CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 126/AT/2021

Coram:
Shri P. K. Pujari, Chairperson
Shri Arun Goyal, Member
Shri P. K. Singh, Member

Date of Order: 8th September, 2021

In the matter of

Petition under Section 63 of the Electricity Act, 2003 for adoption of tariff for inter-State Transmission System connected 1200 MW, ISTS Connected Solar PV Power Projects under open category and selected through competitive bidding process as per the Standard Bidding Guidelines issued by Ministry of Power dated 3.8.2017.

And
In the matter of

NTPC Limited,
Institutional Area, Lodhi Road,
New Delhi – 110 003 …**Petitioner**

Vs

1. TBEA Solar (India) Private Limited,
1048, Vyapar Kendra Rd, Block C,
Sushant Lok Phase I, Sector 43,
Gurugram, Haryana – 122 002

2. Government of Puducherry,
Chief Secretariat, Goubert Avenue,
Puducherry – 60 500

3. M.P.Power Management Company Limited,
Shakti Bhawan, Rampur,
Jabalpur – 482 008 …**Respondents**

The following were present:

Ms. Swapna Seshadri, Advocate, NTPC
Ms. Ritu Apurva, Advocate, NTPC
Shri Anand K Ganesan, Advocate, NTPC
Shri Ashwin Ramanathan, Advocate, NTPC
Shri Aditya Dubey, Advocate, NTPC
Shri Nishant Kumar, Advocate, TBEA Solar
Shri Animesh Kumar, Advocate, TBEA Solar
Ms. Utkarsha Sharma, Advocate, TBEA Solar
Ms. Shweta Singh, Advocate, TBEA Solar
Shri Kapil Sharma, TBEA Solar
Shri Ankesh Raj, TBEA Solar
Shri Pawan Kr. Sharma, ABC Renewable

ORDER

The Petitioner, NTPC Limited ('NTPC'), has filed the present Petition under Section 63 of the Electricity Act, 2003 (hereinafter referred to as the 'Act') for adoption of tariff for 1200 MW solar power projects connected to inter-State Transmission System ('ISTS') and selected through competitive bidding process as per the "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects" (hereinafter referred to as 'the Guidelines') dated 3.8.2017, as amended from time to time, issued by Ministry of Power, Government of India. The Petitioner has made the following prayers:

> *"(a) Adopt the tariff discovered in the competitive bid process for the Grid Connected Solar PV Projects having capacity of 300 MW established by Respondent No. 1 on the terms and conditions contained in the PPA; and*
>
> *(b) Pass such other further order(s) as the Commission may deem just in the facts of the present case."*

Submission of the Petitioner

2. The Petitioner, NTPC has submitted that it issued Request for Selection ('RfS') documents along with draft Power Purchase Agreement ('PPA') and Power Sale

Agreement ('PSA') for setting up of 1200 MW ISTS grid-connected solar PV power projects to be set up anywhere in India under the open category as per the Guidelines and floated the same on 10.8.2019 on the portal of ISN Electronic Tender Service Limited ('ETS'). In pursuance to the above, two bids were received and both the bidders were shortlisted for participating in the e-reverse auction. According to the Petitioner, e-reverse auction was conducted on 25.10.2019 on the portal of ETS in presence of members of Bid Evaluation Committee ('BEC') and pursuant thereto, TBEA Solar India Private Limited was declared successful bidder for allocated capacity of 300 MW at the tariff of Rs. 2.63/kWh. Accordingly, NTPC entered into a PPA dated 13.6.2020 read with Supplementary PPA dated 5.5.2021 with ABC Renewable Energy (RJ-01) Private Limited, i.e. Special Purpose Vehicle ('SPV')/ Project Company of TBEA Solar India Private Limited. Further, pursuant to the allocation of capacity, NTPC entered into a back-to-back PSA dated 5.1.2021 with Government of Puducherry for procurement of 100 MW and PSA dated 30.4.2021 with M.P. Power Management Company Limited for procurement of 200 MW solar power enabling them to fulfill their Renewable Purchase Obligations ('RPOs') as specified under the provisions of the Act and the Regulations framed thereunder. It has been submitted by NTPC that in terms of the arrangement between the parties, NTPC will act as an intermediary and shall sell and make available to the distribution companies the agreed contracted capacity as per the respective PSAs entirely on back-to-back basis as per the terms and conditions contained in the PPA entered into between the Solar Power Developer ('SPD') and NTPC. It has been further submitted that the tariff applicable for sale of solar power to the distribution companies vide PSA shall be Rs 2.63/kWh and in addition, there will be the trading margin of Rs. 0.07/kWh (as mutually agreed between the parties) to be recovered from the distribution companies in terms of the PSA, which NTPC would be entitled to appropriate as its income.

