

ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

I.A.No.37 of 2015 in O.P.No.21 of 2015
Dated: 17-10-2015

Present
Sri Justice G. Bhavani Prasad, Chairman
Dr. P. Raghu, Member

Between:

1. Eastern Power Distribution Company of
Andhra Pradesh Limited (APEPDCL)
2. Southern Power Distribution Company of
Andhra Pradesh Limited (APSPDCL) ... Applicants

A N D

The Hinduja National Power Corporation Limited ... Respondent

The Interlocutory Application has come up for hearing finally on 03-10-2015 in the presence of Sri Shridhar Prabhu, learned counsel for the respondent and Sri P. Shiva Rao, learned Standing Counsel for the applicants. After carefully considering the material available on record and after hearing the arguments of both the counsel, the Commission passed the following:

ORDER

The Hinduja National Power Corporation Limited (HNPCL) filed an application for determination of capital cost of coal fired power station of 1040 MW (2 x 520 MW) capacity in Visakhapatnam District. The parties are referred to herein as they are arrayed in the main original petition.

2. Erstwhile Andhra Pradesh Electricity Regulatory Commission which was functioning as a joint regulatory body for States of Telangana and Andhra Pradesh entered into a *lump sum* contract with M/s. Ernst & Young LLP, New Delhi on 18-08-2014 for the consultant to provide certain consulting services as defined in the contract in respect of the subject matter of the said application. The contract was made terminable under Clause 18 thereof by the Client i.e., Andhra Pradesh Electricity Regulatory Commission with mutual notice by either party on the

happenings of the contingencies mentioned therein. Under Clause 18.1.1.(e) of the contract, the contract may be terminated if the Client in its sole discretion and for any reason whatsoever decides to terminate this contract. Otherwise under Clause 11 of the contract, the termination of contract was provided for in the event of the failure to become effective within the specified period. Clause 13 of the contract provided for expiration of the contract, if not terminated earlier under Clause 18, at the end of such time period after the effective date as specified in the special conditions of contract. In the event of such termination or expiration under any of the three clauses, all the rights and obligations of the parties shall cease under Clause 18 (c) of the contract. Under the special conditions of contract, under Clause 13.1, the time period for expiration of contract was prescribed as 120 days unless extended by the Client.

3. Subsequent to the agreement, the Consultant filed an inception report dated 30-08-2014 before the Commission and on examination of the inception report, the Commission raised certain queries for which a response was submitted by the Consultant. On perusal of the report and the response, the erstwhile Commission considered the same as an acceptable inception report and released an amount of Rs.6,12,362/- to the Consultant towards 10% contract value as per the terms of reference attached to the contract agreement. The Consultant addressed a further letter dated 31-10-2014 about the petitioner herein not providing data and documents sought for by them, due to which timely completion of assignment could not be achieved and the Consultant also requested for suggesting a way forward for the project in view of the reorganization of the Commission itself. Later, the Consultant addressed the present Commission after its constitution, through a letter dated 02-11-2014, to extend time line for the project by 120 days hoping that their request shall be considered by the office of the Commission.

4. While so, the application of the applicant not having been admitted for hearing by following the procedure prescribed by the APERC (Conduct of Business) Regulations, 1999 having been noticed by the Commission, the office of the Commission put up a detailed note about the sequence of events including the decision to engage Consultant even before any proceedings are initiated by the Commission on the petition filed by the respondent in accordance with the prescribed procedure and subsequent constitution of two separate State Electricity Regulatory Commissions in the place of the transitional regulatory body under A.P. Reorganisation Act, 2014. The petition was then taken on file against the two distribution companies within the territorial jurisdiction of the residuary State of Andhra Pradesh leaving open any other incidental questions without any present decision.

5. On the appearance of both parties through their respective counsel before the Commission, the parties were requested to examine and make their respective stands known on the steps to be taken concerning the Consultant appointed by the erstwhile Commission. The Standing Counsel for the respondents and the learned counsel for the petitioner initially represented orally that the agreement with the Consultant expired by efflux of time. Later, the respondents filed I.A.No.37 of 2015 under Clause 55 of the APERC (Conduct of Business) Regulations, 1999 stating that the period of agreement with the Consultant was not extended and the agreement came to end by operation of its terms and conditions. They also stated that since the distribution companies engaged their own Consultant to study the documents furnished by the petitioner about the capital cost of the generating station, any further Consultants to the Commission may not be required. Therefore, they requested for formal orders confirming the extinction of the agreement dated 18-08-2014. The petitioner in its statement of objections claimed that the application does not have even a prayer and the petitioner understood the respondents to be requesting the Commission to

consider appointment of their Consultant as the Consultant of the Commission which is impermissible under law or facts. Conflict of interest and other legal issues will arise and the Commission has no need to engage the very same Consultant of the distribution company as it is supported by a number of internal and external Consultants. Need for appointment of an independent Consultant or otherwise is a matter at the sole discretion of the Commission. Hence, the petitioner desired rejection of the interlocutory application.

6. The learned counsel for both parties are heard and they did not appear to be at controversy on the agreement dated 18-08-2014 with the Consultant expiring by sheer efflux of time with particular reference to the general and special conditions of contract under Clause 13 of the agreement which is expressed in a mandatory form. Clause 13 which is self-contained does not appear to contemplate any extension of the contract after expiry of the prescribed period even at the volition of both parties. As already stated, Clauses 11 and 18 operated under different circumstances and even under Clause 18, the Commission is vested with the sole discretion to terminate the contract, if it so desires for any reason. The special conditions of contract under Clause 13.1 of course referred to extension by the Client i.e., the Commission, but obviously, any such extension should have been expressed before the expiry of 120 days and the language of the agreement does not appear to admit the validity of any retrospective extension after Clauses 13 and 13.1 worked themselves out. While the Consultant has been paid as per invoice for the services already rendered in respect of the inception report, the letters of the Consultant dated 31-10-2014 and 03-12-2014 cannot breathe the agreement back to life after the extinction as per the agreement without any specific extension granted or ordered by the Commission.

7. As of now it is evident that the respondents do not desire to have the advantage of any Consultant appointed by the Commission for the purpose of

assessment of the fixed cost as they engaged their own Consultant for that purpose and I.A.No.37 of 2015 is definitely having a prayer at para 5 requesting for formal orders confirming the extinction of the agreement dated 18-08-2014. The interlocutory application also never asked for the Consultant of the respondents to be appointed or recognized as the Consultant of the Commission also or the Consultant of the Commission and the petitioner also. The respondents are only placing a fact before the Commission when they stated that they engaged their own Consultants as a reason for justifying the absence of any more necessity for any other Consultant for the Commission with further expense. The petitioner itself fairly admitted that it is the sole discretion of the Commission to have or not to have such a Consultant. While dispelling any impression of the petitioner that the Consultants of the respondents are sought to be conferred the status of the Consultants of the Commission or the petitioner, in view of the extensive material placed before the Commission by both parties on the issues involved, there appears to be no need for making any fresh engagement of any Consultant by the Commission or revive the expired agreement of the erstwhile Consultant appointed by the erstwhile Commission.

8. Therefore, it is recorded that the *lump sum* contract entered into between the erstwhile Andhra Pradesh Electricity Regulatory Commission and M/s. Ernst & Young LLP, New Delhi expired by efflux of time not having been extended any further and I.A.No.37 of 2015 is allowed accordingly. The parties shall bear their own costs in this I.A. and the Consultant under the expired agreement be informed of the expiration of the contract as recorded herein, by the office of the Commission.

This order is corrected and signed on this the 17th day of October, 2015.

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman