

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

Appeal no. 274 of 2014

Dated: 12th February, 2016

Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of:

M/s. National Energy Trading and Services Limited
Plot No. 397, Lanco House
Udyog Vihar, Phase – III
Gurgaon – 600 002

...Appellant(s)/
Petitioner

Versus

1. Tamil Nadu Generation and Distribution Corporation Ltd.
144, NPKKR Maligai, Anna Salai
Chennai – 600 002 ...Respondent No.1
2. The Chief Engineer/Private Power Projects
Tamil Nadu Generation and Distribution Corporation Ltd.
144, NPKKR Maligai, Anna Salai
Chennai – 600 002 ...Respondent No.2
3. Tamil Nadu Electricity Regulatory Commission
TIDCO Office Building
No. 19 A, Rukmani Lakshipathy Salai
Marshalls Road, Egmore
Chennai – 600 008 ...Respondent No.3

Counsel for the Appellant : **Mr. Rahul Balaji**
Ms. Shruti Iyer
Mr. Senthil Jagadeesan
Ms. Suchitra Kumabhat
Mr. Govind Manoharan

Counsel for the Respondent : **Mr. S. Vallinayagam for R.1 & R.2**

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

The present Appeal has been filed by M/s. National Energy Trading and Services Limited (**hereinafter referred to as "Appellant"**) under Section 111 of the Electricity Act, 2003 against the Impugned Order dated 15.09.2014 passed by the Tamil Nadu Electricity Regulatory Commission (**hereinafter referred to as "State Commission", the Respondent No.3**) in D.R.P. No. 13 of 2013.

2. The Appellant is a Category - I power trader with Inter State trading licence issued by the Central Electricity Regulatory Commission (**"Central Commission"**).
3. The Tamil Nadu Generation and Distribution Corporation Limited (**hereinafter referred to as "Respondent No. 1"**), the State Distribution Company, is responsible for generation and distribution

of electricity in the State of Tamil Nadu. The Chief Engineer/ Private Power Project, Tamil Nadu Generation and Distribution Corporation Limited (“**TANGEDCO**”) is the Respondent No.2 in the present Appeal.

4. The TANGEDCO (Respondent No.1) had issued a tender notification calling for the Request For Proposal (“**RFP**”) for procurement of power for 450 MW on medium term under bids specification No. 01/PPMT/2011 for a period of 5 years commencing from 10.12.2011 to 09.12.2016. The said RFP was issued by the Chief Engineer (Respondent No.2) and had specified several conditions which were to be complied with by the prospective bidders, *interalia*, including that the tenderers not to conceal any information pertinent to the tender and not to make any misrepresentations regarding position and circumstances of the tenderer as specified in Clause 2.5 (a) of the RFP of the said tender documents.

5. The RFP also stipulated that every prospective bidder shall have to submit bid bond in the form of bank guarantee, which the procurer,

namely, TANGEDCO (Respondent No.1) would have the power to invoke if the bidders have submitted any wrong information or in any manner misrepresented their position as contained in Clause 2.12 of the RFP of the said tender documents.

6. Facts of this Appeal

- a) The present dispute as brought out in the said Appeal has arisen on account of deduction of Rs. 6 crores, as alleged by the Applicant, by the Respondent No.2 from the bills raised by the Appellant, for quantum of power supplied between 01.08.2011 and 08.08.2011 as intimated in letter no. CE/PPP/SE/PP/F.01/PPMT/2011/D.134/12 issued by Respondent No. 2 and this deduction is in lieu of bid bond submitted by the Appellant in respect of Clause 2.5 (a) and Clause 2.12 of RFP of the tender documents.
- b) The stipulations in Clause 2.5 (a) of RFP of the tender documents are reproduced as under:-

“if any bidder conceals any information or makes a wrong statement or misrepresents facts or makes a misleading statement in its bid, in any manner whatsoever in order to create circumstances for the acceptance of its bid, the procurer reserves the right to reject such bid or cancel the letter of intent, if issued. If

such event is discovered after the effective date, consequences specified in the PPA shall apply.”

The dispute in question arises on the allegations of Respondent No. 1 and 2 that the Appellant has made misrepresentation in RFP and not complied with the above conditions.

