KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

PRESENT: Sri.T.M. Manoharan, Chairman

Petition No. 1893/DD (T)/Jhabua/2016/KSERC in OP No. 13/2015

In the matter of Procurement of 865 MW power for long term by KSEB Ltd. on DBFOO basis– adoption of Tariff under Section 63 of the Electricity Act, 2003.

Kerala State Electricity Board Limited : **Petitioner**
Vydyuthi Bhavanam, Pattom,
Thiruvananthapuram.

Order dated 22.12.2016

T.M. Manoharan, Chairman

Introduction

1. Kerala State Electricity Board Limited (hereinafter referred to as KSEB Ltd or the licensee) had, on 21.04.2015, filed a petition before the Kerala State Electricity Regulatory Commission (hereinafter referred to as the Commission) for the adoption of tariff determined under Section 63 of the Electricity Act, 2003 (hereinafter referred to as the Act) for the 865 MW of power procured by it on 'Design, Build, Finance, Own and Operate (DBFOO)' basis in the open bid process claimed to be in accordance with the Bidding Guidelines and the documents notified by the Government of India. KSEB Ltd had invited two tenders based on DBFOO basis. The first tender was for the supply of 450 MW of power from December, 2016 and the second tender was for the supply of 400 MW of power from October, 2017. The first tender was opened on 31.10.2014 and the second tender was opened on 14.11.2014. After processing the bids received in the tenders dated 31.10.2014 and 14.11.2014, KSEB Ltd entered into power purchase agreements with 7 generating companies for the supply of 865 MW of power, the details of which are given below,-

Details of Power Purchase Agreements executed by KSEB Ltd based on Bid 1

Sl. No.	Name of Firm	*Quantum of power in MW*	*Tariff as on Bid Date (Rs./kWh)*	*Date of execution of PPA*
1	Jindal Power Limited	*200*	*3.60*	*29-12-2014*
2	Jhabua Power Limited	*115*	*4.15*	*31-12-2014*

Details of Power Purchase Agreements executed by KSEB Ltd based on Bid 2

Sl. No.	Name of Firm	*Quantum of power in MW*	*Tariff (Rs./kWh)*	*Date of execution of PPA*
1	Bharat Aluminium Company Limited	*100*	*4.29*	*26-12-2014*
2	Jindal India Thermal Power Limited	*150*	*4.29*	*29-12-2014*
3	Jhabua Power Limited	*100*	*4.29*	*26-12-2014*
4	Jindal Power Limited	*100*	*4.29*	*29-12-2014*
5	East coast Energy Private Limited	*100*	*4.29*	*02-02-2015*

2. KSEB Ltd had submitted petition No. 13/2015 on 21.04.2015 for the approval of the above purchases of power. The Commission had, after due consideration of all the issues concerned and the documents placed before it, issued an order on 30.08.2016 by which the following decisions were taken,-

(i) purchase of 200 MW of power from M/s Jindal Power Limited at the rate of Rs.3.60 / kWh for 25 years as per the agreement dated 29.12.2014 and the purchase of 100 MW of power from M/s Bharat Aluminium Company Limited at the rate of Rs.4.29 / kWh for 25 years as per the agreement dated 26.12.2014 were approved.

(ii) The decisions relating to other power purchases will be taken after getting the views of Government of Kerala and Government of India on the deviations pointed out therein.

The operative portion of the order dated 30.08.2016 is quoted hereunder,-

"40. In view of the facts, circumstances and legal provisions explained above the Commission hereby issues the following orders,-

(1) The purchase of 200 MW of power by KSEB Ltd from M/s Jindal Power Ltd, New Delhi at the rate of Rs.3.60 / kWh as per the Bid -1 dated 05.03.2014 which was opened on 31.10.2014, is approved.

(2) The purchase of 100 MW of power by KSEB Ltd from M/s Bharat Aluminium Company Ltd, Chhattisgarh at the rate of Rs.4.29/ kWh as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014, is approved.

