

**TAMIL NADU ELECTRICITY REGULATORY COMMISSION**  
**(Constituted under section 82 (1) of the Electricity Act, 2003)**  
**(Central Act 36 of 2003)**

**PRESENT:-**

**Thiru.S.Nagalsamy** ..... **Member**

**and**

**Thiru.G.Rajagopal** ..... **Member**

**D.R.P.No.13 of 2013**

National Energy Trading and Services Limited  
Plot No.397, Lanco House  
Udyog Vihar, Phase III  
Gurgaon – 122 106.

... Petitioner  
Thiru Rahul Balaji  
(Advocate for the Petitioner)

Vs

1. Tamil Nadu Generation and Distribution Corporation Limited  
Rep by its Chairman & Managing Director  
144, NPKRR Maaligai,  
Anna Salai,  
Chennai – 600 002.
2. Chief Engineer / PPP  
TANGEDCO  
NPKRR Maaligai, 6<sup>th</sup> Floor, Easter Wing  
144, Anna Salai  
Chennai – 600 002.

....Respondents  
Thiru P.H.Vinod Pandian  
(Standing Counsel for the Respondents)

**Dates of hearing :** 12-04-2013, 04-10-2013 and 18-02-2014

**Date of order :** 15-09-2014

The above D.R.P.No.13 of 2013 came up for final hearing before the Commission on 18-02-2014. The Commission upon perusing the above petition and the connected records and after hearing both sides passes the following order:-

### **ORDER**

**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 this Hon'ble Tribunal may deem fit in the circumstances of the case and thus render justice.

**2. Facts of the Case:-**

The Petitioner is a category 1 Power Trader with an inter-state trading licence issued by the CERC. The Petitioner submitted a bid to TANGEDCO in response to a request for proposal (RFP) for procurement of power for 450 MW on Medium Term under Bid Specification No.01/PPMT/2011. The TANGEDCO invoked the Bid Bonds of the Petitioner alleging concealment of information and misrepresentation in the

RFP submitted by the Petitioner and deducted Rs.6 crores from the power purchase bills. Challenging the action of TANGEDCO, the Petitioner filed the D.R.P.

**3. Contention of the Petitioner:-**

3.1. TANGEDCO had issued a Tender Notification calling for the RFP for procurement of power for 450 MW on “Medium Term” under Bid Specification No.01/PPMT/2011 to be valid for a period of 5 years commencing from 10-12-2011 to 09-12-2016. The tender documents had conditions which required 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 per Clause 2.5 (a) of the RFP documents of the tender, 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.

3.2. The tender documents stipulated inter-alia that every prospective bidder would have to submit a bid bond in the form of a bank guarantee, which the procurer, namely TANGEDCO would have the power to invoke if the bidder has submitted any wrong information or in any manner misrepresented his position. As per clause 2.12 of the RFP documents of the tender, 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.

- 3.3. Four bidders, including the Petitioner, submitted their bids. They are -
- (a) M/s.Arkay Energy Ltd. – 50 MW
  - (b) National Energy Trading and Services Ltd.
  - (c) OPG Energy (Gas) - 10 MW
  - (d) OPG Power Generation Pvt. Ltd. - 100 MW.
- 3.4. The Petitioner had submitted its bid on 03-09-2011. The Petitioner had specified in the bid that the quantum of power would be supplied by it from two sources, namely, 200 MW from the generating station of M/s.Lanco Kondapalli Power Limited and 100 MW from the generating station of M/s.Lanco Anpara Power Limited (LAPL). The generation plant M/s.Lanco Kondapalli Power Limited (LKPL) had an installed generation capacity of 366 MW with gas being primary fuel. The generating company, LKPL, had also entered into a Gas (Fuel) Supply Agreement for supply of gas from Krishna-Godavari Basin. LKPL had an assured fuel supply and its generating station was fully capable of generating power upto 90% of the installed capacity at the time based on both firm and fall back allocation of natural gas when the tender was floated by the Respondents. The statement in that regard showing the gas supply at the time of the bid would clearly demonstrate the same.
- 3.5. Subsequent to the submission of the bid, it came to the knowledge of the Petitioner that there were certain discrepancies in the tender documents issued by the TANGEDCO in so far as the work sheet provided for tariff

computation was concerned. The petitioner had filed a petition in M.P.No.32 of 2011 before the Commission seeking directions to TANGEDCO to issue corrigendum and consequently permit the Petitioner to submit fresh details. The aforesaid petition was dismissed by the Commission by its order dated 15-12-2011. Based only on the claim of TANGEDCO and its request seeking a relaxation of condition in favour of LKPL, the Commission passed the following order:-

