BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION AT AHMEDABAD

PETITION NO. 1049 OF 2010

In the matter of:

Petition under Section 63 of The Electricity Act,2003 for approval and adoption of Tariff for procurement of 3000 ± 20% power on long term basis under Class-I route of Tariff based Competitive Bidding Guidelines.

Petitioner : Gujarat Urja Vikas Nigam Limited (GUVNL)
Sardar Patel Vidyut Bhavan, Race Course,
Vadodara.

Coram :
Dr P.K. Mishra, Chairman
Shri Pravinbhai Patel, Member (Tech)
Dr.M.K.Iyer, Member(Fin)

ORAL ORDER

1. The matter was kept for hearing on 19.10.2010. When the matter was called out, S/Shri K.P.Jangid, P.J.Jani along with Shri V.T.Patel were present on behalf of the petitioner.

2. Shri K.P.Jangid, on behalf of the petitioner, submitted that the Commission has vide its order dated 12th October,2010 raised various queries. In this regard, submission of the petitioner is as under.

2.1 With reference to the query of the Commission as to whether under the competitive bidding guidelines, any deviations in the bid documents are allowed after completion of the bidding process, the petitioner submitted that they had invited the bid for procurement of power under Case-1 bidding. As per the approved Request for Proposal (RfP) document by the Commission, the bidders were

required to submit the following documentary evidence in support of proof of fuel arrangement:

a) Letter for linkage of fuel from Fuel Supplier,
b) Fuel Supply Agreement between Bidder and Fuel Supplier
c) Coal Block Allocation Letter/In Principle Approval for Allocation of Captive Block from Ministry of Coal,
d) Gas block allocation letter / in principle approval of Gas block from Ministry of Petroleum and Natural Gas
e) Other details submitted by the Bidder subject to being accepted by GUVNL as a sufficient proof for demonstration of ability.

2.2 M/s Wardha Power Company Ltd. had executed Fuel Supply Agreement for a period of 30 years with Gujarat Mineral Development Company (GMDC) which requires WPCL to supply power generated from coal to be supplied to it from captive coalmines allocated to GMDC to GUVNL at tariff specified in the Fuel Supply Agreement (FSA). Therefore, M/s Wardha Power Company Ltd. (WPCL), in the covering letter of the bid, gave conditional acceptance to the RFP, whereby the Power Purchase Agreement was subject to fulfilment of obligations by GMDC under the FSA.

2.3 M/s Wardha Power Company Ltd. (WPCL) had given conditional acceptance to the RFP based on fulfilment of Fuel Supply Agreement with Gujarat Mineral Development Corporation (GMDC). The petitioner had requested M/s WPCL to give un-conditional acceptance of bid documents, but M/s WPCL continued their stance of conditional acceptance to the RFP Documents and reiterated that their

acceptance to the bid documents is based on the agreement of M/s WPCL for fuel supply by GMDC being fulfilled and subject to conditions of its Coal Supply Agreement (CSA) with GMDC being incorporated in the GERC's approved Power Purchase Agreement. It is not a case where any deviations in the bid documents were incorporated / considered after completion of the bidding process because the bid submitted by M/s WPCL was a conditional bid.

2.4 The Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees dated 19th January, 2005 notified by the Ministry of Power, Government of India is in the nature of an executive order purported to have been passed under Section 63 of the Electricity Act,2003. The proposed modification in the PPA would be with a view to protecting consumer interest by way of providing electricity at a lesser cost and with transparency and fairness in the procurement process. Therefore, the State Commission, which is the authority under the Electricity Act, 2003 may approve the modifications made by the petitioner.

2.5 With reference to the second query as to whether under the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees dated 19th January, 2005 notified by the Ministry of Power, Government of India, as amended, a conditional bid quoted by any bidder can be accepted as qualified bid by the procurer, the petitioner submitted that the Standard Bid Document issued by the Ministry of Power, Government of India, under the Guidelines for Competitive Bidding provides for discretionary powers of the procurer to consider a bid as 'Responsive' or 'Non-Responsive'.

2.6 As per clause no. 3.2 of the Request for Proposal (Step-I Responsiveness check of Non Financial Bid), the petitioner is required to undertake responsiveness check which reads as under:

The Non Financial Bid submitted by Bidders shall be scrutinized to establish responsiveness to the requirements laid down in the RFP. Subject to Clause 2.5(g), any of the following may cause the Bid to be considered "Non-responsive", at the sole discretion of Procurer/ Authorized Representative:

3.2 Step-I Responsiveness check of Non-financial Bid.

- *Bids that are incomplete, i.e. not accompanied by any of the applicable formats inter alia covering letter, power of attorney supported by a board resolution as per Clause 2.4.1.1, applicable board resolutions, applicable undertakings, format for disclosure, valid Bid Bond, Consortium Agreement;*

- *Bid not signed by authorized signatory and / or stamped in the manner indicated in this RFP;*