(3) The approval of the following purchases of power by KSEB Ltd from the bidders other than the lowest bidder (L1) will be considered on getting the approval from Government of India for the deviations from the guidelines and on getting the views from Government of Kerala on the issues raised in paragraphs 34 and 38 of this order.

(a)	*The purchase of 115 MW of power by KSEB Ltd from M/s Jhabua Power Ltd, Gurgaon at the rate of Rs.4.15/ kWh as per the Bid -1 dated 05.03.2014 which was opened on*

	31.10.2014.
(b)	*The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jindal India Thermal Power Ltd, New Delhi (L2) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.*
(c)	*The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jhabua Power Limited, Gurgaon (L3) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.*
(d)	*The purchase of 150 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jindal Power Limited, New Delhi (L4) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.*
(e)	*The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s East Coast Energy Private Limited, Andhra Pradesh (L5) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.*

(4) A copy of this order will be submitted to Government of Kerala with request to communicate their views after duly considering the relevant facts and legal provisions in view of the Government Order GO (MS) No. 45/2014/PD dated 20.12.2014 sanctioning the purchase of 865 MW of power by KSEB Ltd on DBFOO basis.

(5) KSEB Ltd is directed to follow up the matter in Government of India and in Government of Kerala and to submit the results to the Commission as early as possible, considering the fact that the power purchases as per Bid-1 will have to commence with effect from December, 2016.

(6) All the orders above are subject to the final decisions of the Hon'ble High Court in Writ Petition No. WP (C) 33100/2014. "

This order is being issued in continuation to the order of the Commission dated 30.08.2016 in OP No. 13/2015.

Petition submitted by KSEB Ltd

3. KSEB Ltd has, in its letter No. KSEB/TRAC/Power Purchase/2016-17/3384 dated 15.11.2016, requested the Commission to take appropriate decision relating to the purchase of 115 MW of power from M/s Jhabua Power Ltd, in view of the following facts.

(1) KSEB Ltd. has entered into Power Supply Agreements for the long term procurement of 315 MW and 550 MW electricity for a period of 25 years with effect from 1st December 2016 and 1st October 2017 respectively from Thermal Power Stations set up on Design, Build, Finance, Own and Operate (DBFOO) basis.

(2) Out of the 315MW of power contracted for commencement from December 2016, 200MW RTC power is contracted with Jindal Power Ltd., Chattisgarh and 115 MW RTC power is contracted with Jhabua Power Ltd. and the period of contract is from 1-12-2016 to 30-11-2040.

(3) The Commission has approved the purchase of power from Jindal Power Ltd. No approval has been granted for the PPA entered into by KSEBL with Jhabua Power Ltd.

(4) LTA for drawing 109.9MW from Jhabua Power Ltd. is expected to be available by December 2016.

(5) KSEB Ltd expects a significant deficit (around 218MW) in peak availability, even after considering the availability of 115 MW of power from Jhabua Power Ltd. in the summer months.

(6) It is submitted that non-availability of power from Jhabua Power Ltd., will create a further deficit of 105 MW (after deducting aux consumption and transmission loss) at Kerala periphery and short term transactions for meeting this deficit may not be possible due to the present inter regional transmission corridor congestion between NEW grid and SR. This may force KSEBL to schedule the costly internal thermal generation and huge financial liability on KSEBL.

(7) It is further submitted that if KSEB Ltd. does not avail this power, huge financial commitment equivalent to 66% of the estimated transmission charges for the stranded transmission capacity (@ Rs.2,19,325 /MW/ month) for a period of 12 years by way of relinquishment of LTA as stipulated in CERC (Grant of Connectivity, Long-Term Access and Medium-term Open Access in Inter-state Transmission and related matters) Regulations, 2009 will have to be paid by KSEB Ltd to CTU as relinquishment charges. In addition to the above, compensation amount due to generator by way of breach of contract will also have to be borne by KSEBL.