*“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”.*

3.6. As per Clause 2.12 of the RFP document read with Format 4.9, the Petitioner had executed a bank guarantee for Rs.6 crores on IDBI as bid bond. As per the provisions of clause 2.12.2 of RFP, the bid bond could be invoked by the procurer, i.e. TANGEDCO without notice if the bidder had submitted any wrong information as mentioned in clause 2.5 of the RFP. The second Respondent had issued a letter dated 27-02-2012 to IDBI Bank, with whom the Petitioner had instituted the bank guarantee towards the bid bond, seeking to invoke the bid bond on the ground that the Petitioner had made material misrepresentations in the bid submitted which amounted to a violation of clause 2.5 of the RFP Documents. The Petitioner's representative had immediately personally approached the Respondents to point out that such invocation was clearly erroneous as there had in fact been no breach and a unilateral decision in that regard without examining the facts was unjust, unfair and

contrary to law. Acceding to such representation of the Petitioner, the letter dated 27-02-2012 was revoked by another communication from the second Respondent dated 29-02-2012 issued to IDBI Bank.

3.7. Pursuant to the direction of the TANGEDCO as a condition not to invoke the bank guarantee till such time as the issue was examined, the Petitioner by its letter dated 30-03-2012 had given an undertaking that TANGEDCO could deduct an amount of Rs.6 crores from the amount payable by the invoices raised by the Petitioner against TANGEDCO in lieu of the bank guarantee executed by the Petitioner as bid bond. The Petitioner's letter contained the specific condition that the deduction could be made only upon occurrence of any event / ground and only after providing details / proof that would have enabled TANGEDCO to invoke the original bank guarantee. The Petitioner had also stated that the deduction shall be made after intimation to the Petitioner. The above request of the Petitioner had been agreed to by the Respondents and the bank guarantee had not been subsequently renewed.

3.8. The Petitioner has been issued with a further letter by the second Respondent in Lr.No.CE/PPP/SE/PP/F.01/PPMT/2011/D.134/12, dated 02-12-2012 wherein the Petitioner was informed that a sum of Rs.6 crores had been adjusted against the bill raised by the Petitioner for power supplied during the period from 01-08-2011 to 08-08-2011 in terms of the letter of undertaking given by the petitioner dated 30-03-2012 on grounds that the Petitioner had violated clause 2.5 of the RFP documents of the tender by misrepresenting facts material to the bid. The second Respondent had in the said letter listed out three violations as being the grounds leading to deduction of the said sum of Rs.6 crores.

3.9. The first violation alleged by the second Respondent is that the Petitioner offered 200 MW quantum for Bid Specification No.01/PPMT/2011 from LKPL. The installed capacity of the gas based power plant is 366 MW. But gas allocated was only for 200 MW. Without having sufficient fuel allocation, the Petitioner had participated in Bid Specification No.01/PPMT/2011 by suppression of facts which amounts to material inconsistency in the bid. In this regard, the Petitioner had already entered into an agreement with Reliance Industries Limited for supply of gas from Krishna-Godavari Basin and Gas Transportation agreement with Reliance Gas Transportation Infrastructure Limited which was valid till 2014 with provision for renewal. The fuel supplies were equivalent to generation capacity in excess of 300 MW on the date of the bid i.e. 30-08-2011. In terms of the letter dated 26-08-2009 issued by the Ministry of Petroleum and Natural Gas, natural gas from the Krishna Godavari basin KG D6 was allocated to the Petitioner's LKPL plant on fall back basis so as to permit it operate at a 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 Petitioner's generation plant LKPL was allotted 1.46 mmscmd of natural gas from KG D6. Therefore, the occasion for the Petitioner to have insufficient fuel supply for power generation could not have arisen. In Form 4.13 submitted along with the tender documents, the Petitioner had specified that the surplus capacity was 200 MW. The detail indicates that the 200 MW of power was the surplus power available with the Petitioner which was not otherwise promised for the period of supply as indicated in the bid. The surplus quantum as referred to in Form 4.13 can only be understood to refer to the quantum available which is not already promised for the period of supply indicated in the bid.

In the letter dated 02-12-2012, the second Respondent has failed to specify the source of information on the basis of which it has arrived at the conclusion that the Petitioner did not have an assured fuel supply beyond a generation capacity of 200 MW. In the absence of any such information or reasons in the letter, the conclusion of the second Respondent that the Petitioner had participated in the tender process without an assured fuel sources is entirely erroneous.

3.10. The second violation alleged by the second Respondent is that the Petitioner had stated in Form 4.13 that the quantum contracted with other purchaser is nil whereas the Petitioner had participated in short term tender of TANGEDCO in Tender No.13 opened on 18-08-2011 where Letter of Intent was issued on 02-09-2011 i.e. before the opening of the Case I bid in Bid Specification No.01/PPMT/2011. The offered quantum has already been contracted with TANGEDCO. 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.