3. The matter was called out for virtual hearing on 23.7.2021 after notice to the Respondents. During the course of hearing, the Commission observed that the Clause 5.7.1 (Change in Law) of the Guidelines provides for restitutionary principle so as to put the party affected by a Change in Law to the same economic position as if such Change in Law had not occurred. However, perusal of Article 12 (Change in Law) of the PPA *prima facie* reveals that such restitutionary principle has not been incorporated and thus, being of the view that such exclusion *prima facie* appeared to be a deviation from the provisions of the Guidelines, the Commission deemed it necessary to consider the views of the project developer and the buying companies thereof. Accordingly, Respondents were directed to file their reply to the Petition including on the aforesaid observation of the Commission. The Commission had further directed the Petitioner to provide the following details/ information on affidavit:

(i) Details of publication of notice in compliance with requirement of Clause 6.4 of the Guidelines; and

(ii) Details of deviations taken in the bid documents (RfS, PPA and PSA) from the provisions, particularly, Clause 5.7.1 of the Guidelines, if any, along with reason thereof and whether approval of the Appropriate Commission was obtained in accordance with Clause 3.1.1(c) and Clause 18 of the Guidelines. In case, no deviations have been taken, an undertaking to the effect that 'no deviations have been taken in the bid documents from the provisions of the Guidelines'.

4. In compliance with the aforesaid direction, the Petitioner filed additional affidavit dated 3.8.2021 furnishing its response as under:

(a) As to the details of publication of notice in compliance of Clause 6.4 of the Guidelines, NTPC had come with an internal Policy dated 5.6.2018 wherein it had been decided to discontinue the publication of abridged IFB/NIT in newspapers and that the detailed IFB/NIT along with salient technical features shall be henceforth published on the website of NTPC, Central Public Procurement Portal ('CPPP') and Government e-Market Place ('GeM'). Accordingly, NTPC published the invitation for bids for selection of solar power developers on its website on 5.10.2020 and the copy of proof of such publication has been furnished along with the instant Petition.

(b) As regards the details of any deviation taken in the bid documents, NTPC has formulated and issued the draft RfS, PPA and PSA in line with the Guidelines and amendments thereof. NTPC has also issued the conformity certificate in this respect on 10.10.2020 to the effect that bidding process and evaluation of bids has been carried out in conformity to the provisions of the RfS.

(c) With regard to Change in Law (Article 12) provision incorporated in the PPA, the said Article is in conformity with Clause 5.7.1 of the Guidelines. While the Clause 5.7.1 of the Guidelines provides the broad contours of the principles to be followed while deciding the issue of Change in Law, Article 12 provides that an aggrieved party shall be required to approach this Commission for seeking approval of Change in Law. The decision of this Commission to acknowledge a Change in Law and the date from which it will become effective and provide relief for the same shall be final and governing on all the parties. There is nothing in Article 12 to suggest that it is a deviation from the principles laid down in Clause

5.7.1 of the Guidelines and in fact Article 12 of the PPA is a wider provision and provides a process for relief to be given for Change in Law.

(d) Even otherwise, it is now settled law that a Change in law provision in a competitive bidding PPA needs to be interpreted keeping the restitutionary principle in mind. In this regard, reliance has been placed on the judgment of Hon'ble Supreme Court in the case of UHBVNL v. Adani Power Limited [(2019) 5 SCC 325].

(e) The provisions of Article 12 of the PPA are in no manner a deviation to the principles provided in Clause 5.7.1 of the Guidelines and NTPC is also furnishing a certificate to the effect that no deviations have been taken in the bid documents from the provisions of the Guidelines.

5. The Respondent No.1, ABC Solar (India) Private Limited [formerly known as [TBEA Solar (India) Private Limited] vide its reply dated 12.8.2021 has submitted as under:

(a) Parties have signed the PPA and agreed to the terms of the PPA to ensure that the terms and conditions therein are in conformity with the Guidelines issued under Section 63 of the Act. More particularly, the intention of the parties while agreeing upon the contents of Article 12 of the PPA is the same as provided under Clause 5.7.1 of the Guidelines.