- *Material inconsistencies in the information / documents submitted by the Bidder, affecting the Qualification Requirements;*

- *Information not submitted in the formats specified in this RFP;*

- *A Bidder submitting more than one Bid or participating in more than one Bid as a Member of Bidding Consortium;*

- *Bid validity being less than that required as per Clause 2.9 of this RFP;*

- ***Bid being conditional in nature;***

- *Bid not received by the Bid Deadline;*

- *Bid having Conflict of Interest;*

- *More than one Member of the Bidding Consortium or a Bidding Company using the credentials of the same Parent Company / Affiliate;*

- *Bidder delaying in submission of additional information or clarifications sought by Procurer as applicable;*

- *Bidder makes any misrepresentation as specified in Clause 2.5.*

In terms of the above clause, though the bid may be non-responsive when it is conditional in nature, the bid document provides discretion to procurer (GUVNL) to treat it as responsive or non-responsive on a case to case basis. The expression used in the opening part of Clause 3.2 is "at the sole discretion of the Procurer". In terms of the above, in the given circumstances and considering the larger public interest, the petitioner exercised its discretion to consider the bid as responsive even though it may be conditional.

2.7 Further, the issue of conditional acceptance to the RFP Documents by M/s WPCL and insistence for incorporating that their bid is subject to conditions of its Coal Supply Agreement (CSA) with GMDC was discussed and deliberated during the Bid Evaluation Committee meeting (Technical Evaluation) on 5th March, 2010 and the Bid Evaluation Committee considered the conditional bid of M/s WPCL as responsive, since the bid submitted by M/s WPCL was based on coal supply by GMDC from the mines allocated to GMDC under the State PSU dispensation route by Ministry of Coal (Government of India) to Gujarat. The Committee also observed that as per the Fuel Supply Agreement between GMDC and M/s WPCL the power is to be

supplied to the State of Gujarat at a tariff agreed with GMDC under the Fuel Supply Agreement, which is very competitive and the same should be availed by the petitioner. Energy & Petrochemicals department, Government of Gujarat through communication dated 6th April 2010 conveyed that the bid of M/s WPCL may be considered as responsive.

2.8 The petitioner, further, submitted that by virtue of discretionary powers to the procurer in respect of Responsiveness check, it was found that the levelised tariff of Rs. 2.345 per unit quoted by WPCL was substantially lower than the quoted levelised tariff of Rs. 2.800 per unit of the next lowest bidder (L-2 bidder) in the said bidding process, as well as significantly lower as compared to the levelised tariff, received under Competitive Bidding Process by various other State Utilities under Case-1 / Case-2.There is substantial difference of Rs. 0.455 per unit in the two tariffs quoted by lowest bidder and 2nd lowest bidder, which will result in additional financial gain to the petitioner of Rs. 342 crores annually i.e. Rs. 8554 crores in 25 years. Moreover, GMDC is a Government of Gujarat undertaking and has committed coal to Wardha Power Company Ltd. with the condition that the power should be made available to GUVNL. Therefore, the petitioner considered the bid of M/s WPCL as responsive qualified bid.

2.9 As regards the third query of the Commission as to why the condition imposed by any of the bidders regarding dependence of their bid on fuel supply agreement with the third party, should not render the bid unresponsive, the petitioner submitted that the procurer has discretionary power as to whether a particular bid can be considered

'Responsive' or 'Non-Responsive'. Since, in the Fuel Supply Agreement submitted by M/s WPCL along with RFP documents it is agreed that WPCL shall supply power to Gujarat at a levelised tariff of Rs. 1.98 per unit at generator bus-bar and Rs.2.345 at Gujarat periphery, the petitioner, in the interest of consumers at large and to ensure availability of cheaper power to all categories of consumers, being principal objective of tariff policy, considered the bid submitted by M/s WPCL as responsive.

2.10 As regards the fourth query of the Commission as to whether it is permissible to accept such bid by the evaluation committee without allowing equal opportunity of the same deviation, as allowed to M/s Wardha Company Pvt. Ltd., to other bidders, the petitioner submitted that amongst the 11 bids which were received by the petitioner, only M/s WPCL had submitted conditional bid based on the Fuel Supply Agreement executed with GMDC. The necessity for incorporating the modifications in the GERC's approved Power Purchase Agreement arose on account of the conditional bid submitted by M/s WPCL stipulating that their bid was valid provided the obligations of fuel supply by GMDC being fulfilled and subject to conditions of its Coal Supply Agreement (CSA) with GMDC being incorporated in the GERC's approved Power Purchase Agreement.

2.11 The Fuel Supply Agreement executed by M/s WPCL and GMDC is unique in nature as compared to normal Fuel Supply Agreement, wherein over and above the obligation of fuel supplier to supply fuel there is counter obligation binding the procurer of coal to supply power generated by using the coal to be supplied under the agreement to GUVNL at the rate specified in the FSA. Thus, there is no

possibility that giving equal opportunity of the same deviation, as allowed to M/s Wardha Company Pvt. Ltd., to other bidders, could have materially affected the quotes offered by other bidders. It is a peculiar case, where there is a binding condition on the bidder to use the coal for supply of power to GUVNL and at a specified tariff only. Conversely, the bidder has agreed to supply power to GUVNL only, at tariff not more than mutually agreed between GMDC and M/s WPCL provided such coal is made available to him.

2.12 It is further submitted that the power of the Commission under Section 63 of the Electricity Act,2003 is not restricted in any manner to allow any deviation in the PPA, so long as such deviation is a transparent and fair, and protects consumer interest.

2.13 With the above submission, the petitioner prayed that the Commission may be pleased to approve the deviations in Power Purchase Agreement executed by the petitioner with all Successful bidders under Competitive Bid Specification No. 01/LTPP/2009 and adopt the tariff determined through competitive bidding process in accordance with Competitive bidding guidelines and section 63 of Electricity Act,2003.

3 We have carefully considered the submissions made by the petitioner. The petitioner has made submission regarding the queries raised by the Commission. They relied on section 3 of Request for Proposal (RfP) for long-term procurement of power in the Case I bidding documents, which pertains to evaluation criteria. Clause 3.2 of the RfP is with reference to responsiveness check of non-financial bid. The wording used in the first para of the said clause provides the

discretionary power to the procurer to decide bid as non-responsive and not otherwise. The checks which are required to be carried out are with reference to verification of the responsiveness of the non-financial bid. The various points stated in this clause are with reference to non-qualification of bidder. It does not provide any power to consider the bids as responsive bid. The interpretation given by the petitioner is not in the right spirit of the bidding process envisaged under Section 63 of the Electricity Act,2003. If the interpretation given by the petitioner is accepted, in that eventuality, there is no meaning of carrying out responsiveness check, because every default as stated in para 3.2 considered as non-responsive is subject to discretion of the procurer, which may lead to a situation where disqualified bidders might also become qualified. Therefore, we do not agree with the submission made by the petitioner in this regard.

3.9 The petitioner submitted that the levelised tariff of Rs.2.345 per unit quoted by the petitioner is lowest and it is in the interest of the consumers of the State. However, it is also essential to consider that the same bid is subject to availability of the coal from Morga II block of GMDC and in case the same is not available to M/s.Wardha Power Ltd. in that case, the bidder may terminate the contract. In such an event, the petitioner requires to fulfil the shortage from procurement of power through other resources and it might be possible that they have to pay higher charges than the competitive price quoted by other bidders. Hence, the argument of the petitioner that the levelised tariff quoted by M/s.Wardha Power Company Ltd. is in the consumers' interest is also subject to fuel supply agreement between GMDC and M/s.Wardha Power Company Ltd. The sanctity of the biding process is not maintained by allowing one bidder a special treatment. The

Fuel supply agreement between GMDC and M/s.WPCL is also incorporated in the Power Purchase Agreement executed between the petitioner and M/s.KSK Mahanadi Power Co.Ltd. (formerly M/s.Wardha Power Company Ltd). However, under Case I bidding, arrangement of fuel supply is the sole responsibility of the supplier. Hence, incorporation of FSA as part of PPA is not a valid PPA under Case I bidding. A PPA should not be a conditional PPA, in that case the sanctity of the contract will be lost. Both the petitioner and KSK Mahanadi Power Co.Ltd. are, therefore, directed to review the inclusion of FSA as a part of the PPA. The Commission has approved the deviation from the Standard Bid Document vide orders dated 13.11.2009 & 21.12.2009. The present petition incorporates deviation which is significantly different from the approved PPA by the Commission. Hence, the PPA in the present form cannot be approved.

4 We direct the petitioner that they may re-negotiate with M/s.KSK Mahanadi Power Co.Ltd. (erstwhile M/s.Wardha Power Company Ltd.), remove the FSA from the PPA and delete the conditionality articles/clauses which are part of the PPA and report to the Commission in this regard. In so far as the PPA in the present form is concerned, minor deviations and definitions are required to be appropriately incorporated/ amended in the PPA as may be directed by the Commission in its final order.

5 Similar corrections shall also be made in the PPAs of the other two companies viz. Essar Power Ltd. and Shapoorji Pallonji Energy (Gujarat) Pvt. Ltd as may be directed in the final order of the Commission.

6 We order accordingly.

7 The next date of hearing is kept on 16.11.2010 at 11.30 hrs.

Sd/-	Sd/-	Sd/-
[**Dr. P.K. MISHRA**]	**[PRAVINBHAI PATEL]**	**[Dr.M.K.IYER]**
Chairman	**Member (Tech)**	**Member (Fin)**

Place: Ahmedabad
Dated: 10/11/2010