The Petitioner submitted that, while participating in the tender in Bid Specification No.01/PPMT/2011, the Petitioner had made an offer for supply of 300 MW from two sources—100 MW from LAPL and 200 MW from LKPL. The power generation by LKPL was based on natural gas as a fuel and LKPL had an installed capacity of 366 MW and had an assured fuel supply with equivalent generation capacity in excess of 300 MW as on 30-08-2011, being the date of submission of the bid for the tender in Bid Specification No.01/PPMT/2011. The Petitioner had participated in the Tender No.13 floated by TANGEDCO for supply of power from LKPL which was opened on 18-08-2011 and the Petitioner had been issued a Letter



of Intent for supply was issued on 02-09-2011. The quantum and period of supply of bid by the Petitioner for Tender No.13 are as follows:-

Sl. No.	Period	Quantum (MW)
1	October 2011	150
2	November 2011	200
3	01-12-2011 to 09-12-2011 (9 days)	200
4	10-12-2011 to 31-12-2011 (22 days)	100
5	January 2012	100
6	February 2012	100
7	March 2012	100
8	April 2012	100
9	May 2012	100
10	June 2012	100

The Letter of Intent dated 02-09-2011 issued by the Respondent was for supply of power from October 2011 to December 2011. Therefore, the power the Petitioner was contracted to supply from LKPL as per the Letter of Intent was as follows:-

Sl. No.	Period	Quantum (MW)
1	October 2011	150
2	November 2011	200
3	01-12-2011 to 09-12-2011 (9 days)	200
4	10-12-2011 to 31-12-2011 (22 days)	100

As per the tender in Bid Specification No.01/PPMT/2011, the Petitioner was required to start supply of power from 10-12-2011 onwards. As would be evident from the above table, the Petitioner had no contractual obligations to supply power from LKPL to TANGEDCO under Tender No.13 and LOI dated 02-09-2011 beyond 100 MW. LKPL having a generation capacity in excess of 300 MW was well equipped to supply the 200 MW from LKPL as stated in Form 4.13 submitted with the bid documents. Therefore, there was no misrepresentation of the Petitioner's generation and supply capacity in the bid documents. The second Respondent has failed to

appreciate the Petitioner's statements on the total generation capacity of LKPL and has consequently reached the erroneous conclusion that the Petitioner had misrepresented its capacity to supply power.

3.11. The third violation alleged by the second Respondent is that the Petitioner 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". But the Petitioner participated in other tender using the same quantum of power and same source against the terms of RFP. The Petitioner had thus resorted to suppression of facts or disclosure of incomplete facts, in order to influence the bid process in terms of clause 2.19.3 of the RFP. The Petitioner had participated in Tender No.13 dated 11-08-2012 floated by TANGEDCO for which the contractual supply period was from October 2011 to December 2011. The undertaking by the Petitioner in Form 4.7 only stipulated that the Petitioner 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 tender in Bid Specification No.01/PPMT/2011 floated by TANGEDCO had the deadline fixed on 03-09-2011. Therefore, the process of determination of successful bidder would commence only from 03-09-2011 and the undertaking given by the Petitioner in Form 4.7 would also operate only from 03-09-2011. However, the tender floated by TANGEDCO which the Petitioner participated in pre-date the bid deadline for tender in Bid Specification No.01/PPMT/2011. Therefore, this action of the Petitioner cannot possibly be construed as a violation of the undertaking given in Form 4.7. The total generation

capacity of LKPL was in excess of 300 MW and the Petitioner had in its bid quoted that it would be in a position to supply 200 MW from LKPL. The supply was to commence from 10-12-2011 onwards. On the other hand, the power the Petitioner was contracted to supply to TANGEDCO under Tender No.13 and LOI dated 02-09-2011 was as follows:-

Sl. No.	Period	Quantum (MW)
1	October 2011	150
2	November 2011	200
3	01-12-2011 to 09-12-2011 (9 days)	200
4	10-12-2011 to 31-12-2011 (22 days)	100

Therefore, there was no possibility of a situation arising wherein the Petitioner would have defaulted in supply of 200 MW power under the instant tender to TANGEDCO because of its prior commitment to supply power under the LOI dated 02-09-2011. If it had been adjudged successful bidder in the instant tender in Bid Specification No.01/PPMT/2011, the Petitioner would have been able to supply the contracted quantum of 200 MW to TANGEDCO as the Petitioner's total generation capacity in LKPL was well in excess of 300 MW.

3.12. The Petitioner had not made any misrepresentation or incomplete disclosure of relevant and material facts in the bid documents with an aim to influence the bid process. The Petitioner had only quoted a quantum of 200 MW supply from LKPL despite having an installed capacity of 366 MW only because of its prior commitments to supply the remaining quantum to TANGEDCO.

