

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 166 of 2017

Date: 6 December, 2017

**Coram: Shri Anand B. Kulkarni, Chairperson
Shri Deepak Lad, Member**

**Petition of The Tata Power Co. Ltd. (Generation) under Section 86(1)(f) read with
Section 86(1)(b) of the EA, 2003 challenging BEST's decision dated 29.11.2017
informing that Tata Power has not pre-qualified for e-reverse auction for procurement
of 250MW of power for a period of 5 years from FY 2018-19**

The Tata Power Co. Ltd. (Generation) [TPC-G]	...Petitioner
Brihanmumbai Electric Supply & Transport Undertaking (BEST)	...Respondent 1
Tata Power Trading Company Limited (TPTCL)	...Respondent 2

Appearance

Representative for the Petitioner:	Smt. Deepa Chawan (Adv.)
Representative for Respondent 1:	Shri Harinder Toor (Adv.)
Authorised Consumer Representative:	Dr. Ashok Pendse, TBIA

DAILY ORDER

1. TPC-G set out the background and facts of the matter. TPC-G submitted that the RFQ, RFP and Model Agreement were issued by MoP, in terms of the Competitive Bidding Guidelines. Clauses 1.2.13, 2.8, and 2.19 of the RFQ specifically confer power on BEST to provide clarifications to the prospective bidders. BEST exercised its power and responded to TPC's queries on 3 October, 2017. Based on the clarification provided by BEST, TPC was induced to change its position.
2. TPC-G submitted that Appendix 1 of the RFQ provides the Covering Letter to be submitted by the Bidder. TPC-G sought clarifications regarding the interpretation of

Clauses 10 and 11 of Appendix 1, which were replied to by BEST. BEST is a State Entity under Article 12 of the Constitution and is required to act in a fair and just manner.

3. TPC-G submitted that BEST issued Corrigendum (1) dated 3 October, 2017 to the Bid Documents, in response to TPC's query, which reads as under:

<i>S. No.</i>	<i>Clause No.</i>	<i>Reference Clause</i>	<i>Query</i>	<i>Response</i>
244	RFQ	<i>APPENDIX I I/ We declare that our Associates are not a Member of a/ any other Bidder applying for pre-qualification</i>	<i>Kindly clarify whether a trading licensee and its parent company may participate in the bid independently, each participating from different projects.</i>	<i>A Trading Licensee and the parent company can bid independently from different projects subject to the fulfilment of the Clause 2.2.2 of RFQ</i>

4. TPC-G submitted that Clause 2.8.3 of the RFQ states that all clarifications and interpretations issued by the Utility shall be deemed to be part of the RFQ. Clause 2.9.1 of the RFQ empowers BEST to amend the RFQ, either at its own initiative or in response to clarifications requested by a Bidder. In any case, BEST is bound by its clarifications, as held by the Hon'ble Supreme Court in the Usha Martin Judgment.
5. TPC also referred to Clause 2.8.2 of the RFQ, which empowers BEST to not provide any clarification at its sole discretion. However, BEST chose to provide clarifications, and induced TPC to change its position and act on the clarification. The clarifications were in force for around one and a half months from 3 October, 2017 to the Bid date, i.e., 15 November, 2017.
6. Corrigendum (10) dated 22 November, 2017 issued by BEST stipulated the date for intimation to short-listed and pre-qualified Bidders for opening of the Bids, as 24 November, 2017. This also implied that the disqualified Bidders would be informed on 24 November, 2017, however, no such communication was received from BEST on 24 November, 2017. On 29 November, 2017 at 18:44 hours, BEST informed TPC vide a one-line communication that it has been disqualified. While BEST is within its rights to disqualify any Bidder without assigning any reason, however, its internal Files should have cogent reasons for such action, which would show that BEST has applied its mind in this regard.

7. TPC submitted that BEST's actions show malice and poor conduct, as the communication of disqualification was sent in the late evening of 29 November, 2017, when the bidding was scheduled on the morning of 30 November, 2017. TPC filed the present Petition before the Commission at the first opportunity, in the morning of 30 November, 2017, with due notice to BEST at 10:18 hours.
8. TPC submitted that BEST, in Para 7 of its reply, has stated that any clarification provided by BEST cannot overrule the MoP Guidelines, and any deviations to the MoP Guidelines have to be done with prior approval of the Commission. Hence, such clarifications provided by BEST are not sacrosanct but are to be understood within the framework of MoP Guidelines and Commission's Orders. TPC submitted that the clarifications are binding on BEST, and cited the Usha Martin Judgment of the Supreme Court in this regard.
9. In reply, BEST submitted that the auction has taken place on 30 November, 2017, and hearing TPC's Petition at this juncture is a mere academic exercise.
10. The Commission stated that it has no intention of undertaking any academic exercise. The Commission enquired whether BEST had approached the Commission during the bidding process, either by way of Petition or letter, seeking the Commission's guidance. BEST's counsel appeared to be unaware of any such communication. The Commission read out relevant parts of the BEST's letter dated 23 November, 2017 and the Commission's reply dated 28 November, 2017, which are reproduced below:

i. Extracts of BEST letter dated 23 November, 2017

"As per the order of the Hon'ble Commission, BEST has floated three tenders for procurement of 300 MW, 200 MW & 250 MW power on Medium Term basis through DEEP portal and bid due date was on 15th November 2017.