- c) Clause 2.12 of the RFP of the tender documents have the following stipulations

“Each bidder shall submit the bid accompanied by the bid bond, as per Format 4.9 issued by any of the banks listed in Format 5.8. In the case of a consortium, the lead member shall furnish the bid bond as stipulated in the RFP, on behalf of the consortium members as per the consortium agreement. In case the bidder is offering capacity from more than one generation source, the bid bond shall be submitted separately for each capacity. The bond shall be valid for a period of thirty days beyond the validity of the bid.

the bid bond may be invoked by the procurer without any notice, demure, or any other legal process upon occurrence of any of the following;

.....

Bidder submitting any wrong information or making any misrepresentation in bid as mentioned in clause 2.5.”

In terms of the above provisions, the Appellant furnished Bank Guarantee of Rs. 6 crore along with the RFP.

- d) The following bidders submitted their bids:
1. M/s. Arkay Energy Ltd.
 2. M/s. National Energy Trading and Services Ltd.
 3. OPG Energy (Gas)
 4. OPG Power Generation Pvt. Ltd.
- e) The Appellant submitted its bid against this said bid specifications on 03.09.2011 and stated therein that the quantum of power would be supplied by it from two sources such as 200 MW from the generating station of M/s. Lanco Kondapalli Power Limited (**hereinafter referred to as “LKPL”**) and 100 MW from M/s. Lanco Anpara Power Limited (**hereinafter referred to as “LAPL”**) The generating plant of LKPL had an installed generation capacity of 366 MW with gas being primary fuel and as such had entered into a Gas (Fuel) Supply Agreement for supply of gas to the tune of 1.46 mmscmd from Krishna-Godavari Basin and claimed to be fully capable of generating power meeting the installed capacity in view of firm allocation of natural gas at the time the tender was floated by the Respondent No.1 and 2. In addition, LKPL was also allocated

fall back quantum on 0.29 mmscmd by EGOM which was also available for LKPL from time to time.

- f) The Appellant stated that subsequent to this submission of its bid against the above mentioned RFP, it noticed certain discrepancies in the tender documents issued by TANGEDCO (Respondent No.1 and No.2) in so far as the work sheet provided for tariff computation was concerned and as such filed a petition before the State Commission seeking directions to TANGEDCO to issue corrigendum and consequently permit the Appellant to submit fresh details. The aforesaid petition was dismissed by the State Commission by its order dated 15.12.2011 disqualifying the Appellant for the quantum of power from LKPL and the relevant extract of the said judgment is reproduced below:-

“4. TANGEDCO stated that OPG Energy Limited were disqualified on the grounds of misrepresentation that they have not participated in any other tender. But the TANGEDCO proposes to relax this condition for LANCO Kondapalli although they have committed the same irregularity of participating in other tenders of TANGEDCO. We find it difficult to go along with the proposal of TANGEDCO and therefore we reject the bid of LANCO Kondapalli. That leaves the TANGEDCO only with single offer of 100 MW Source-2 from LANCO, Uttar Pradesh”.

- g) The Appellant alleged such an order by the State Commission was without giving any hearing to the Appellant. The Appellant further stated that such a decision of disqualification was taken in haste and it does not have any merit at all. The issues brought out by the Appellant requiring resolution should have first been examined by the TANGEDCO (Respondent No. 1 and 2), however, based on the information given by Respondent No.1 and 2 to the State Commission on account of concealment/misrepresentation of relevant information, the State Commission took the extreme step of disqualification.
- h) In terms of Clause 2.12 of the RFP of tender documents, at the time of submission of bid, the Appellant had executed a bank guarantee of Rs. 6 cores on IDBI bank as bid bond and this bid bond could be invoked by the procurers with the TANGEDCO as stipulated in Clause 2.12.2 of the said RFP of tender documents and without serving any notice in the event the bidder had submitted any wrong information as mentioned in Clause 2.5 of the RFP of the tender documents.

- i) On the ground of making material misrepresentations in the RFP submitted by the Appellant, the Respondent No. 1 and 2 approached IDBI bank for invocation of the bid bond submitted along with the tender by the Appellant on account of violation of Clause 2.5 of the RFP of the tender documents. The said allegation was objected to by the Appellant and as a result, approached the Respondent No. 1 and No. 2 to point out that such invocation was clearly erroneous as there had in fact been no breach and unilateral decision in this regard without examining the facts was unjust and unfair and in contrary to law and till the time the issue is examined, the Respondent No. 1 and 2 should not insist for invocation of bank guarantee. Considering this request of the Appellant, the Respondents issued communication dated 29.02.2012 to IDBI bank for revocation of the said bank guarantee.
- j) As the matter in dispute required examination and as such TANGEDCO (Respondent No. 1 and No. 2) while agreeing to the request of the Appellant not to invoke the bank guarantee till such time the issue was examined, sought a letter of undertaking from the