3.13. The terms of the undertaking dated 30-03-2012 given by the Petitioner specifically stated that the second Respondent would be entitled to make the deduction only after providing details / proof that an occasion warranting the

invocation of the original bank guarantee had arisen and after intimating the same to the Petitioner. The Respondents without a careful scrutiny of the facts and figures provided by the Petitioner in bid documents have arrived at a hasty conclusion that the Petitioner has violated clause 2.5 of the RFP documents and without any prior intimation to the Petitioner had deducted the sum of Rs.6 crores from the Petitioner's bill for energy supply and subsequently issued the letter dated 02-12-2012.

3.14. The deduction made by the second Respondent is patently illegal and the said sum ought to be refunded to the Petitioner particularly in view of the fact that the Petitioner has not made any misrepresentation or incomplete disclosure that can be construed as a violation of clause 2.5 of the RFP documents of the tender in Bid Specification No.01/PPMT/2011.

3.15. The Petitioner sent a reply dated 21-12-2012 to the letter of the second Respondent dated 02-12-2012, wherein the Petitioner had brought to the notice of the second Respondent that none of the 3 violations set out by the second Respondent in its letter had any basis and had also called upon the second Respondent to make refund of the deducted amount of Rs.6 crores. The Petitioner had not received any positive response from the Respondents to the said letter despite substantial lapse of time.

#### **4. Contention of the Respondents:-**

4.1. TANGEDCO floated a tender (01/PPMT/2011) on 10-06-2011 for procurement of 450 MW base load power (minimum bid capacity of 100 MW) for 5 years from 2012 to 2017 under Case I bidding in accordance with the guidelines for determination of tariff by bidding process for procurement of

power by distribution licensees issued by Government of India vide Notification dated 19-01-2005. Before floating the tender, necessary approval was obtained from the Commission in M.P.No.48 of 2011 for deviation in guidelines in respect of payment mechanism.

- 4.2. The non-financial bids of M/s.Arkey Energy (Rameswaram) Limited, M/s.National Energy Trading & Services Limited, M/s.OPG Energy Pvt. Limited and M/s.OPG Power Generation Private Limited were opened on 03-09-2011. M/s.National Energy Trading & Services Limited offered the quantity of 200 MW through Source I and 100 MW through Source II and enclosed bid bond for Rs.6 crores and Rs.3 crores valid upto 31-01-2012 respectively for Source I and II. Since the bidders made misrepresentation, the Non-Financial Bid Evaluation Committee declared their bids as non-responsive.
- 4.3. M/s.National Energy Trading and Services Ltd. (Source I–200 MW) participated in Tender No.01/PPMT/2011 using the same generation source and quantum of power offered in Short Term Power Purchase Tender No.13 of 2011 and concealed material information on installed capacity.
- 4.4. M/s.OPG Energy Private Limited has filed W.P.No.22908 of 2012 in the High Court of Madras on 21-08-2012 with a prayer to refund the bid bond amount of Rs.30 lakhs as well for stay of the proceedings. M/s.OPG Power Generation Private Limited has filed W.P.No.24164 of 2012 in the High Court of Madras in the High Court of Madras on 03-09-2012 with a prayer to refund the bid bond amount of Rs.3 crores which was deducted in the payment bill. The Writ Petitions are pending in the High Court. The Petitioner alone has approached the Commission with a prayer to refund the sum of Rs.6 crores deducted from the bill amount payable to them towards the value of the bid

bond along with interest at 18% from the date of alleged illegal adjustment till the date of payment.

- 4.5. The Petitioner had participated in Case I Bidding Tender No.01/PPMT/2011 with offered quantum of 200 MW + 100 MW from the source of Lanco Kondapalli and Lanco Anpara Power respectively.

Source – 1 (Lanco Kondapalli Power Limited, Andhra Pradesh)

The details furnished in the Format 4.13 are as below:-

Installed capacity	-	366 MW
Quantum of power contracted with other purchasers	-	0 MW
Surplus quantum	-	200 MW
<u>Actual Position:</u>		
Installed capacity	-	366 MW
<u>Power supplied to TANGEDCO under short term</u>		
From October 2011 to 9 <sup>th</sup> December 2011-		200 MW
From December 10 <sup>th</sup> 2011 upto May 2012-		100 MW
Power supplied to Karnataka	-	12.5 MW
To IEX	-	Rest of the quantum
Surplus quantum	-	Nil
(since gas allocated only for 200 MW generation)		