(b) In terms of Clause 5.7 of the Guidelines and Article 12 of the PPA, an affected party is required to make application before the Commission for approval of Change in Law events and its consequences. In process of seeking approval of Change in Law events, there is always time lag between occurrence of Change of Law event and its approval by this Commission and this time lag may be substantial. Therefore, to put the affected party in the same economic position as if such Change in Law event had not occurred, it is appropriate to allow interest or carrying costs in favour of the affected party for the period from the date when Change in Law event becomes operational till the date of its approval by this

Commission. The principle behind awarding such interest or carrying costs is the principle of restitution which purports to put the party affected by Change in Law to the same economic position as if such Change in Law event had not occurred.

(c) Provision of Change in Law is provided under the PPA to protect the interest of the affected party pursuant to occurrence of any Change in Law event which results in additional expenditure. The jurisprudence of Change in Law provisions is that the affected party is not subjected to any additional expenditure on account of occurrence of an event as mentioned under the category of Change in Law events.

(d) A combined reading of the provisions contained under Clause 5.7 of the Guidelines and Article 12 of the PPA would reveal that no deviation has been adopted by either of the parties while executing the PPA. The Petitioner, during the hearing held on 23.7.2021 and vide its additional submissions dated 6.8.2021, has accepted that there is no deviation and the principle of restituting the affected party to the same economic position will remain as part of the Change in Law provisions. Therefore, based on the submissions, understanding and intent of the parties, it is clear that there is no deviation from the Guidelines and the affected party shall be placed in the same economic position if any Change in Law event occurs.

(e) The Appellate Tribunal for Electricity ('APTEL') vide judgment dated 13.4.2018 in Appeal No. 210 of 2017 in the case of Adani Power Limited v. Central Electricity Regulatory Commission and Others has explained the applicability of the restitutionary principle on account of Change in Law event. The above judgment of APTEL has been upheld by the Hon'ble Supreme Court in case of Uttar Haryana Bijli Vitran Nigam Limited and Anr. v. Adani Power Limited and Ors. [reported at (2019) 5SCC 325] and that in view of the aforesaid decisions, the party affected by the Change in Law ought to be compensated by putting into the same economic position as if such Change in Law event had not occurred by allowing the claim of carrying costs. Therefore, the Change in Law provisions are to be construed in line with the principle of 'restitution'.

(f) If the restitutionary principle is not mentioned in express terms under Article 12 of the PPA, it does not *ipso facto* amount to deviation from the Guidelines. As such, in the absence of contrary intention of parties, it may not be assumed that the parties intended to exclude the restitutionary principle in Article 12 of the PPA. The parties always intended to interpret Article 12 so as to include the restitutionary principle within its ambit. The Commission may record the above interpretation of Article 12 of the PPA so as to include the principle of restitution under its ambit based on the intention of the parties as stated.

6. The matter was called out for virtual hearing on 3.9.2021. During the course of hearing, the learned counsel for the Petitioner submitted that pursuant to the direction of the Commission vide Record of Proceedings for the hearing dated 23.7.2021, the Petitioner has filed its additional affidavit dated 3.8.2021, *inter alia,* submitting that the provisions of Article 12 of the PPA are in no manner a deviation to the principles provided under Clause 5.7.1 of the Guidelines. The learned counsel for the Respondent No.1 submitted that the PPA has been executed by the parties in accordance with the provisions of the Guidelines and that though the language of the provisions of Article 12 of the PPA and the principles provided under Clause 5.7.1 of the Guidelines is different, the understanding and intent of the parties is clear regarding the principle of restitution.

Analysis and Decision

7. In the above background, we now proceed to consider the prayer of the Petitioner as regards adoption of tariff in respect of solar PV power project(s) discovered pursuant to the competitive bid process carried out in terms of the Guidelines issued by the Ministry of Power, Government of India under Section 63 of the Act.

8. Section 63 of the Act provides as under:

> *"Section 63. Determination of tariff by bidding process: Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government."*

9. Thus, in terms of Section 63 of the Act, the Commission is required to adopt the tariff, on being satisfied that transparent process of bidding in accordance with the guidelines issued by the Ministry of Power, Government of India under Section 63 of the Act, has been followed in determination of such tariff.