Appellant which was given by the Appellant vide its letter dated 30.03.2012 stating therein that TANGEDCO (Respondent No. 1 and 2) could deduct an amount of Rs. 6 crores from the amount payable by the invoices raised by the Appellant against TANGENDCO for supply of power in respect of other agreement and such deduction shall be made after intimation to the Appellant. In light of this Letter of Undertaking, the TANGEDCO (Respondent No. 1 and 2) agreed for not to insist for invocation of bank guarantee in lieu of the bid bond and as such the said bank guarantee was not subsequently renewed by the Appellant.,

- k) However, vide letter no. CE/PPP/SE/PP/F.01/PPMT/2011/D.134/12 dated 02.02.2012 issued by the Respondent No. 2, the Appellant was informed that a sum of Rs. 6 crores has been adjusted against the bill raised by the Appellant for power supplied during the period from 01.08.2011 to 08.08.2011 in terms of the letter of undertaking given by the Appellant dated 30.03.2012 on grounds that Appellant had violated conditions contained in Clause 2.5 of the RFP of tender documents by misrepresenting facts material of the bid. As alleged

by the Appellant, this was done unilaterally without prior intimation to the Appellant.

- l) Aggrieved by the above action of the TANGEDCO (Respondent No. 1 and 2), the Appellant made a Petition vide D.R.P. No. 13 of 2013 to the State Commission with the following prayers:

“1. Prayer of the Petitioner:-

The prayer of the Petitioner is to –

- a. Declare that the Petitioner has not made any misrepresentation or incomplete disclosure amounting to a violation of Clause 2.5 of RFP documents of tender in Bid Specification No.01/PPMT/2011 floated by the Respondents ;*
 - b. Declare that the deduction of Rs.6 crores from the bills raised by the Petitioner for supply of power between 01-08-2011 and 08-08-2011 as intimated in Letter No.CE/PPP/SE/PP/F.01/PPMT/2011/D.134/12, dated 02-12-2012 issued by the second Respondent is illegal and consequently direct the Respondents to refund the sum of Rs.6 crores to the Petitioner along with interest at 18% from the date of the illegal adjustment till the date of payment ;*
 - c. Order costs of the petition to be paid by the Respondent and pass such other or further orders as may deem fit in the circumstances of the case and thus render justice.”*
- m) The State Commission vide its order dated 15.09.2014 dismissed the above petition. Aggrieved by the above impugned order dated

15.09.2014 issued by the State Commission the Appellant has filed the present Appeal.

7. The only issue in the present Appeal is **Whether the State Commission is correct in holding that there was a misrepresentation or incomplete disclosure by the Appellant amounting to violation of provisions of Clause 2.5 of RFP of the subject tender documents?**

8. We have heard at length Shri Rahul Balaji, learned counsel for the Appellant and Shri S. Vallinayagam, learned counsel for the Respondents and considered various submissions made by them and the arguments made by the rival parties during pleadings of the case and our observations are as follows:-
 - i) The learned counsel for the Appellant argued that subsequent to the submissions of the bid when they noticed that there were certain discrepancies in the tender documents issued by Respondent No. 1 and 2 in so as the worksheet provided for tariff computation was concerned, then they sought through a petition, directions from the State Commission to Respondent No. 1 No. 2 to issue corrigendum

and consequently permit the Appellant to submit fresh details. However, the State Commission by its order dated 01.12.2011, rejected the Appellant's bid of LKPL.

- ii) The Appellant further stated that it had the requisite gas supply tie up which would enable him to supply 200 MW from LKPL as quoted in its bids to the Respondent No. 1 and 2 and never thought that such a harsh decision would be forced upon it by the State Commission by rejecting its bid which resulted into the encashment of bank guarantee in lieu of bid bond which was temporarily not impressed upon in light of the undertaking furnished by the Appellant to the Respondent No. 1 and No. 2, however, finally resulted into deduction of Rs. 6 crores by the Respondent No.1 and 2 from the Appellant's energy bills.