- 4.6. The Ministry of Petroleum and Natural Gas vide letter dated 18-11-2009 had allocated 1.37 mmscmd of Natural gas from KG D6 on fallback basis to Lanco Kondapalli Andhra Pradesh for commissioning and operation of plants at 70% PLF. As such Lanco Kondapalli A.P. can generate power upto 250 MW only.
- 4.7. The Lanco Kondapalli had requested PGCIL for reduction of LTOA quantum from 350 MW to 250 MW since generation is limited to 70% of the installed capacity which is evident from the minutes of the 14<sup>th</sup> meeting of South Region constituents regarding connectivity and long term access applications of IPPs and letter represented by Lanco Kondapalli vide letter dated January 24, 2012. The Annual Plant Load Factor achieved by Lanco Kondapalli 366 MW Station for the periods from April 2010 to March 2011, April 2011 to March 2012 and April 2012 to March 2013 are 70.11%, 68.54% and 20%

respectively. The above PLFs represent that 70% allocation of gas to Lanco Kondapalli gas power station reduced its generation capacity from 366 MW to 250 MW.

- 4.8. Due to allocation of gas only to the extent of 70% PLF, the generator capacity is limited to 250 MW, and then the surplus quantum of power will be as follows:-

Quantum to TANGEDCO under short term

From Oct. 2011 to 9<sup>th</sup> December 2011 - in the range of 150 MW to 200 MW

From Dec.10<sup>th</sup> 2011 to 31-12-2011 - 100 MW

Quantum contracted to Karnataka - 12.5 MW (as per NETS letter dated 21-12-2-12)

To IEX - Rest of the quantum

- 4.9. On the bid submission date, the surplus quantum of power available with Lanco Kondapalli is not 200 MW as stated in the Format 4.13 of the bid. Thus there is suppression of facts, misrepresentation of generation and supply capacity in the bid documents. In Format 4.13 of the bid, it was stated that the quantum contracted with other purchaser is Nil whereas M/s.NETS had participated in short term tender of TANGEDCO against the Tender No.13 opened on 18-08-2011 where LOI was issued on 02-09-2011 i.e. before opening of the Case 1 Bidding Tender No.01/PPMT/2011 (03-09-2011). The offered quantum had already been contracted with TANGEDCO under short term. This amounts to furnishing wrong information by way of suppression of facts or disclosure of incomplete fact, in order to create circumstances for acceptance of the Bid. The contention of Lanco Kodapalli that the fuel supplies were equivalent to generation capacity in excess of 300 MW on the date of bid i.e. 30-08-2011 is false.

4.10. Clause 2.19.1 of RFP states that the bidder shall observe the highest standard of ethics during the bid process. Notwithstanding anything to the contrary contained herein, the procurer shall reject a bid, without being liable in any manner whatsoever to the bidder, if it determines fraudulent practice in the bid process. In such event the procurer shall forfeit the bid bond, without prejudice to any other right or remedy that may be available to the procurer hereunder or otherwise. As per clause 2.19.3 (b) of RFP, “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 2.19.2 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”.

4.11. As per clause 2.5 (a) of RFP “If any bidder conceals any material 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”.

4.12.. As per clause 2.12.2 of RFP, 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; namely,-

Failure to incorporate the project company as a legal entity within fifteen (15) days of issue of Letter of Intent;

Failure to furnish the contract performance guarantee as per clause 2.13;

Failure to execute the RFP documents subject to the provisions of clause 2.2.11; or



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

4.13. The non-financial bid evaluation committee has concluded for the stated reasons that the bid submitted by M/s.NETS to be non-responsive and the bid bonds submitted by the bidder was invoked and the concerned banks were intimated vide letter and fax dated 27-02-2012 to invoke the bid bond submitted by the bidders.

4.14. The consequences of invoking the bid bond would have larger impact and the company would have faced the material breach and it is possible that the bidders shall not be eligible for participating in any tender for a period of two years from the date of such invoking of the Bid Bond. At the request of the bidder, TANGEDCO as a benevolent gesture decided to get an undertaking from the company that they are liable to pay the penalty imposed by the TANGEDCO from pending power purchase bills. Such action will not in any way alter the condition of invoking the Bid Bond by the procurer without any notice, demure, or any other legal process as stipulated in clause 2.12.2 of RFP. Considering the representation of M/s.NETS, the bid bond amount of Rs.6 crores has been deducted for power purchase bill from 01-08-2011 to 08-08-2011 in lieu of invoking the Bid Bond.

4.15. The Government of Madhya Pradesh has debarred M/s. Lanco Power Limited and other Lanco group of companies of its promoters for further business with the Government of Madhya Pradesh and all subsidiaries / undertakings / institutions / companies, etc. of the Government of Madhya Pradesh for a period of 5 years with effect from the date of order vide its order dated 14<sup>th</sup> February 2012 for non-supply of power as per agreement. The Haryana Power Corporation also

invoked the Bid Bond amount of Rs.11.67 crores which was submitted by M/s.Lanco Kondapalli Power Limited for the act of non-signing of PPA in Case I bidding.

