

No.N/57/12

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BANGALORE**

Dated : 7th March, 2013

- | | |
|-------------------------------|----------|
| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri Vishvanath Hiremath | Member |
| 3. Sri K. Srinivasa Rao | Member |

OP No.33/2012

BETWEEN :

M/s.BMM Ispat Limited
No.114, Danapur Village
Hospet Taluk
BELLARY DISTRICT ..
[Represented by M/s. Shridhar Prabu Associates, Advocates]

Petitioner

AND

- 1) BANGALORE Electricity Supply Company Limited
K.R. Circle
BANGALORE – 560 001
- 2) Power Company of Karnataka Limited (PCKL)
1st Floor, KPTCL Building
Cauvery Bhavan
BANGALORE – 560 009
- 3) Karnataka Power Transmission Corporation Limited
Cauvery Bhavan
Bangalore – 560 009 ..

Respondents

[R1 and 2 represented by M/s.Justlaw, Advocates]

- 1) In this Petition, the Petitioner has sought the following directions to the 2nd Respondent-Power Company of Karnataka Limited (PCKL):

- (a) To open a Letter of Credit as mandated under Article 8.4 of the PPA dated 27.8.2011;
- (b) To pay a sum of Rs.6,13,14,000/-, conservatively quantified as on 22.5.2012, towards the payment for the Procurer's Event of Default as contemplated under 4.9.1 (a) of the PPA, together with interest at 1.5% per month;
- (c) To refund a sum of Rs.3,93,15,720/- illegally deducted in the March, 2012 bill together with interest at 1.5% per month; and
- (d) Grant cost of the Legal Notice dated 22.5.2012;

2) On Notice, the Respondents have put in appearance through their Counsel and have filed Statement of Objections dated 2.11.2012, to which the Petitioner has filed a Rejoinder on 21.11.2012.

3) The facts of this case are that the Respondent No.2- PCKL on 7.7.2011 (Annexure-P1) had invited bids for procurement of power for Medium Term for the period from 1.9.2011 to 15.6.2013 under Case-1 Bidding Procedure prescribed by the Government of India under Bidding Guidelines. The Petitioner, in response, had submitted its bid, vide its letter dated 28.7.2011 (Annexure-P2), offering to supply power of 30 mw at the rate of Rs.4.10 per KWH. The Petitioner also had participated in the interaction meeting with the 2nd Respondent on 3.8.2011 after opening of the financial bid and also submitted an undertaking

dated 4.8.2011 (Annexure-P3) to the effect that it is in a position to evacuate 30 MW of power as per required Schedule. Thereafter, the Petitioner entered into a Power Purchase Agreement (PPA) dated 27.8.2011 (Annexure-P4) with the 1st Respondent and supplied electricity as per the agreement in different quantities.

4) The dispute in the present case raised by the Petitioner is on the action taken by the 1st Respondent, vide its letter dated 30.4.2012 (Annexure-P8) in deducting a sum of Rs.3,93,15,720/- as penalty, on the ground that the Petitioner did not supply electricity in agreed quantity as per Schedule.

5) It is submitted by the Petitioner that the 1st Respondent could not have recovered any amount from it towards short-supply, as the short-supply was on account of non-performance of the obligations undertaken by the 1st Respondent under the PPA, viz., in ensuring the availability of the interconnection facility and the evacuation of power from the Delivery Point before the Scheduled Delivery Date. Further, it is the case of the Petitioner that it had performed all its obligations undertaken under the PPA, but the Respondents failed to perform their obligations and therefore, it is the 1st Respondent which is liable to pay damages to it as per Article 4.9 of the PPA.

6) Per contra, it is submitted on behalf of the Respondents that there was no delay on their part in providing the interconnection facility to the Petitioner and therefore the Petitioner cannot contend that in view of their not providing the interconnection approval in terms of Article 4.3, it could not supply the power

contracted from the Scheduled Delivery Date. According to the Respondents, due to non-supply of the contracted quantity of power from the Scheduled Date of Delivery, the Petitioner is liable to pay damages as per Paragraph- 4.2.5 of Schedule-4 of the PPA. Further, it is contended that as the Respondents had performed their part of their Contract, they are not liable to pay any damages to the Petitioner, as claimed in the Petition.

7) We have considered the averments made by the Petitioner in the Petition and in the Rejoinder, the averments made by the Respondents in the Statement of Objections and the documents produced by the parties in support of their respective case. We have also heard the oral submissions made by the Counsel for the parties in the case.