- iii) During the arguments, the Appellant pointed out that all the three conditions stated as violations by the Respondent No. 2 which led to deduction of said sum of Rs. 6 crores, are not tenable and in support of its arguments that violations of the bid conditions as stated in the

letter issued by Respondent No. 2 had not been done by the Appellant, it made following submissions:-

(a) As regards the first violation of stipulated conditions in the subject tender is concerned that the Appellant did not have firm supply of designated full on the date of bid submission, the Appellant while denying this allegation and submitted the following;

- that the Appellant had already entered into an Agreement with Reliance Industries Limited for supply of gas from Krishna - Godavari Basin, Gas Transportation Agreement with Reliance Gas Transportation Infrastructure and these Agreements are valid till 2014 with provision for renewal. The Appellant further submits that the firm fuel supplies were equivalent to generation capacity in excess of 300 MW on the date of bid.
- that Appellant submits that in terms of the letter dated 26.08.2009 issued by the Ministry of Petroleum and Natural Gas, natural gas from Krishna – Godavari Basin KG D6 was allocated to the Appellant's LKPL plant so as to enable it operate at a maximum PLF of 90%. Subsequently, this letter was superseded by letter dated 18.11.2009 by which a

number of power plants were allotted gas supply from KG D6 fields. As per this letter, the generation plant of the Appellant i.e. LKPL plant was allotted firm allocation of 1.46 mmscmd of natural gas from KG D6 which is sufficient to generate more than 300 MW and also sufficient to cater to all contracted/bid quantity offered to the Respondent No. 1 and 2. Furthermore, the LKPL was also allocated fall back quantum of 0.29 mmscmd by EGOM. The Appellant alleged that these allocations of gas supply to LKPL plant would have ensured sufficient fuel for full generation and there would not have been any occasion for the Appellant to have insufficient gas supply for requisite power generation from the said plant.

- that the Appellant stated that in Form 4.13 submitted along with the tender documents, it had specified that surplus capacity available with the Appellant was 200 MW which was not otherwise promised for the period of supply as indicated in the bid. It was further pointed out that the phase II of the LKPL plant has an installed generation capacity of 366 MW and as GE frame – 9FA advanced gas turbine machines installed

therein are highly efficient and can generate requisite quantum of power with the assured gas supply.

- that the Appellant further stated that on the date of bid submission (03.09.2011), the generation of LKPL was equivalent to more than 300 MW on firm fuel supply and the same is evident from the SRLDC/SRPC reports for the last 2 months July and August, 2011.
 - that the Appellant's main argument lies on the fact that when it had assured gas supply which would have generated the requisite quantum of power as per the tender specification, how Respondent No. 2 in its letter has concluded that the Appellant did not have an assured fuel supply beyond a generation capacity of 200 MW and as such this conclusion of the Respondent No. 2 that the Appellant had participated in the tender process without an assured fuel supply is erroneous.
- (b) The another violation according to the Respondent No. 2 as quoted by the Appellant is that in Form 4.13 of the RFP, the Appellant had stated that the quantum contracted with other purchaser is nil whereas the Appellant had participated in short

term tender of Respondent No. 1 in Tender No. 13 opened on 18.08.2011 that is before the opening of the subject tender under bid specification No. 01/PPMT/2011 and the same amounts to furnishing wrong information by way of suppression of facts or disclosure of incomplete facts in order to create circumstances for acceptance of the bid. In support of the Appellant's claim that it has not concealed any information, the following submissions were made:-

- that while participating in the tender in bid specification No. 01/PPMT/2011, the Appellant has made an offer for supply of 300 MW from two sources that 100 MW from LAPL and 200 MW from LKPL having an installed capacity of 366 MW and with an assured gas supply the Appellant was in a position to generate in excess of 300 MW as on the bid submission date.
- that the Appellant had participated in Tender No. 13 issued by Respondent No. 1 for supply of power from LKPL which was opened on 18.08.2011 and the Appellant had been issued a Letter of Intent for supply on 02.09.2011 for supply of power from October, 2011 to December, 2011.

- that as per the tender No. 01/PPMT/2011, the Appellant was required to start supply of power from 10.12.2011 onwards and from this date till 31.12.2011 i.e. for 20 days Tender No. 13 vide LOI dated 02.09.2011 had a contractual obligation of supplying only 100 MW to Respondent No. 1 from LKPL and even taking out this 100 MW, it was well equipped to supply the 200 MW from the same plant as stated in Form 4.13 of the subject bid documents in respect of tender specification No. 01/PPMT/2011 and as such there was no misrepresentation committed by the Appellant.