10. The Ministry of Power, Government of India has notified the Guidelines under Section 63 of the Act vide Resolution No.23/27/2017-R&R on 3.8.2017. The Guidelines have been subsequently amended by the resolutions dated 14.6.2018, 3.1.2019, 9.7.2019, 22.10.2019 and 25.9.2020. The salient features of the Guidelines are as under:

(a) The Guidelines are applicable for procurement of power from grid connected solar PV power projects having size of 5 MW and above through tariff based competitive bidding to be conducted by procurers which includes distribution licensees, or the Authorized Representative(s), or Intermediary procurers.

(b) The procurer shall prepare the bid documents in accordance with the Guidelines and the Standard Bid Documents notified by the Ministry of Power, Government of India. If any deviation is proposed to be made in the Guidelines and Standard Bid Documents, approval of the Appropriate Commission would be necessary. Intimation about initiation of the bid process shall be sent by the procurer to the Appropriate Commission.

(c) Bids shall be designed in terms of a package. The minimum size of a package should be 50 MW in order to have economies of scale. Bidders shall quote for entire package.

(d) The procurer has option to choose to invite the two bids, namely, (i) power capacity (MW) terms, or (ii) energy quantity (kWh or million units i.e. MU) terms. For procurement of power, the procurer may opt for either tariff or viability gap funding as bidding parameter.

(e) Draft PPA proposed to be entered into with the successful bidder and draft PSA, if applicable, shall be issued along with the RfS. Standard provisions to be incorporated as part of the PPA shall include, *inter-alia*, PPA period, quantum of power/ energy to be procured, payment security, generation compensation of off-take constraint, event of default and consequences thereof and Change in Law and shall be provided for, on back-to-back basis, in the PSA.

(f) Procurer and Intermediary procurer shall provide payment security to the solar power developer through revolving Letter of Credit of an amount not less than one month average billing and Payment Security Fund for at least three months' billing of all the projects tied up with such fund. In addition, the procurer may also choose to provide State Government Guarantee.

(g) End procurer shall provide payment security to the intermediary procurer through revolving Letter of Credit of an amount not less than one month`s average billing from the project under consideration and State Government Guarantee. In addition, end procurer may also choose to provide Payment Security Fund with at least three months' billing of all the projects tied up with such fund.

(h) The procurer shall call the bids adopting a single stage bidding process to be conducted through electronic mode (e-bidding). The procurers may adopt e-reverse auction, if it so desires. For this purpose, e-procurement platforms with a successful track record and with adequate safety, security and confidentiality features will be used. In case of solar park specific project, procurer shall provide intimation to the solar power park developer about the initiation of the bidding process and arrange the access of the bidders to the drafts of Implementation Support Agreement and land related agreement.

(i) RfS notice shall be issued in at least two national newspapers and on the websites of the procurer to provide wide publicity. Standard documentation to be provided in the RfS Stage shall include technical criteria, financial criteria, quantum of earnest money deposit and lock-in requirements for the lead members of the consortium.

(j) The procurer shall constitute committee for evaluation of the bids (Evaluation Committee), with at least three members, including at least one member with expertise in financial matters/ bid evaluation.

(k) Bidder shall submit non-refundable processing fee and/or project development fee as specified in the RfS, separate technical and price bids and bid guarantee. To ensure competitiveness, the minimum number of qualified bidders shall be two. If the number of qualified bidders is less than two even after three attempts of bidding, and the procurer still wants to continue with the bidding process, the same may be done with the consent of the Appropriate Commission.

(l) The PPA shall be signed with the successful bidder or an SPV formed by the successful bidder. After conclusion of bidding process, Evaluation Committee shall critically evaluate the bids and certify that the bidding process and the evaluation have been conducted in conformity with the provisions of RfS. After execution of the PPA, procurers shall disclose the name(s) of the successful bidder(s) and the tariff quoted by them in its website. Accordingly, the distribution licensee or the intermediary procurer shall approach the Appropriate Commission for adoption of tariff in terms of Section 63 of the Act.

11. In terms of the provisions of the Section 63 of the Act, we have to examine

whether the process as per provisions of the Guidelines has been followed in the present case for arriving at the lowest tariff and for selection of the successful bidder.