8) The Issues that arise for consideration and decision are:

- (1) Whether any direction to the 2nd Respondent is to be issued for opening a Letter of Credit, as per Article 8.4 of the PPA?
- (2) Whether the Petitioner is entitled for refund of the penalty levied from the 2nd Respondent?
- (3) Whether the Petitioner is entitled to claim any damages from the 2nd Respondent?

9) At the outset, we may point out that the very Petition filed by the Petitioner, seeking relief only against the 2nd Respondent, is not maintainable, as the contractual relationship for supply of electricity, etc., is only with the 1st

Respondent-BESCOM and not with the 2nd Respondent. Though the 2nd Respondent called for bids, etc., and facilitated signing of the PPA, it had no role in the supply of electricity and payment to be made therefor. Moreover, the PPA dated 27.8.2011 has been entered into only with the 1st Respondent and the actions impugned are taken by the 1st Respondent. Therefore, the reliefs claimed are taken to be against the 1st Respondent.

ISSUE No.1 :

10) The Respondents, in their Statement of Objections, at paragraph-4, have stated that the 1st Respondent has opened the Letter of Credit for Rs.7,53,00,000/- on 18.6.2012 and a copy of the Letter Credit has been produced at Annexure-R4. This has not been disputed by the Petitioner. In view of this submission by the Respondents, Issue No.1 does not survive for consideration.

ISSUE No.2:

11) The case of the Petitioner is that the 1st Respondent failed to ensure availability of interconnection facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date as per Article 4.3 of the PPA, because of which it could not fully supply the electricity undertaken to be supplied by it under the PPA. Therefore, the penalty levied and collected by the 1st Respondent on the ground of short-supply is not valid and legal.

12) In order to appreciate the case made out by the Petitioner, we have seen Article 4.3 of the PPA. The said Clause reads as under :

“4.3 Procurer’s Obligations

4.3.1 *Subject to the terms and conditions of this Agreement, the Procurer(s) shall:*

- (a) *ensure the availability of Interconnection Facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date.*

XXX

XXX

XXX “

13) In order to understand what is the obligation of the 1st Respondent as per the above provision, it is necessary to refer to the following definitions in the PPA :

“1.1 Definitions

‘Delivery Point’ shall mean the STU Interface(s) as specified in Schedule 1 of this Agreement;

‘Injection Point’ shall mean the 220 KV LILLO between Ittagi and Lingapur of KPTCL Grid (Schedule 10 of this Agreement);

‘Interconnection Facilities’ shall mean the facilities on the Procurers’ side of the Delivery Point for receiving and metering the electrical output in accordance with this Agreement and which shall include, without limitation, all other transmission lines and associated equipments, transformers, relay and switching equipment and protective devices, safety equipment and, subject to Article 6, Metering System required for supply of power as per the terms of this Agreement;

‘Interconnection Point’ shall mean the point where the power from the Power Station switchyard bus of the Seller is injected into the interstate/intrastate transmission system (including the dedicated transmission line connecting the Power Station with the interstate/intrastate transmission system);

'Scheduled Delivery Date' shall have the same meaning ascribed in Article 4.1 of this Agreement;

'State Transmission Utility' or 'STU' shall mean the Board or the Government company notified by the respective State Government under Sub-section (1) of Section 39 of the Act;

XXX

XXX

XXX “

14) When Article 4.3.1 of the PPA is read in conjunction with the Definitions extracted above, it becomes clear that the obligation of the 1st Respondent will come into question only if the Petitioner interconnects its additional 70 MW generating plant also to the Delivery Point (as the existing plant had already been connected to the Grid). From the documents produced by the Petitioner, viz., the Official Memorandum dated 28.6.2011 (Annexure-P11) of the Chief Electrical Inspector to Government, the provisional interconnection approval for the 70 MW generating plant dated 9.1.2012 (Annexure-P12) granted by the 3rd Respondent and Respondent No.1's letter No.BESCOM/GMPP/BC-39/DGM-1/F-3080(B)/11-12/4924-26, dated 20.1.2012 (Annexure-P16), it is evident that the said additional generating plant of 70 MW capacity of the Petitioner was not connected to the Grid and was synchronized to the Grid only on 21.1.2012. This is supported by the declaration of capacity made by the Petitioner (Annexure-R3 of the Objection Statement of the Respondents). It is observed that on no hour of any day before 21.1.2012, the declaration was more than 12 MW and only subsequent to 21.1.2012, the date of synchronization of the generating plant of 70 MW to the Grid, it was increased to 30 MW. Once the Petitioner had not connected its additional plant to the Interconnection Point of the STU, the

question of the 1st Respondent ensuring availability of interconnection facilities from the Delivery Point for that additional plant would not arise. Therefore, the Petitioner cannot excuse itself from performing the Contract on the ground that the 1st Respondent had failed to fulfil its obligation of ensuring availability of interconnection facility from the Delivery Point.