- (c) The third violation according to the Respondent No. 2 that when the Appellant in Form 4.7 submitted with the bid, in Serial No. 6 stated that we undertake we shall not submit any bid, on the basis of PPA submitted along with our bid for the same quantum of power and generation source specified therein, for any other bid process till the selection of the successful bidder and issue of LOI, or till the termination of the process, whichever is earlier, subject to a maximum period of 120 days from the bid dead line, participation by the Appellant in other

tender i.e. Tender No. 13 using the same source of supply i.e. LKPL is in clear violation of the stipulated conditions against the terms of RFP. As per Clause 2.19.3 of the RFP, the appellant had resorted to suppression of facts or disclosure of incomplete facts, in order to influence the bid process, as alleged by the Respondent No. 1 & 2.

In support of its arguments that it had not committed this violation as alleged by the Respondents No. 1 and 2, the Appellant submitted that the undertaking submitted by it vide Form 4.7 only stipulated that the Appellant should not submit any bid for any other tender process till the selection of successful bidder and issuance of LOI or till termination of process. The Appellant stated that the subject tender had the deadline fixed on 03.09.2011 and in its opinion, the process on determination of successful bidder could commence only from 03.09.2011 and the undertaking given by the Appellant in Form 4.7 would only operate from 03.09.2011 in light of fact that the LOI in respect of tender No. 13 floated earlier by Respondent No. 1 was issued on 02.09.2011, therefore, the undertaking

submitted along with the present tender as stated above has not been violated since it would have operated from 03.09.2011 only.

- iv) The Appellant alleged that the Respondents without a careful scrutiny of the facts and figures provided by the Appellant in bid documents have arrived at a hasty conclusion that the Appellant has violated Clause 2.5 of the RFP documents of the subject tender and without any prior information to the Appellant, the Respondent No. 1 and 2 had deducted the sum of Rs. 6 crores from the Appellant's bill for energy supply and subsequently communicated the same to the Appellant vide letter dated 02.12.2012 which should have been done after consulting/intimating the same to the Appellant, that too, after establishing the allegations made by the Respondent No. 1 and 2.
- v) The Appellant submits that deduction made by the Respondent No. 2 from the energy bills to the extent of Respondent No. 6 crores is abundantly illegal and the said sum ought to be refunded to the Appellant particularly in view of the fact that the Appellant has not made any misrepresentation or incomplete

disclosure that can be construed as a violation of Clause 2.5 of the RFP of the tender documents in bid specification No. 01/PPMT/2011.

- vi) The learned counsel for the Respondent No. 1 and 2 submitted that though the Appellant had offered power quantum of 200 MW in the subject RFP from the generation source of LKPL having installed capacity as 366 MW with primary fuel gas having duration of Fuel Supply Agreement upto 2014 with a provision of renewal, however, the assured gas supply could have made possible generation around 265 MW in combined cycle mode and 183 MW in open cycle after deducting for auxiliary power consumption. In the opinion of the Respondent No. 1 and 2, the Appellant would not have been in a position to generate the offered quantum from LKPL in the subject tender after adjusting the Appellant's other two contracted quantum i.e. 100 MW to Respondent No. 1 and 12.5 MW to Karnataka from the same plant during same part period of supply.
- vii) The Respondent further submitted that as on the schedule delivery commencement date 10.12.2011 of the subject tender, the Appellant had an existing contract for supply of 100 MW

power to Respondent No. 1 in another tender vide LOI dated 02.09.2011 and another contract for supply at 12.5 MW power to Karnataka as per order of PCKL dated 30.08.2011. These details were not disclosed in the bid submitted by the Appellant for the subject tender. It is clear case of misrepresentation. As a consequence, the Respondents vide their communication to IDBI bank requested the bank to invoke the bind bond of the Appellant as per provisions of RFP Clause 2.12.2 of the said tender documents and deposit the proceeds with the Respondents.

viii) Since the Appellant approached the Respondents and requested not to invoke the bank guarantee and gave an undertaking dated 30.03.2012 to the respondents in lieu of the bank guarantee of Rs. 6 crores submitted by it in the subject tender and the relevant portion of the undertaking is extracted below:-

“We hereby agree to deduct an amount of Rs. 6 crores (Six Crores only) from the power supply invoice submitted to TANGEDCO for the power supplied from M/s. LKPL or from the pending payments with prior intimation to us.

The deduction can be made only upon the occurrence of any event/ground, any only after providing the details/proof that

would have enabled TANGEDCO to invoke the Bank Guarantee that stands replaced with the undertaking.”

