has been allocated on monthly basis, Seller shall pay compensation to Procurer at 20% of tariff per kWh for the quantum of shortfall in excess of permitted deviation of 15% in the energy supplied and pay for the open access charges to the extent not availed by the Procurer.”*

Further, it is relevant to reproduce clause 7 of these Guidelines which read as:

“Generally no deviation shall be allowed from these Guidelines. However, if it is essential to have the deviation from these Guidelines, the same could be done with the prior approval of the Appropriate Commission”

10.3 From the above conditions in the Guidelines issued by MoP, it is amply clear that the distribution licensee is required to strictly adhere to the conditions stipulated in the Guidelines and only when it is essential to have deviation from these guidelines, the same could be done with the prior approval of the Commission. Notwithstanding the above, UPCL went ahead with the bidding process with an apparent deviation, as mentioned in the above Para 8 of this Order, in the tender document without seeking prior approval of the Commission on the above deviation in accordance with the conditions stipulated in the guidelines.

10.4 However, during the proceedings in the matter when deficiencies/ additional information were sought by the Commission in its daily Order dated 18.12.2014, UPCL has forwarded some reasons which have been reproduced in Para 8 of this Order. Examining the same the Commission holds that the reason put forth do not

warrant making the liquidated damage more stringent than those allowed in MoP guidelines.

- 10.5 Further, from the reading of the aforesaid clause 5(vi)(e) of the guidelines it is apparent that it casts obligation equally on both parties i.e. the procurer as well as the seller to ensure that actual scheduling does not deviate by more than 15% of the contracted power as per the approved open access on monthly basis. In case of deviation, by either procurer or seller, it is the responsibility of the defaulter to compensate the other at 20% of tariff per kWh. However, the modified clause incorporated by UPCL, discussed in Para 8 in the first instance does not provide obligation on both the parties stipulated in the guidelines rather, it casts obligation only on the seller for payment of compensation in case of any default in scheduling by the seller without any obligation on the procurer/UPCL for payment of compensation in case deviation is on procurer side. Further, UPCL has modified the condition including rate of payment of compensation which is stipulated @ 20% of tariff per kWh in case of deviation of more than 15% of contracted energy for which open access has been allocated on monthly basis and instead has included payment of compensation at a much higher rate than provided in the guidelines i.e. at forbearance price of RECs for non-solar energy for any quantum of difference between contracted energy and scheduled energy taking away 15% margin.
- 10.6 Taking these deviations from MoP guidelines and including such unreasonable harsh penal conditions in the tender document for failure to supply the instructed capacity by the seller could have resulted failure to obtain reasonable participation in the bidding process resulting in UPCL having received only one bid in the tendering process. However, if at all UPCL was contemplating any such modification, it should have approached the Commission, for seeking prior approval of the same in accordance with the provisions of the MoP guidelines.
- 10.7 Now on the "third issue" as per para 6 of this Order requiring UPCL "to submit as to how requirements of the clause 3 of the guidelines of MoP were met." with regard to intimation to the Commission about initiation of procurement process, the submission made by UPCL, as mentioned in Para 9 of this Order that it had

intimated the Commission, in the progress reports submitted by it in compliance of regulations 5.2 of UERC (Compliance of Renewable Purchase Obligation) Regulations, 2010, that balance RPO shall be fulfilled by purchase of RE power through open tender is also not acceptable since no specific intimation was filed by UPCL before the Commission in accordance with the requirement of MoP guidelines. UPCL being a distribution licensee, its actions and deeds should be compliant of the legal/ statutory procedures. The guidelines have been framed by MoP on strength of authority vested in Government of India under section 63 of Electricity Act. These guidelines are subordinate legislation and have the same force as the Act itself. From the above narration, it is evident that the licensee has failed to comply with the provisions of this guideline in the instant procurement of power. The Commission, even though desirous of prompt procurement of RE power, has no option but to refuse the permission to continue with the procurement of RE power under instant bid invitation holding the bid invitation to be invalid.

- 10.8 In the light of the above, the Commission hereby directs UPCL to cancel the present bid and float a fresh tender consistent with the MoP, GoI "Guidelines for short-term procurement of power by distribution licensee through tariff based bidding process". The cancellation of the present bid is on account of failure of UPCL's concerned officer(s) to abide by the relevant law and guidelines framed thereunder.
- 10.9 Taking a serious view the Commission directs the MD, UPCL to take stern action against the concerned officer(s) for their arbitrary action in the entire bidding process. Fresh invitation of bids for RE Power should also be done in accordance with GoI guidelines in the matter at the earliest. Requirement of clause 3 of the guidelines for this bid invitation would be deemed met for this bid invitation.

Ordered accordingly.

(K.P. Singh)
Member

(C.S. Sharma)
Member

(Subhash Kumar)
Chairman