15) It is contended on behalf of the 1st Respondent, relying on Article 4.2.5 of Schedule-4 of the PPA that the Petitioner is liable to pay penalty as provided therein, since the Petitioner failed to supply the required quantity of electricity. It is an admitted fact that the Petitioner did not supply the required quantum of electricity undertaken in the PPA. Having failed to get its Plant interconnected with the STU network and supply the required quantity of electricity undertaken in the PPA, in our view, the Petitioner is liable to pay penalty as provided in Article 4.2.5.1 of Schedule-4 of the PPA. Consequently, we hold that the action taken by the 1st Respondent in levying and recovering the penalty is in accordance with the provisions of the PPA, and valid and legal. Accordingly, we answer Issue No.2 in the negative and against the Petitioner.

ISSUE No.3 :

16) The Petitioner has submitted that since the 1st Respondent failed to ensure the availability of interconnection facility and evacuation of power from the Delivery Point before the Scheduled Delivery Date, the 1st Respondent is liable to

pay Liquidated Damages as per Article 4.9 of the PPA. In order to appreciate this submission, let us see Article 4.9 of the PPA, which is reproduced below :

“4.9 Liquidated Damages for delay due to Procurer event of Default or Force Majeure Event (affecting the Procurer)

4.9.1 *If the Seller is otherwise ready to commence supply of power and has given due notice, as per the provisions of Article 4.1.2, to the Procurer(s) of the date of commencement of power supply, where such date is on the Scheduled Delivery Date, but is not able to commence supply of power by the said date specified in the notice, due to a Procurer Event of Default or due to Force Majeure Event affecting the Procurer(s) has continued for a period of more than three (3) continuous or non- continuous Months, the Seller shall, until the effects of the Procurer Event of Default or of Force Majeure Event affecting the Procurer(s) no longer prevent the Seller from providing supply of power to the Procurer(s), be deemed to have an Available Capacity equal to the Aggregated Contracted Capacity relevant to that date and to this extent, be deemed to have been providing supply of power with effect from the date modified, and shall be treated as follows :*

a) *In case of delay on account of the Procurer Event of Default, the Procurer(s) shall make payment to the Seller @ Rs.1.00/kwh in proportion to their Contracted Capacity, calculated on Normative Availability of Contracted Capacity for and during the period of such delay.*

b) XXX XXX XXX

c) XXX XXX XXX

 XXX XXX XXX “

17) In our view, the opening words of Article 4.9.1 itself negate the contention of the Petitioner and also its claim made for damages. Article 4.9.1 of the PPA

opens with the words, "If the Seller is otherwise ready to commence supply of power and has given due notice, as per the provisions of Article 4.1.2, to the Procurer(s) of the date of commencement of power supply, where such date is on the Scheduled Delivery Date, but is not able to commence supply of power by the said date specified in the notice, due to a Procurer Event of Default" [emphasis supplied]. As pointed out by us while dealing with Issue No.2 above, it is the Petitioner which was not ready to commence supply of electricity by interconnecting its Plant with the STU interface till 21.1.2012. Therefore, the question of the 1st Respondent becoming liable to pay damages would not arise. The Petitioner who failed to fulfil its obligations by being ready to supply electricity to the 1st Respondent as undertaken in the PPA, it cannot blame the 1st Respondent and lodge a claim for damages. We are of the considered view that there was no failure on the part of the 1st Respondent in performing its obligations and therefore it is not liable to pay any damages to the Petitioner as per Article 4.9 of the PPA. Accordingly, we answer Issue No.3 in the negative and against the Petitioner.

18) Consequently, this Petition is liable to be dismissed and accordingly dismissed.

Sd/-

(M.R. SREENIVASA MURTHY)
CHAIRMAN

Sd/-

(VISHVANATH HIREMATH)
MEMBER

Sd/-

(K.SRINIVASA RAO)
MEMBER