The above undertaking, in the opinion of the Respondents, was given by the Appellant to escape from the rigour penal provisions of RFP as stated below;

Clause 2.19.2 of RFP states that

“The bidder if found indulged in fraudulent practice such bidder shall not be eligible to participate in any tender during a period of 2 years from the date such bidder is found by the procurer”.

2.19.3(b) of the RFP states that:

“fraudulent practice” means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Bid process”

Clause 2.12.2 of RFP states that:

“The Bid Bond, may be invoked by the Procurer/Authorized Representative or its authorized Representative, without any notice, demure, or any other legal process upon occurrence of any of the following: Bidder submitted any wrong information or making any misrepresentation in Bid as mentioned in Clause 2.5 (a).”

However, the Respondents, instead of invoking the bank guarantee as per RFP terms and conditions of the subject tender, considered the request of the Appellant and deducted the bid bond amount from the bills of the Appellant as agreed in its letter of undertaking dated 30.03.2012 and by doing all this, the Appellant was not barred from

participation in future bids of the Respondents for a period of two years.

ix) After looking into the submissions made by the rival parties and arguments put forth during the pleadings before us, our views are detailed hereunder:-

(i) Ministry of Petroleum and Natural Gas allocated 1.46 mmscmd gas to LKPL on firm basis. In addition, LKPL was also allocated fall back quantum of 0.29 mmscmd of gas by EGOM from time to time. Considering this allocation of gas to LKPL, with the advanced class gas turbines having efficient operating parameters, LKPL would have been in a better position to generate at the optimum level and this fact has been demonstrated by the Appellant by producing original accounts for the months of July and August, 2011 giving details of the electricity generated from its LKPL plant.

(ii) The Appellant submitted a bid to Respondent No. 1 in response to request for proposal (RFP) for procurement of power for 450 MW on medium term under bids

specification No. 01/PPMT/2011 to be valid for a period of 5 years commencing from 10.12.2011 to 09.12.2016. The subject tender documents stipulated certain conditions, *interalia*, including the tenderers are not permitted to conceal any information pertinent to the tender and not to make any misrepresentations regarding position and circumstances of the tenderer. Clause 2.5 (a) of the RFP of the tender documents stipulates that if any bidder conceals any information or makes a wrong statement or misrepresents facts or makes a misleading statement in its bid, in any manner whatsoever in order to create circumstances for the acceptance of the bid, the procurers reserves right to reject such bid or cancel the Letter of Intent if issued and if such an event is discovered after the effective date, consequences specified in the PPA shall apply.

- (iii) The subject tender documents had the stipulations that every prospective bidder would have to submit a bid bond in the form of a bank guarantee favouring the procurer i.e. the Respondent No. 1 and the procurer would have the

power to invoke the said bank guarantee/bid bond if the bidder has submitted any wrong information or in any manner misrepresented his position.

- (iv) As per the subject tender, each bidder was required to submit the bid accompanied by the bid bond as per the prescribed format issued by any of the banks listed in format as per the relevant provisions contained in clause 12.2 of the RFP of the subject tender documents. It was also made clear that in the case the bidder is offering capacity from more than single generation source, the bid bond shall be submitted separately for each capacity and the same shall be kept valid for a period of 30 days beyond the validity of the bid.
- (v) The Appellant submitted a bid on 03.09.2011 specifying therein different quantum of power from generation sources, namely, 200 MW from the generating station of M/s. Lanco Kondapalli Power Limited (LKPL) and 100 MW from the generating station of M/s. Lanco Anpara Power Limited (LAPL).

(vi) Subsequent to submissions of bid, the Appellant noticed certain discrepancies in the tender documents issued by the Respondent No. 1 relating to the tariff computation as claimed by it and filed a petition before the State Commission seeking directions to the Respondent No. 1 to issue corrigendum and consequently permit the petitioner to submit fresh details. Based on the information submitted by the Respondent No. 1 and 2 before the State Commission in this petition that they have disqualified one of the tenderers in the said tender on the grounds of misrepresentation that they have not participated in any other tender, however, they proposed to relax this condition for LKPL submitting therein that they have also committed the same irregularities of participating in other tenders of Respondent No.1. The State Commission by its order dated 15.12.2011 rejected the bid of LKPL on the grounds of misrepresentation.

(vii) Consequently, the Respondent No. 1 had issued a letter dated 27.02.2012 to IDBI bank with whom the Appellant had instituted the bank guarantee towards the bid bond

and sought its invocation on the ground that the Appellant had made material misrepresentations in the bid submitted amounting to violation of clause 2.5 of the RFP of the tender documents.