12. The Petitioner, has been designated as the nodal agency for implementation of scheme for setting up of ISTS connected/ State specific solar/ wind power projects under Tariff Based Competitive bid process; enter into PPAs at the tariff discovered in the competitive bid process; and enter into PSAs with the distribution licensees to enable them to fulfill their Renewable Purchase Obligations under Section 86(1)(e) of the Act. NTPC acts as an intermediary agency in purchase and sale of power under the PPAs and PSAs on back-to-back basis.

13**.** The Guidelines provide for procurement of solar power at a tariff to be determined through transparent process of bidding by the procurer(s), from grid connected solar power projects having size of 5 MW and above. As per the Guidelines, NTPC in the capacity of Intermediary Agency, invited proposals for setting-up of ISTS connected solar power projects on pan-India basis, on “Build, Own and Operate” basis for an aggregate capacity of 2000 MW (which was subsequently amended to 1200 MW) and for procurement of solar power from the projects being set-up in relation thereto. As per the arrangements, NTPC is to procure the power by entering into PPAs with the successful bidder with back-to-back PSA for sale of power to the distribution licensees.

14. The key dates in the bidding process were as under:

Sr. No.	**Event/Milestone**	**Date**
1	Issuance of RfS	10.8.2019
2	Last date for submissions of online bid	30.9.2019
3	Opening of technical bid	30.9.2019

4	Opening of financial bid	24.10.2019
5	e-Reverse Auction	25.10.2019
6	Issuance of Letter of Award	20.11.2019

15. As per Clause 3.1.1(b) of the Guidelines, procurer is required to inform the Appropriate Commission about the initiation of the bidding process. During the course of hearing on 23.7.2021, the learned counsel for the Petitioner submitted that the Petitioner has not separately intimated the Commission regarding initiation of the bid process. However, its publication of RfS notice ought to be considered as prior intimation about initiation of the bid process including to the Commission.

16. On 10.8.2019, NTPC issued the RfS document, along with draft PPA and PSA documents for setting up of 1200 MW ISTS-connected solar PV power projects. As per Clause 6.4 of the Guidelines, RfS notice is required to be published in at least two national newspapers and on the websites of the procurer to provide wide publicity. As noted above, the Petitioner, vide Record of Proceedings for the hearing dated 23.7.2021 was directed to submit the details of the publication of notice in compliance with requirement of Clause 6.4 of the Guidelines. In response, the Petitioner vide its affidavit dated 3.8.2021 has submitted that as per its Internal Policy dated 5.6.2018, NTPC had decided to discontinue the publication of abridged IFB/NIT in the newspapers and the detailed IFB/NIT along with salient technical feature shall be published on the website of the Petitioner, CPPP and GeM portal of Government of India. Accordingly, the RfS notice for inviting the bids for selection of Solar Power Developers was published on its website.

17. Taking into the consideration submissions of the Petitioner and the similar

dispensation already allowed by the Commission to the other CPSUs inviting the tenders in the capacity of intermediary procurer, we exempt the Petitioner from publishing the RfS notice in two national newspapers as per Clause 6.4 of the Guidelines in the present case.

18. Further, for opening and evaluation of the bids, the Bid Evaluation Committee comprising of the following was constituted:

Sr. No.	Particulars
1.	Sh. Rajiv Gupta, GM (RE-CS)
2.	Sh. V.N Jain, GM (Fin)
3.	Sh. Shyam Kumar, AGM (Corporate Commercial)

19. Last date of submission of bid was 30.9.2019 and technical part of the bid was opened on 30.9.2019 itself. Response to RfS was received from the following bidders:

Sr. No.	Name of Bidders
1.	SBE Renewables Fifteen Private Limited
2.	TBEA Solar India Private Limited

20. Pursuant to the opening and evaluation of technical and financial bids, the above two bidders were found eligible for participating in the e-reverse auction. E-reverse auction was carried out on 25.10.2019. After completion of e-reverse auction, TBEA Solar India Private Limited was declared as successful bidder for 300 MW capacity at a tariff of Rs. 2.63/kWh.

