**Counter to the Writ Petition No.16122 of 2015 (Rattan India vs. TSDISCOMS)**

**PRAYER:**

* The basic prayer of the Petitioner is to issue order /direction declaring the condition stipulated by the Utility requiring the location of the prospective bidders in Southern Region (all Southern States like Telangana, AP, Karnataka, Tamil Nadu, Kerala & Pondicherry), as mentioned at Clause 1.1.1 of the RFQ (Request for Qualification) dated 18.05.2015, on account of which the Petitioner is eliminated from participating in the Bid Process, as arbitrary, illegal stating that it is a deviation to Model RFQ leading to elimination of competition and sought to set aside the same.
* The 2nd prayer of the Petitioner is to declare the condition stipulated for commencement of supply of power within a period of 40 days from Bid due date as mentioned at Clause 1.1.1 of the RFQ dated 18.05.2015, which is alleged to be restricting the participation of power projects under construction in the bidding process, as arbitrary, illegal and sought to set aside the same.
* The 3rd prayer of the Petitioner is to declare the condition put forth by the Utility in the Model RFQ that the applicant/bidder shall have executed Open Access Agreement /Transmission Service Agreement with Power Grid Corporation (PGCIL, a Govt.of India Enterprise) for the quantum of power offered in the Bid and the period of open access agreement shall be co-terminus with PSA (Power Supply Agreement to be valid for 8 years) as mentioned at Clause 2.2.1 (e) of the RFQ dated 18.05.2015 as arbitrary, illegal and against the principles of natural justice.
* The 4th prayer of the Petitioner is to direct the Respondents to allow the Petitioner to submit the Application/Bid and further sought direction to the Respondents to process the Application/Bid of the Petitioner ignoring the above impugned conditions and pass other orders as this Hon’ble Court may deem fit.
* In addition to the above, the Petitioner also sought for Stay of the further process of RFQ dated 18.5.2015 by permitting the Petitioner to submit the Application/Bid and by processing the same being uninfluenced by the impugned conditions in RFQ, pending disposal of Writ Petition

**FACTS:**

Before discussing on the merits of the Petition, the facts are submitted below:

* The present bidding process has been undertaken for procurement of 1000 MW power to TSDISCOMS (TSSPDCL & TSNPDCL with TSSPDCL as lead procurer) on long term for a period of 8 years from Power Projects located within Southern Region.
* At the outset, it is humbly submitted that for any prospective bidder to participate in the bidding, he has to fulfill the bid eligibility conditions like Technical eligibility & Financial eligibility. Otherwise, he cannot qualify in the Bid process.
* The power procurement guidelines and Standard Bidding Documents (SBDs) had been issued by the Ministry of Power, Govt. of India vide notification 19th January 2005, which were subsequently amended from time to time and again revised the guidelines vide notification dated 5th May 2015.
* In addition to the said revision, the Ministry of Power has also revised the Standard Bidding documents (also called Model Bid Documents) for adopting by the Procurers and for any deviations to be taken up in the document, the Appropriate Commission (Telangana State Electricity Regulatory Commisson) is authorized to approve the same.

The relevant extract of the revised guidelines is as below:

Clause 3(i)…

*“Any deviation from the Standard Bidding documents shall be made by the Distribution Licensees with the prior approval of the Appropriate Commission instead of Central Government.”*

* The Model RFQ document has permitted to make changes in the RFQ document as required by the Utility (to Customise the document by the Utility) as extracted below:

“1.1.1 …………………

**Instructions for customisation of the document by the utility**

**The Model Request for Qualification (the “RFQ”) may be customized for project-specific use in accordance with the instructions below:**

**……………………….**

**Note II: All project-specific provisions in the RFQ have been enclosed in square parentheses and may be modified, as necessary, before issuing the RFQ to prospective Applicants. The square parentheses should be removed after carrying out the required modification…………… “**

In line with the above provision, the [36] months (months mentioned in the square bracket) in the Model RFQ has been changed to 40 days in view of urgent power requirement.