(viii) Aggrieved by the above action of the Respondent No. 2, the Appellant pointed out that such invocation was clearly erroneous as there had not been any breach and sought the matter needs examination based on the factual details and as such Respondent No. 2 vide its letter dated 29.02.2012 issued to IDBI bank revoked its earlier decision.

(ix) As a condition for not invoking the said bank guarantee till such time the issue was examined, the Appellant was required to furnish an undertaking and as such the Appellant by its letter dated 30.03.2012 had given a undertaking that the Respondent No. 1 could deduct an amount of Rs. 6 crores from the amount payable by the invoices raised by the Appellant against it in lieu of the bank guarantee executed by the Appellant as bid bond. In the undertaking, the Appellant stated that the deduction

shall be made after intimation to the Appellant and in view of this undertaking, the bank guarantee had not been subsequently renewed.

(x) Vide letter dated 02.12.2012, Respondent No. 2 informed the Appellant that a sum of Rs. 6 crores had been adjusted against the bill raised by the Appellant for power supplied during the period 01.08.2011 to 08.08.2011 in terms of undertaking given by the Appellant dated 30.03.2012 on the grounds that the Appellant had violated clause 2.5 of the RFP of the tender documents by facts material to the bid.

(xi) The State Commission vide Impugned Order dated 15.09.2014 have opined as follows:-

“7.9. TANGEDCO further contended that format 4.13 seeks the details of the primary fuel. The bidder ought to have furnished the details of his firm allocation and allocation on fallback basis, etc but the bidder has merely mentioned fuel thereon as “Gas”. The bidder had failed to disclose complete details of primary fuel and therefore it attracts RFP clause 2.19.3 (b). The format 4.13 seeks the details of generation of power contracted with other procurer if any in Sl. No. 6. There, it is not giving any scope to the bidder to assume that the power contracted under short term on fallback basis gas allocation need not be disclosed. Since the format 4.13 seeks the details of quantum of power and whatever basis it may be, ought to have been disclosed. Failing to disclose and suppressing the fact of short term contract clearly attracts RFP clause 2.19.3 (b).

7.10. There are only two aspects to be examined in this case. The first one is about the fuel inadequacy for generation and supply of power for the quoted quantity of power in the Bid Document. The contention of TANGEDCO is that, without having adequate fuel allocation, the petitioner had participated in the bid by suppression of facts which amounts to material inconsistency in the bid. The petitioner's response is that they had additional gas allocation on fall back basis and thus the overall gas allocation was adequate for generation and supply of the quoted quantity in the bid. Now the question is whether gas allocation on fall back basis be considered as source of fuel supply for generation of power for procurement of power under this Medium Term Tender. Gas allocation on fall back basis happens if any consumer for whom there is firm allocation of gas, fails to offtake such allocation or any gas from any unconfirmed field becomes available for uncertain period. Therefore, gas allocation on fall back basis is purely temporary and it is also uncertain. Hence, gas allocation on fall back basis cannot be a source for participating in the present medium term tender for supply of power.

7.11. The second aspect is about non disclosure of complete details in respect of certain important items in the Bid Formats. The Bid Format No. 4.13 seeks the details of primary fuel. The bidder must have furnished the details of firm allocation of gas and allocation of fall back basis, etc. but the bidder has merely mentioned fuel thereon as 'Gas'. Further, Sl. No. 6 of the Bid Format 4.13 seeks the details of generation of the power contracted with other procurer. Even though the petitioner had participated in short term tender of TANGEDCO in tender No. 13 opened on 18-8-2011 for which LOI was issued on 2-9-2011 i.e. before opening of the present bid, the petitioner has not disclosed these details, herein but mentioned as Nil. The petitioner's explanation that their statement that the quantum of power contracted with other purchaser is Nil indicates that the quantum for the period of supply which is being quoted in the instant bid is not contracted with any other customers. This argument of the Petitioner is not tenable as there is no scope to assume that the power contracted under short term on fall back

basis gas allocation need not be disclosed at all. Since Format 4.13 seeks the details of quantum of power on whatever basis this must have been disclosed by the petitioner. Failure to disclose this fact and failure to disclose complete details about primary fuel attracts RFP clause 2.19.3 (b). Hence, the Commission is not inclined to intervene in the action of TANGEDCO in deducting Rs.6 crores equivalent to the value of the bid bond from the bills of the petitioner on the strength of the undertaking furnished by the Petitioner for the same.”