(8) The Regulation 18 (1) (b) of CERC (Grant of Connectivity, Long –term Access and Medium-term Open Access in Inter-state Transmission and related matters) Regulations, 2009 stipulates that 66% of the estimated transmission charges for the stranded transmission capacity is payable by long term customers. Compensation is payable by the KSEB Ltd as per 29.2 of the PPA for all direct costs suffered by the supplier, which includes interest payment on debt, O&M expenses etc.

(9) KSEB Ltd submitted that the purchase of 115MW power from M/s. Jhabua Power Ltd. is inevitable and requested for approval of the Commission for scheduling power from M/s Jhabua Power Ltd. from December 2016.

(10) KSEB Ltd submitted that KSEBL shall approach the Commission with the approval from Ministry of Power once the same is received.

4. Thereupon, the Commission, as per letter No. 1893/DD (T)/Jhabua/2016/ KSERC dated 28.11.2016 directed KSEB Ltd to submit approval of Government of India received if any and the approval of Government of Kerala received if any. In reply to the said letter of the Commission, KSEB Ltd has submitted letter No. KSEB/TRAC/Power Purchase/2016-17/3473 dated 13.12.2016, with a copy of GO (Rt) No.238/2016/PD dated 31.11.2016 issued by Government of Kerala permitting KSEB Ltd to procure 115 MW from M/s Jhabua Power Ltd from 01.12.2016. KSEB Ltd has also submitted that no formal communication has been received in respect of approval of Government of India.

Analysis and decisions

5. The reasons and grounds for issuance of the order dated 30.08.2016 in OP No. 13/2015 have been explained in paragraphs 7 to 39 of the said order. In the paragraphs 32 to 37, the grounds for postponement of the final decision with regard to purchase of 115 MW of power from M/s Jhabua Power Ltd. (L2) at the rate of Rs.4.15 / kWh as per the tender opened on 31.10.2014, have been explained. Paragraphs 33, 34 and 38 are quoted hereunder.

"33. The award of power supply contract to M/s Jhabua Power Ltd. Gurgaon (L2 of Bid-1) at a higher rate of Rs. 4.15 / kWh is not found to be in order for the reasons explained below. KSEB Ltd had requested the bidders L2 to L4 in Bid 1 to match their rates with that of L1. But none of them matched their rates with that of L1. In the normal course of tender process, KSEB Ltd should have followed the procedures prescribed by Government of India in para 3.3.4 of the guidelines which states as follows,-

> *"3.3.4 In the event that no Bidder offers to match the Lowest Bidder in the second round of bidding as specified in Clause 3.3.3, the Utility may, in its discretion, invite fresh Bids (the "third round of bidding") from all Bidders except the Lowest Bidder of the first round of bidding, or annul the Bidding Process, as the case may be. In case the Bidders are invited in the third round of bidding to revalidate or extend their Bid Security, as necessary, and offer fresh Bids, they shall be eligible for submission of fresh Bids provided, however, that in such third round of bidding only such Bids shall be eligible for consideration which are lower than the Bid of the second lowest Bidder in the first round of bidding."*

On the other hand KSEB Ltd is seen to have accepted the second lower offer of M/s Jhabua Power Ltd. Gurgaon (L2) also at a rate of Rs.4.15 / kWh (Rs.2.39 as fixed cost and Rs.1.76 as fuel charge). The justification given by KSEB Ltd for accepting L2 rate of Rs.4.15 kWh in the Bid-1 dated 5/3/2014 is that it is lower than the L1 rate of Rs.4.29/ kWh, in Bid-2 dated 25/04/2014. The rationale and basis adopted by KSEB Ltd for accepting the higher rate offered by L2 in Bid 1, are not in accordance with the

guidelines issued by GoI or with the general principles of financial propriety in tender processes for the following reasons,-

(i) The guidelines issued by GoI of India categorically state that the bid process shall be open, transparent, and competitive based on the offer of lowest tariff. Hence there is absolutely no scope for accepting the second lower offer (L2) as per the provisions of the guidelines issued by GoI under Section 63 of the Electricity Act, 2003.