* The Respondents have floated the present tender as per the latest guidelines.
* TSERC has given in-principle approval to the proposed procurement on 26.05.2015.
* Now coming to the Petitioner’s contentions, it is to submit that the Petitioner has contested the following Clauses 1.1.1 & 2.2.1(e) of the RFQ dated 18.05.2015, which prescribed conditions such as the Participating bidder’s Power Project must be located within Southern Region (Telangana, A.P., Karnataka, Tamil Nadu, Pondicherry), Commencement of Power Supply shall be 40 days from Bid due date, the Bidder must have executed Open Access Agreement with Power Grid Corporation (PGCIL) etc.
* The Petitioner is contesting the condition to limit the procurement to Southern Region as it is located in Maharashtra (Northern Region) and therefore he will not qualify in the tender as the bidders power projects. Moreover, as per Petitioner’s statement in WP, it has commissioned only one (1) unit of 270 MW out of the total 5 units (5x270 MW), which units are stated to be under construction and hence it cannot supply power to Utility in 40 days from Bid due date. Even on this front also, he will not qualify in the RFQ stage. To gain entry into the Bid process, the Petitioner has contested these conditions on the pretext of restricting competition and prayed this Hon’ble Court to direct the Respondents to ignore these conditions and to permit it to participate in the Bid process, which is untenable.
* The reason for limiting the procurement to SR Region by the Respondents is that for power to flow from Northern Region (NR) grid to SR grid, there must be adequate transmission lines /Corridor availability. As the existing corridor is not adequate (existing transmission lines already fully loaded), additional power isnot permitted by National Load Despatch Centre (NLDC), New Delhi from NEW grid (North, East & Western Regions) to SR grid. Additional 765 KV Transmission Lines (Inter-State) are being constructed by PGCIL for improving the corridor, which is expected to commission in the year 2017 only. Therefore the procurement is limited to SR Region.
* In this regard, it is to submit that though the Govt. of Telangana has entered into an MOU with Govt. of Chattisgarh, for 1000 MW supply on long term basis. Because of non-availability of corridor, no power flow is taking place.
* The corridor between NEW grid and SR grid is expected to improve only in the year 2017. Till such, TSDISCOMS cannot wait for such corridor. Wherever available sources are there, we have to tap the same. Within Southern Region (SR), there are two sub-regions called S1 (Telangana, AP & Karnataka States) & S2 (Tamil Nadu, Kerala, Pondicherry) and there is no corridor constraint between S1 & S2 Sub-regions.
* The other reason for stipulating the condition that the commencement of supply shall be 40 days from Bid due date, is that Telangana State requires immediate power at affordable price, as the State is facing acute power shortage. The Respondents are anticipating significant load growth and the following priorities have been identified by the Govt. of Telangana.
* 9 hours supply to Agricultural Sector
* 24x7 supply to Rural domestic customers
* New Industrial Policy announced which requires huge quantum of power availability round the clock.
* Water grid project & Lift Irrigation Schemes taken up on priority.
* Further, regarding the other condition for Open access agreement in place, it is to submit that for power flow to happen between SR & Telangana State, there must be Open Access agreement executed by the bidder with Power Grid (PGCIL), which is operating Inter-state Transmission lines, in order to ascertain the availability of transmission Corridor. Therefore this condition was incorporated in the RFQ.
* All these deviations in the RFQ have been approved by TSERC vide letter dated 09.06.2015 (Copy of the letter is annexed).
* The prices under Short term Procurement are very high depending upon prevailing market conditions such as demand, supply availability and the quantum traded. Therefore, the TSDISOMS have chosen Long term Procurement, where the price offered will be competitive and lesser than the Short term prices.
* TSERC has already given in-principle approval. However, prior approval of the TSERC may not be possible as the Model RFQ has been revised based on the queries raised by certain prospective bidders in the pre-application conference held on 25.05.2015 and sent to the Commission for approval of the deviations proposed. Without examining the deviations, the Commission cannot issue any prior approval. Now the revised RFQ has been uploaded in the website after TSERC gave its approval.
* In this context, it is to submit that the Petitioner has not even purchased the RFQ document by paying Rs.1,00,000/- and also not participated in pre-application conference held on 25.05.2015. He is simply contesting that he is aggrieved without purchasing RFQ. As per Clause 5.1 of RFQ, those who purchased RFQ can only seek clarifications and no one else is permitted to write letters or make any other correspondence.

The para-wise remarks are hereunder:

* Paras 1&2 – General details about the Petitioner. No remarks required.
* Paras 3&4 - The petitioner has stated about the provisions of the Electricity Act 2003 and the obligations on the part of Respondents. The Respondents have been following the bidding guidelines scrupulously. The TSERC has issued in-principle approval to the proposed procurement considering the same.
* Paras 5,6,7 &8 - The Petitoner has mentioned about the provisions of the Electricity Act 2003 and National Tariff Policy issued by the Ministry of Power, Govt. of India. - No remarks required.
* Paras 9,10 - The Petitoner has mentioned about the origin of the Competitive Bidding Guidelines issued by the Ministry of Power, Govt. of India. - No remarks required.
* Para-11 - The Petitioner has referred to previous tender of 2000 MW floated by TSSPDCL (as a Lead procurer). That was cancelled and hence it has no relevance to the present Petition.
* Para-12 - The Petitioner has referred to present tender of 1000 MW floated by TSSPDCL(as a Lead procurer with TSNPDCL –the Respondents) - No remarks required.
* Paras -13,14,15 &16 - The Petitioner has contested that the RFQ dated 18.05.2015 is inconsistent and violation of the Model RFQ & other Model Bidding Documents and extracted the clauses no.1.1.1 & 2.2.1(e) and alleged that the deviations made are arbitrary and unreasonable from Model RFQ and further alleged that no prior approval was issued by TSERC and he was eliminated from participating in the Bid process, which is totally false and untenable. The reasons for limiting to SR Region have been submitted at above paras.
* The grounds raised in the Petition at Para-16 are also not reflecting the facts.
* The Petitioner has contended at Para-17 that it has been left with no other alternate remedy except invoking the jurisdiction of the Hon’ble Court. In this regard it is to submit that, there is an alternate remedy available to the Petitioner to approach TSERC under Section 86(1) (f) & (k) of the Electricity Act, 2003 to refer the matter for adjudication. Therefore, the Hon’ble Court may direct the Petitioner to approach TSERC for seeking any clarifications or for adjudication.
* Therefore, there is no merit in the Petition and hence the WP may be dismissed as devoid of merits.