(xii) Vide letter dated 02.12.2012 by the Respondent No.2 to the Appellant, there were three violations alleged to have been committed by the Appellant as being the grounds leading to deduction of the said sum of Rs. 6 crores from the Appellant's energy bills, in lieu of bid bond. We have gone into these violations as alleged by the Respondent No. 1 and 2 against the Appellant and our findings are as follows:-

(a) The installed capacity of LKPL is 366 MW. As per the conditions stipulated in the said tender documents, it was mandatory for the bidder to have made firm arrangements for fuel tie up by way of long term Fuel Supply Agreement for the period and quantum of power proposed to be supplied by the bidder in its bid.

As per the Respondent No. 1 and 2, the firm allocation of gas in this case was sufficient only for 200 MW generation and without having adequate fuel allocation, the Appellant had participated in the bid specification No. 01/PPMT/2011 by suppression of facts which amounts to material inconsistency in the bid. On the other issue relating to with the additional quantity of 0.29 mmscmd gas allocation on fall back basis, it should not be construed as a firm allocation case as it happens only in situation when shortfall in the off take by the other consumers happens or gas from some other source/field becomes available for uncertain period which would be withdrawn when the source goes off. Firm allocation of gas is limited to the extent which the gas supplier has guaranteed to supply. Even if we give the advantage of better and efficient design of gas turbine installed in LKPL, still with the firm allocation of gas available for LKPL would not have been sufficient to meet the requirement of the installed capacity. Assuring that the entire firm

allocation of gas supplied to the said plant, after considering 100 MW commitment made in the earlier tender of Respondent No. 1 and 2 and 12.5 MW Power Supply Agreement to the Karnataka State, the Appellant would not have been able to supply 200 MW as committed in RFP by the Appellant during the same contracted period.

- (b) The second violation by the Appellant as alleged by the Respondent No. 1 and 2 is that the Appellant had stated in Form 4.13 that the quantum contracted with other purchaser is "Nil" whereas the Appellant had participated in short term tender of Respondent No. 1 in Tender No. 13 opened on 18.08.2011 where the Letter of Intent was issued on 02.09.2011 and the subject tender opening date in bid specification no. 01/PPMT/2011 was 03.09.2011. This allegation as put forth by the Respondent No. 1 and 2 against the Appellant is materially correct and it amounts to

furnishing wrong information by way of suppression of facts or disclosure of incomplete facts.

- (c) The third violation alleged by the Respondent No. 1 and 2 is that the Appellant in Form 4.7 submitted with the bid, in Serial No. 6 stated that it undertakes not to submit any bid for the same quantum of power and generation source as quoted for any other bid process till the selection of the successful bidder and issue of LOI, or till the termination of the process, whichever is earlier, in the subject tender subject to a maximum period of 120 days from the bid dead line. Since the Appellant had participated in Tender No. 13 dated 11.08.2012 floated by Respondent No. 1 for which the contractual supply period was from October 2011 to December 2011 from the same generation source from which the Appellant intended to supply electricity to the Respondent No. 1 in the subject tender no. 01/PPMT/2011, it is observed after perusing the documents submitted before us, this allegation against the Appellant as stated by Respondent No. 1 and 2 is

not correct especially in view of fact, the bid of earlier tender was opened on 11.08.2011 (LOI – 02.09.2011) which is prior to date of bid of earlier tender opening of subject tender i.e. 03.09.2012.

In view of the above, we are of the opinion that allegations put forth by the Respondent No. 1 and 2 against the Appellant on account of the violation of the certain conditions of the subject tender specification No. 01/PPMT/2011 have been found materially correct by not providing requisite information about the LOI issued in the earlier Tender No. 13 in the RFP for the subject tender submitted by the Appellant.

As such the deduction of Rs. 6 crores by the Respondent No. 1 and 2 from the energy details of the Appellant as mentioned above is correct since there has been a breach committed by the Appellant in the present tender.

We are in agreement with the above findings of the State Commission vide its Impugned Order dated 15.09.2014

ORDER

In light of the above, we find no merit in the Appeal filed by the Appellant and as such this Appeal is hereby dismissed

No order as to costs.

Pronounced in the Open Court on this **12th day of February, 2016.**

(I.J. Kapoor)
Technical Member

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REPORTABLE/NON-REPORTABLE

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(Justice Surendra Kumar)
Judicial Member