21. On 20.11.2019, NTPC issued Letter of Award ('LoA') to the selected bidder. Relevant portion of the Letter of Award issued to the project developer, namely, TBEA

Solar (India) Private Limited is extracted as under:

"*2.0 NTPC is pleased to accept your Response to RfS mentioned at para 1.0 (C), (E) and (H) above and intend to sign Power Purchase Agreement for development of Grid Connected Solar Photo Voltaic Project of capacity of 300 MW and Supply of Solar Power from this project to NTPC subject to the terms and conditions contained in RfS mentioned at para 1.0 above and briefly brought out hereunder.*

3.0 In line with the terms and conditions of RfS, before signing of PPA, you have the option to form Special Purpose Vehicle (hereinafter called "Project Company") under Indian Companies Act. The company (Bidding Company or Project Company) executing the project (hereinafter called "Solar Power Developer") shall enter into Power Purchase Agreement (PPA) as per the format given along with RfS within 60 days of issue of this Letter of Award (LOA). All the documents referred to at para 1.0 above shall form integral part of the Power Purchase Agreement to be entered into between Project Company I Solar Power Developer and NTPC so far these are not repugnant to the terms and conditions contained in the RfS referred to in para 1.0 above. The signing of PPA shall constitute the agreement for setting up of the project.

As specified in the RfS, irrespective of the date of signing of PPA, the Effective Date of PPA shall be 60 days from issuance of LOA or the actual date of signing of PPA if signed beyond 60 days of issuance of LOA for delays solely attributable to NTPC.

4.0 As per clause 3.26 of RfS document, you shall ensure that the Shareholding of Bidding Company TBEA Solar (India) Pvt Ltd in the SPV/ project company executing the PPA shall not fall below 51 % (fifty one per cent) at any time prior to 3 (three) years from the Commercial Operation Date (COD), except with the prior approval of NTPC. Further, you shall also ensure that the promoters shall not cede control of TBEA Solar (India) Pvt Ltd till 3 (three) years from the COD except with the prior approval of NTPC. Any change in the shareholding after the expiry of 3 (three) years from the COD can be undertaken under intimation to NTPC.

5.0 The Tariff for electricity generated from the Solar Power Project to be developed by the Solar Power Developer for the entire period of twenty five (25) years of Power Purchase Agreement (PPA) to be entered into between the Solar Power Developer and NTPC for this project shall be Rs.2.63/kWh (Rupees Two and Sixty Three paisa only per Kilowatt hour).

6.0 You along with your Project Company (if formed by your Company) are required to submit the following documents along with originals for verification within 15 days of issuance of LOA:

i) Original Response to RfS referred to in para 1.0 (C) above.

ii) If Project Company is formed by your company for this project, Board Resolutions from your Company and your Parent and/or Affiliates duly certified by the Company Secretary or the Director, as applicable, regarding fulfilment of equity investment obligations of Project Company in the same manner as provided by you and your Affiliates in your favour at the time of submission of RfS.

iii) Copy of the Certificate of Incorporation along with Memorandum & Article of

Association (MOA) of Soalr Power Developer highlighting the relevant provision of Power/Energy/Renewable Energy/ Solar Power Plant development as per clause 3.15 (A 11) of RfS duly certified to be True copy by Company Secretary.

iv) Details of Promoters and current shareholding pattern of the Bidding Company and Project Company (if formed) developing the project, duly certified by the Company Secretary in original along with a copy of Return filed with Registrar of Companies (ROC) for registering the shareholding and its terms and conditions which became due for filing during this period.

v) If Project Company is formed by your company to execute the project, a fresh Integrity Pact between Project Company and NTPC has to be signed. Certificate for Compliance to all Provisions of RfS Documents is also to be submitted by Project Company.

7.0 Vide letter dated 30.10.2019 (copy enclosed at Annexure-VIII), you have indicated that you shall develop one (01) project of 300 MW as under:

Sl. No.	*Capacity of Project (MW)*	*Location of Project*
1	*300*	*Village: Chodiya; Teh: Fatehgarh, Dist: Jaisalmer; State: Rajasthan*

In line with clause 3.27 of RfS documents, Solar Power Developer shall have option to change the Project location before the Financial Closure.

8.0 In line with the provisions of Clause 3.24 of RfS document, the Solar Power Developer shall submit Performance Bank Guarantee of Rs. 20 Lakh/MW to NTPC within 30 days from the date of issue of Letter of Award or before signing of PPA, whichever is earlier, as per the Performa available in RfS document from any bank listed in the RfS for this purpose. The total value of the Performance Bank Guarantee (PBG) for the project of 300 MW capacity shall be Rs. 60 Crore, The Bank Guarantees shall be valid for a period of 25 months from the Effective Date of PPA. Further, the PPA shall be signed only upon receipt of the total Performance Bank Guarantees of requisite value.