(ii) The offers obtained in both Bid 1 dated 5/3/2014 and Bid 2 dated 25/04/2014 have to be evaluated and decisions taken independently and therefore the rates obtained in Bid 1 dated 5/3/2014 cannot be compared with the rates obtained in Bid 2 dated 25/04/2014 in any manner.

(iii) As per the guidelines issued by the Government of India, the tender process is to discover the lowest tariff and the second round of bidding can be adopted only if the bidders other than L1 offer the lowest rate offered by L1. The licensee cannot accept any higher rate in order to meet its requirements, since it is against the very principle of discovering the lowest tariff in an open, transparent and competitive tender process in accordance with the guidelines issued by GoI.

(iv) The Bid 1 dated 5/3/2014 is for supply of power with effect from December 2016 whereas Bid 2 is for supply of power from October 2017. In the case of Bid 2, the date of commencement of supply of power is after 3 years and hence the generator / supplier need not submit the project specific details as specified in clause 2.2.1 (e) of the Model RFQ. As per clause 2.2.1 (e) of the Model RFQ, the applicant should,- (a) possess at least one half of the land required for power station, (b) obtain environmental and forests clearances, (c) commence the construction of the power station, (d) have assured supply of fuel, and (e) other project specific conditions stipulated by the licensee. The above conditions are not required if the date of commencement of power supply is after 3 years from the date of the RFQ. The date of commencement of supply as per the Bid 1 dated 5/3/2014 is December, 2016 which is within 3 years from the date of RFQ and the date of commencement of supply as per the Bid 2 dated 25/04/2014 is, October 2017 which is after 3 years from the date of RFQ. As admitted by the licensee, no eligibility conditions as stated above have been insisted in the case of Bid 2 dated 25.04.2014. Thus the conditions of tender for the supply of power as per Bid 1 and Bid 2 are different and distinct.

Therefore the rates discovered in Bid 1 dated 5/3/2014 and the rates discovered in Bid 2 dated 25/04/2014 cannot be compared.

(v) It is also noticed that KSEB Ltd had not invited all the remaining bidders to revalidate or extend their bid security as specified in paragraph 3.3.3 of the RFP document.

"34. KSEB Ltd has submitted that it had taken up the matter with Government of India for approval. But KSEB Ltd has not so far submitted any document relating to the approval if any granted by Government of India. In this regard it has to be noted that as per the provisions of the guidelines issued by Government of India, prior approval of Government of India is required for any deviation. The Hon'ble Supreme Court and Hon'ble High Courts have concurrently and repeatedly held that prior approval cannot be obtained subsequently. Before taking a decision on the approval of power purchases by KSEB Ltd from the bidders other than the lowest bidder, the Commission would like to know the response of Government of India with regard to the approval sought for by KSEB Ltd."

"38. KSEB Ltd has submitted that Government of Kerala has accorded sanction for the procurement of 865 MW of power on DBFOO basis, vide GO (MS) No. 45/2014/PD dated 20.12.2014. It is not known to the Commission whether or not all the matters discussed above have been duly placed before the Government of Kerala by KSEB Ltd, and whether or not Government have considered such matters before issuance of the said Government Order. Therefore, before taking a decision on the approval of purchases of power by KSEB Ltd, from the bidders other than the lowest bidder of Bid-1 and Bid-2, the Commission has to necessarily ascertain the views of Government of Kerala after examining the issues explained above."

6. The Commission had categorically stated in the order dated 30.08.2016 that, the Commission would consider the approval of purchase of power by KSEB Ltd from the bidders other than L1 in Bid-1 and Bid-2 including the purchase of 115 MW from M/s Jhabua Power Ltd on getting the approval from Government of India for the deviations from the guidelines and on getting the views from Government of Kerala on the issues raised in paragraphs 34 and 38 of the order. The Commission had further directed the KSEB Ltd to follow up the matter in Government of India and in Government of Kerala and to submit the results to the Commission as earlier as possible, considering the fact that the power purchase as per Bid-1 will have to commence with effect from December, 2016.