4.16. This petition is not maintainable either on law or on facts or RFP. The Petitioner being an intending bidder is bound by the terms and conditions of the tender and as such estopped from contending otherwise. The Commission may be pleased to dismiss the Petition with cost and declare that the Respondent has evaluated the bid as per Government of India guidelines and the bid submitted by the Petitioner concluded as 100% non-responsive due to misrepresentation made by the Petitioner and that the deduction made by the Respondent is correct as per guidelines of MOP.

**5. Contention of the Petitioner in the Rejoinder to the Counter Affidavit:-**

5.1. It is incorrect to state that the initial attempt to invoke the guarantee and the subsequent letter of undertaking given arose out of a benevolent gesture. In any event, the claim for payment could only have been done by the Respondent if there was any actual misrepresentation. In the case of the Petitioner herein, there has been no misrepresentation.

5.2. The power tied up from 10<sup>th</sup> December 2011 which is the effective date of supply is only 112.5 MW by NETS for LKPL and the fuel availability as on date of bid submission is equivalent to generation of more than 300 MW. The Petitioner's statement that the quantum of power contracted with other purchasers 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. Also, the surplus quantum of 200 MW indicates that the quantum left to be

supplied / contracted for the period from 10<sup>th</sup> December 2011 onwards. The TANGEDCO has incorrectly stated that surplus quantum is Nil.

5.3. MoPNG vide its letter dated 26-08-2009 had allocated 1.37 MMSCMD to the Petitioner's Plant Phase-II for commissioning purpose. Further, MoPNG vide its letter dated 18-11-2009 has allocated 1.46 MMSCMD to the Petitioner Phase-II on firm basis. Furthermore, the Petitioner was also allocated fall back quantum of 0.29 MMSCMD and as on the date of submission of bid the generation was equivalent to more than 300 MW and the same is evident from the SRLDC / SRPC reports. The assumptions by the Respondent are therefore demonstrably incorrect.

5.4. The gas supplies allocated by MoPNG were equivalent to 70% PLF on firm basis and 0.29 MMSCMD on fall back basis, which means that the Petitioner can produce more than 300 MW of power. The firm and fall back quantum of gas is sufficient to generate more than 300 MW and as evident from the REA published, the generation for the months of July 2011 and August 2011 was as follows:-

Month	Generation in Mus	Equiv MW
July 2011	228.86	307.71
August 2011	226.07	303.86

However, after non-selection of bid of the Petitioner, considering the subsequent position in gas supplies and also considering that it may not be able to get customers in Western region and Northern regions, vide letter dated 24<sup>th</sup> January 2012 has requested PGCIL to reduce its open access capacity and change of target region to Southern Region.

5.5. The gas supply on the date of bid submission was equivalent to generation of more than 300 MW and the already contracted quantum for the supply period

vide TANGEDCO supply order dated 02-09-2011 was only 100 MW from 10<sup>th</sup> December 2011 onwards and 12.5 MW of power to PCKL as per PCKL order dated 30-08-2011. Therefore, the Petitioner was having surplus quantum of 200 MW and had correctly participated in the bid. The fuel supply details as given by supplier for the month of August 2011 were submitted which would clearly demonstrate the incorrectness of the Respondent's stand.

5.6. The Petitioner had submitted an undertaking dated 30<sup>th</sup> March 2012 according to which the Respondent can recover the equivalent amount of Bid Bond only after providing the details / proof that would have enabled the Respondent to invoke the bank guarantee. However, the Respondent without providing any details / proof as per the undertaking has unilaterally adjusted Rs.6 crores from the outstanding receivables to the Petitioner.

5.7. The present dispute cannot be determined by the TANGEDCO on entirely extraneous grounds. The Respondent has sought to mischievously rely upon the letter dated 14<sup>th</sup> February 2012, from Madhya Pradesh government, debarring LANCO and LANCO group companies from doing business in M.P. While failing to place on record that the same has been revoked by the Government of Madhya Pradesh vide letter dated 30<sup>th</sup> November 2012. The issue that LITL (LANCO Infratech Limited) or LANCO Amarkantak Power Limited had with the state of Madhya Pradesh has got no relevance to the current issue in discussion and is in no way related to what TANGEDCO has done to NETS. Further, MPPMC (Madhya Pradesh Power Management Company erstwhile MP Tradeco) is buying the entire power generated from Unit I of LANCO Amarkantak Power Limited from December 2012 onwards, thereby setting at naught the incorrect claims being made by the Respondent.