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9.0 The Solar Power Developer shall report financial closure within 12 months from the Effective date of Power Purchase Agreement and shall submit relevant documents to NTPC as per the terms and conditions of RfS.

10.0 All disputes arising out of and/or in connection with this "Selection of Solar Power Developers for 2000 MW Grid-Connected Solar PV Power Plants to be set up anywhere in India under OPEN Category" and Supply of Solar Power therefrom and execution of PPA thereto shall be governed by laws of India and Courts of Delhi shall have exclusive jurisdiction.

11.0 This Letter of Award (LOA) is being issued to you in duplicate. You are kindly requested to return the duplicate copy of this LOA including all Annexure, duly signed on each page by your authorized signatory in token of your unequivocal acknowledgement of *the same within 7 days from the date of this LOA."*

22. Pursuant to issuance of Letter of Award and allocation of capacity, NTPC entered into PSA dated 5.1.2021 with the Government of Puducherry for 100 MW and PSA dated 30.4.2021 with M.P. Power Management Company Limited for 200 MW. It has been submitted by NTPC that even though it took all the steps to discuss the execution of PSA with M.P. Power Management Company Limited promptly, there had been some delay in finalizing the documents due to Covid-19 pandemic prevailing all over the country. NTPC also entered into PPA dated 13.6.2020 read with Supplementary PPA dated 5.5.2021 with ABC Renewable Energy (RJ-01) Private Limited i.e. Project Company/ SPV of TBEA Solar India Private Limited.

23. In terms of Clauses 3.1.1(a) and 3.1.1(c) of the Guidelines, the procurer (including intermediary procurer) is required to prepare the bid documents in accordance with the provisions of the Guidelines and in case of any deviation in the bid documents, it is required to seek approval of the Appropriate Commission in accordance with the process specified in Clause 18 of the Guidelines. In this regard, it was observed that Clause 5.7.1 of the Guidelines, which deals with Change in Law, *inter alia,* specifically provides for restitutionary principle so as to put the party affected by Change in Law to the same economic position as if such Change in law had not occurred. The relevant extract of the Clause 5.7.1 of the Guidelines reads as under:

"5.7. CHANGE IN LAW

5.7.1 In the event a Change in Law results in any adverse financial loss/gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law, the Solar Power Generator/Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and *mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the Appropriate Commission."*

24. Article 12.2 of the PPA reads as under:

*"**12.2. Relief for Change in Law***

12.2.1 The aggrieved Party shall be required to approach the Central Commission for seeking approval of Change in Law.

12.2.2 The decision of the Central Commission to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on all the Parties. "

25. Perusal of the above quoted provisions of the Guidelines and PPA reveals that the exclusion of the restitutionary principle as provided under Clause 5.7.1 of the Guidelines from the Article 12 (Change in Law) of the PPA *prima facie* appeared to be a deviation from the provisions of the Guidelines. Vide Record of Proceeding for the hearing dated 23.7.2021 the Petitioner was directed to clarify the deviations taken in the bid documents from the provisions, particularly, Clause 5.7.1 of the Guidelines, along with the reasons thereof and whether the approval of the Appropriate Commission was obtained in accordance with Clause 3.1.1(c) and Clause 18 of the Guidelines.

26. In response, the Petitioner has submitted that there is nothing in Article 12 of the PPA to suggest that it is a deviation from the principle laid down in Clause 5.7.1 of the Guidelines and since as per the PPA, the decision to acknowledge an event as Change in Law, the date and also the relief to be provided for the same is to be decided by the Commission, such decision would be in conformity with the principle laid down in Clause 5.7.1 of the Guidelines. It has also been submitted by the Petitioner that it is now settled law that Change in Law provision in a competitive bid PPA needs to be

interpreted keeping in view the restitutionary principle in mind and thus, the provisions of Article 12 are in no manner a deviation to the principles provided in Clause 5.7.1 of the Guidelines.