7. Government of Kerala has also, as per government letter No. 146/B1/16/PD dated 02.12.2016, communicated a copy of GO (Rt) No.238/2016/PD dated 31.11.2016 and requested the Commission to take necessary further action. Paragraphs 2, 3 and 4 of the said Government order are quoted hereunder.

"2) Article 4 Section 63 of Electricity Act, 2003, states that in the executed PSAs (Conditions Precedent) the tariff discovered in the

tender is to be adopted by the Appropriate Commission, provided that the bidding process is transparent and in accordance with guidelines issued by Government of India. But the Kerala State Electricity Regulatory Commission has issued orders on 30.08.2016 adopting the tariff only for 300 MW, in respect of PSAs executed by L1 bidders of Bid 1 and Bid 2. The KSERC has pointed out certain deviations in the bidding procedure and directed KSEB Ltd to submit the approval from the Government of India for the same, for enabling the Commission to adopt the tariff for the long term procurement of remaining 565 MW. Accordingly, the above matter has been taken up with MoP, Government of India vide letter read as 2nd paper above.

3) In the letter read as 3rd paper above Chairman & managing Director, K S E B L has reported that as per PSA, supply of power from M/s Jhabua (P) Ltd , the L2 bidder of Bid 1, commences on 1.12.2016, for which KSERC has not granted approval. However, Long Term Access (LTA) for the transfer of power from the power plant of M/s Jhabua Power Ltd in Madhya Pradesh to Kerala with effect from 1.12.2016 has been granted by the CTU. If K S E B Ltd. does not avail of this power, huge financial commitment equivalent to 66% of the estimated transmission charges for the stranded capacity (@ Rs. 2,19,325/MW/Month for a period of 12 years by way of relinquishment of long term access rights will have to be borne by K S E B Ltd. Besides, there will be litigation for payment of Fixed Charge citing breach of contract by K S E B Ltd. by the Generator; if the verdict is adverse to K S E B Ltd. there will be substantial financial burden by way of payment of fixed charges. Moreover, non receipt of 115MW power from this power plant would affect the Load Generation Balance of K S E B Ltd. which is already facing shortage of power due to poor monsoon. Further, procurement of power to meet the system demand during the oncoming summer months was arranged in anticipation of obtaining the 115MW power from this power plant. Therefore, K S E B Ltd. has requested to accord sanction for procurement of contracted 115MW power from M/s Jhabua Power Ltd with effect from 1/12/2016.

4)Government have examined the matter in detail and are pleased to permit K S E B Ltd. to procure of 115 MW power from M/s Jhabua Power Ltd from 1.12.2016 for the reasons stated above"

From the above Government order it is seen that,-

(i) Government of Kerala has examined the matter in detail and permitted KSEB Ltd to purchase power from M/s Jhabua Power Ltd with effect from 01.12.2016, and

(ii) Government of Kerala has, vide letter No. CA-DBFOO/KSERC / 2016/PD dated 15.09.2016 of the Additional Chief Secretary to Government, Power Department, written to Government of India for its decision on the matters mentioned therein.

Order of the Commission

8. In view of the facts, circumstances and urgency explained by KSEB Ltd and in view of the decision of Government of Kerala in GO (Rt) No.238/2016/PD dated 31.11.2016, the Commission hereby approves provisionally the purchase of 115 MW of power by KSEB Ltd from M/s Jhabua Power Ltd at the rate of Rs.4.15 / kWh as per the power purchase agreement dated 31.12.2014, subject to the clearance from Government of India and subject to the final decision of the Hon'ble High Court in Writ Petition No. WP (C) 33100/2014.

Sd/-

T.M. Manoharan
Chairman

Approved for issue

Santhosh Kumar.K.B
Secretary