In the 250 MW tender, three parties participated, which are

<i>Sr No.</i>	<i>Bidder</i>	<i>Bid Quantum (MW)</i>
<i>1</i>	<i>MSEDCL</i>	<i>250</i>
<i>2</i>	<i>Tata Power Trading Company Limited</i>	<i>250</i>
<i>3</i>	<i>Tata Power Co. LTD</i>	<i>150</i>

Sr. No. 2 and 3 are getting disqualified considering para 10 and 11 of Appendix-1 of RFQ & RFP.

In the event we disqualify Sr. No. 2 and 3, only Sr. No. 1 will remain as a sole bidder which would not be a competitive price and e-RA cannot be effected.

It is therefore intended to cancel the tender of 250 MW and retender the same with deviations as follows:

- i. Exempt pre bid meeting*
- ii. Reduce time period for overall processing of tender proportionately...*

ii. Extracts of Commission’s reply dated 28 November, 2017

“In this regard, the Commission notes the following facts:

- 1) The point on which BEST now proposes cancellation of the tender had been formally clarified to the contrary by BEST in response to an issue raised by Tata Power Co. (TPC) at the pre-bid meeting;*
- 2) TPC had sought clarification as to whether a Trading Licensee and its parent Company could participate in the Bid independently, each from different generation sources.*
- 3) BEST had clarified to TPC and other prospective Bidders that a Trading Licensee and its parent Company can bid independently based on different generation sources subject to fulfilment of Clause 2.2.2 of the RfQ;*
- 4) The Bids at Sr. Nos. 2 and 3 appear to have been made on the basis of that formal clarification.*

The Bid Documents have to be read with the pre-bid clarifications. In the light of the factual matrix set out above, BEST may approach the Commission, through a Petition, for prior approval of cancellation of the tender for 250 MW if it still considers it appropriate.”

11. The Commission asked BEST as to why it had provided clarifications to TPC’s queries, as it could have chosen to remain silent. BEST replied that while the above was true, the clarifications cannot overrule the law. BEST stated that there is no estoppel against the statute and TPC has misunderstood the clarification.
12. BEST also submitted that inducement and malafide behaviour are applicable only to individuals, and there are no personal allegations against any officer of BEST, hence, TPC’s submissions in this regard should be ignored.
13. BEST referred to Clause 2.5.2 of the RFQ, which states that the Utility shall not be liable for any omission, mistake or error in respect of any matter concerning this document or the bidding process, including any error or mistake in any information or data given by the Utility. BEST stated that TPC’s Petition is belated and the tendering process is complete, which cannot be undone.

14. The Commission asked BEST whether its clarification was a mistake, and qualified under Clause 2.5.2 of the RFQ. The Commission also observed that it would have to study whether estoppel was applicable in the present Case.
15. In rejoinder, TPC submitted that it had approached the Commission at the first available opportunity. TPC added that it qualifies to bid, based on the bid documents read with BEST's clarification. Further, a format of a letter to be submitted along with the bid should not be equated to the law. TPC submitted that if BEST's action of disqualifying TPC is allowed, then any Utility can give a contract to any chosen entity by disqualifying the other Parties.
16. TPC requested the Commission to permit it to submit a compilation of the relevant Judgments of the Supreme Court. The Commission allowed the same, and directed TPC to submit the compilation within 3 days.
17. TPC submitted that in the meantime, BEST should not proceed with the Bid and issue Letter of Award, and clarified that the necessary relief seeking stay on the process had been sought in its Petition. BEST submitted that it strongly opposed grant of any stay on the proceedings.
18. The Commission is not expressing a final view in the matter, and shall do so after detailed study of all the documents and the relevant Supreme Court Judgments. In the meantime, the Commission directs BEST to refrain from taking any further action in the context of this Bid, such as issuing of Letter of Award, signing of APP, etc., till the Commission issues the final Order in this matter. The Commission is of the view that this would not cause undue hardship to any of the Parties involved.

Sd/-
(Deepak Lad)
Member

Sd/-
(Anand B. Kulkarni)
Chairperson