5.8. The other matter relating to Haryana Power Corporation referred by the Respondent relates to Haryana Case I Bid where the bidder was Lanco Kondapalli with a bid capacity of 389 MW and bid submission dated of 26<sup>th</sup> November 2007 and issue of LOI on 17<sup>th</sup> July 2008. The HPGCL filed a petition before HERC seeking direction for the specific performance of Lanco Kondapalli raised objection regarding the jurisdiction of HERC on the matter. HERC passed an order against Lanco on 31-08-2009, clarifying that HERC had jurisdiction to decide on the matter. The bid bond (Rs.11.67 cr.) was encashed by HPGCL ON 13-01-2009 on account of failure to execute PPA. Thereafter, an appeal was filed by Lanco Kondapalli against HPGCL in Appellate Tribunal, which was dismissed on 20<sup>th</sup> January 2010. An appeal has been preferred to the Hon'ble Supreme Court in 2010, which is pending for final hearing.

5.9. In the Haryana matter the Bid Bond was encashed on 13<sup>th</sup> January 2009 which is more than 32 months prior to the bid submission date in the current case with the Respondent. As per the terms of the RFP and also the Case I bidding guidelines, the Petitioner is eligible to participate in any Case I bid as long as the bid bonds of the bidder or the associate companies have not been encashed in any other Case I bid in the previous one year as on the date of the bid submission.

**6. Contention in the Written Submission filed by the Respondents:-**

6.1. The medium term Tender No.01/PPMT/2011 was called for by adhering to the tender documents specified by Ministry of Power, Government of India. The RFP used for floating of the tender was prescribed by the Government of India and statutorily that has to be followed by the seller and procurer.

- 6.2. As per RFP clause 2.19.3 (b), “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. The RFP documents further prescribed Format 4.13 with the caption “Details of the generation sources and the primary fuel”. No exemption is given in the Format 4.13 for Fall Back basis Gas Allocation and short term contract based on “Fall Back Basis Gas Allocation”. Gas Allocation on Fall Back Basis can happen, if any firmly allocated gas consumer fails to offtake such firm allocation temporarily and when gas from any unconfirmed field becomes available for uncertain period and liable to be get disturbed when the source goes off etc. Such allocation is uncertain in all aspects.
- 6.3. If any bidder bids against a short term tender stating the basis of Fall Back Gas Allocation then his bid may not be accepted. The correct platform for generation on Fall Back Basis Gas Allocation is Power Exchange which has provisions inbuilt to absorb the variations on account of Fall Back Basis Gas Allocation and any such bids cannot be made in bilateral Contract of Short Term / Medium Term / Long Term etc.
- 6.4. The argument of the Petitioner relying on Fall Back Basis Gas Allocation etc. is an afterthought. Anyway the bidder should have disclosed that he has contracted the power under short term tender which he intended to meet by Fall Back Basis Gas Allocation. Failing to disclose the above, attracts RFP clause 2.19.3 (b).
- 6.5. 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 fall back basis etc. The bidder has merely mentioned the fuel therein as “Gas”. From the website of Ministry of Petroleum and Natural Gas, it was gathered that firm allocation

of 1.46 MMSCMD was made to M/s.Lanco Kondapalli, way back in November 2009 where the maximum possible PLF could be 75%. Failed to disclose the complete details of primary fuel 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 Serial No.6. There it is not giving any scope to the bidder to assume that the power contracted under short term on Fall Back 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).

6.6. The bidder had resorted to misrepresentation, omission of facts, suppression of facts, disclosure of incomplete facts in order to get the contract. The bidder attracts RFP clause 2.19.3 (b) and squarely liable to face the consequences as set out in RFP clause 2.12.2.

## **7. Findings of the Commission:-**

7.1. TANGEDCO has issued a tender notification calling for the RFP for procurement of power for 450 MW on medium term under bid specification No. 01/PPMT/2011 to be valid for a period of 5 years commencing from 10.12.2011 to 9.12.2016. As per clause 2.5(a) of the RFP documents of the tender, if the bidder conceals any information or makes a wrong statement or misrepresents facts or makes misleading statements in its bid, in any manner whatsoever in order to create circumstances for the acceptance of the 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.

7.2. The tender documents stipulated *inter alia* that every prospective bidder would have to submit a bid bond in the form of the Bank Guarantee (BG), which the procurer namely, TANGEDCO would have the power to invoke if the bidder has submitted any wrong information or in any manner misrepresented his position.

The following four bidders including the petitioner 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.

7.3. The petitioner had submitted its bid on 3.9.2011. The petitioner had specified in the bid that the quantum of power would be supplied by it from two sources, namely, 200 MW from the generating station of M/s. Lanco Kondapalli Power Ltd. (LKPL) and 100 MW from the generating station of M/s. Lanco Anpara Power Ltd. (LAPL). The generation plant of LKPL had a installed capacity of 366 MW with gas as primary fuel. As per clause 2 (12) of the RFP documents read with format 4.9, the petitioner had executed a Bank Guarantee for Rs. 6 crores of IDBI as Bid Bond. As per the provision of 2.12 of RFP, the Bid Bond could be invoked by the procurer i.e. TANGEDCO without notice if the bidder has submitted any wrong information as mentioned in clause 2.5 in RFP. TANGEDCO has issued a letter dated 27.2.2012 to IDBI, with whom the petitioner had instituted the BG towards the Bid Bond, seeking to invoke the Bid Bond on the ground that the petitioner had made material misrepresentations in the bid submitted which amounts to a violation of clause 2.5 of RFP documents. Subsequently, on the request of the petitioner duly furnishing an undertaking agreeing for deducting the amount of Rs. 6 crores through the amounts payable by the invoices, TANGEDCO has revoked the above letter issued to the IDBI.



7.4. However, subsequently TANGEDCO had deducted a sum of Rs. 6 crores equivalent to the value of the bid bond, from the bills of the petitioner for the power supplied from 1-8-2011 to 8-8-2011 in terms of the above letter of undertaking and accordingly informed the petitioner in letter dated 2-12-2012. Against this deduction of Rs. 6 crores, in their bills, the petitioner had raised this dispute.

7.5. TANGEDCO contended that the petitioner had stated in form 4.13 that the quantum contracted with other purchaser is Nil whereas the petitioner had participated in short term tender of TANGEDCO in Tender No. 13 opened on 18-8-2011 where Letter of Intent was issued on 2-9-2011 i.e. before opening of the case I Bid specification No. 01/PPMT/2011. The offered quantum has already been contracted with TANGEDCO. 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.

7.6. TANGEDCO had further contended that the petitioner offered 200 MW quantum for the bid specification No. 01/PPMT/2011 from LKPL. The installed capacity of the power plant is 366 MW. But gas allocated was only for 200 MW. Without having sufficient fuel allocation, the petitioner had participated in the bid specification No. 01/PPMT/2011 by suppression of facts which amounts to material inconsistency in the bid. TANGEDCO further contended that the Ministry of Petroleum and Natural Gas (MPNG) in the letter dt. 18.11.2009 had allocated 1.37 mmscmd of natural gas from KG D6 on fallback basis to LKPL, Andhra Pradesh for commissioning and operation of plants at 70% PLF. As such LKPL, Andhra Pradesh can generate power only up to 250 MW. Hence after supplying under short

term tender to TANGEDCO to the extent of 100 MW, and to Karnataka to the extent of 12.5 MW the balance cannot be sufficient to supply 200 MW under this tender bid.

7.7. To the above contention of TANGEDCO, the petitioner explained 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. MOPNG in their letter dt. 26.8.2009 had allocated 1.37 mmscmd to the petitioner's plant phase II for commissioning purpose. Further MOPNG in their letter dt. 18.11.2009 has allocated 1.46 mmscmd to the petitioner phase II plant on firm basis. Furthermore, the petitioner was also allocated fallback quantum of 0.29 mmscmd and as on the date of submission of the bid the generation was equivalent to more than 300 MW and the same is evident from SRLDC / SRPC reports. Hence the firm and fallback quantum of gas is sufficient to generate more than 300 MW, from this 100 MW was already contracted into TANGEDCO in TANGEDCO's supply Order dt. 2.9.2011 and 12.5 MW to PCKL as per PCKL Order dt. 30.8.2011. Therefore, the petitioner was having surplus quantum of 200 MW and had correctly participated in the bid.

7.8. Against this, TANGEDCO contended that gas allocation on fallback basis can happen if any firmly allocated gas consumer fails to offtake such firm allocation temporarily and when gas from any unconfirmed field becomes available for uncertain period and liable to get disturbed when the source goes off etc. such allocation is uncertain in all aspects. TANGEDCO further contended that the argument of the petitioner relying on the fallback allocation etc is after thought. Any way the bidder ought to have disclosed that he has contracted the power under short

term tender which he intended to meet by fallback basis gas allocation. Failing to disclose the above, attracts the clause 2.19.3 (b).

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.

For the above reasons, the D.R.P. is liable to be dismissed and accordingly the D.R.P.No.13 of 2013 is dismissed.

**8. Appeal:-**

An appeal against this order shall lie before the Appellate Tribunal for Electricity under section 111 of the Electricity Act, 2003 within a period of 45 days from the date of receipt of a copy of this order by the aggrieved person.

(Sd.....)  
**(G.Rajagopal)**  
**Member**

(Sd.....)  
**(S.Nagalsamy)**  
**Member**

/ True Copy /

Secretary  
Tamil Nadu Electricity  
Regulatory Commission