27. The Respondent No. 1, Solar Power Developer with whom the Petitioner, NTPC has executed the PPA, has supported the submissions of the Petitioner vide its reply dated 12.8.2021. The Respondent No. 1 has submitted that the concept of placing the affected party to the same economic position (restitutionary principle) cannot be alienated from the provisions of Change in Law and that the combined reading of provisions of Clause 5.7 of the Guidelines and Article 12 of the PPA would reveal that no deviation from the Guidelines has been taken by either of the parties while executing the PPA. The Respondent No.1 has further submitted that the Petitioner has also accepted that there is no deviation and the principle of restituting the affected party to the same economic position will remain as part of the Change in Law provisions and accordingly, based on the understanding and intent of the parties, there is no deviation from the Guidelines. The Respondent No.1 has also submitted that if the restitutionary principle is not mentioned in express terms under Article 12 of the PPA, it does not *ipso facto* amount to deviation from the Guidelines and in absence of the contrary intention of the parties, it may not be assumed that the parties intended to exclude the restitutionary principle in Article 12 of the PPA.

28. We have noted the submissions of the Petitioner and the Respondent No.1. It appears that though the language of the provisions of Article 12 of the Power Purchase Agreement (‘PPA’) and the principles provided under Clause 5.7.1 of the 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid

Connected Solar PV Power Projects' ('the Guidelines') dated 3.8.2017 are different, the understanding and intent of the parties are clear regarding the principle of restitution and both the parties are in agreement with the provisions of Article 12. Therefore, we are not inclined to delve into this aspect any further and take on record the undertaking furnished by the Petitioner along with its affidavit dated 3.8.2018 to the effect that no deviations have been taken in the bid documents from the provisions of the Guidelines. The relevant extract of the said undertaking is reproduced as under:

> "…… <u>*UNDERTAKING*</u>
>
> *In addition to the Conformity Certificate dated 10.10.2020 already placed on record, it is declared that with respect to the RFS No. RE-CS-0000-BOO-5 dated 10.08.2019, no deviations have been taken in the bid documents prepared from the provisions of the Ministry of Power Guidelines dated 03.08.2017 and its amendments. …"*

29. We also find it necessary to clarify that at this stage we have not expressed any opinion as to whether the restitutionary principle and consequences thereof form part of the Article 12 of the PPA or not and the consideration of the aforesaid undertaking as furnished by the Petitioner will not be construed as the approval of the submissions or the intentions of the parties as pleaded by them. The aforesaid issue will be considered by the Commission as and when and if at all, the concerned party approaches the Commission invoking Article 12 of the PPA.

30. Further, as per Clause 10.2 of the Guidelines, Evaluation Committee is required to certify that the bidding process and the evaluation have been conducted in conformity with the provisions of the RfS. In this regard, the Petitioner vide certificate dated 10.10.2020 has submitted that the Evaluation Committee constituted for evaluation of bids has conducted the techno-commercial and financial bid evaluation in conformity

with the provisions of the RfS. The relevant extract of the aforesaid conformity certificate dated 10.10.2020 is extracted as under:

> *"With respect to the RfS no. RE-CS-0000-BOO-5 dated 10.08.2019, it is hereby declared as follows:*
>
> > *After the conclusion of bid submission, the Evaluation Committee constituted for evaluation of bids has conducted the bidding process as well as techno-commercial and financial bid evaluation in conformity to the provisions of the RfS."*

31. The Petitioner has prayed to adopt the tariff discovered in the competitive bid process for Respondent No. 1. As discussed above, it emerges that the selection of the successful bidders has been done and the tariff of the solar project has been discovered by the Petitioner, NTPC through a transparent process of competitive bidding in accordance with Guidelines issued by Ministry of Power, Government of India under Section 63 of the Act. Therefore, in terms of Section 63 of the Act, the Commission adopts the following tariff for the solar project as agreed to by the successful bidder, which shall remain valid throughout the period covered in the PPA and PSAs:

Bidder	**Tariff (Rs./kWh)**	**Allotted Capacity (MW)**
ABC Renewable Energy (RJ-01) Private Limited [Project Company/SPV of TBEA Solar (India) Private Limited]	2.63	300

32. Article 10.3 of the PPA provides as under:

> *"10.3 Payment of Monthly Bills*
>
> *10.3.1 NTPC as per prevailing "CERC Terms and conditions for tariff determination from Renewable Energy Sources" Regulation shall pay the amount payable under the Monthly Bill/Supplementary Bill by the 60th (sixtieth) day from the date of presentation of bill i.e. the Due Date to such account of the SPD, as shall have been previously notified by the SPD in accordance with Article 10.3.2 below.*
>
> *10.3.2 All payments required to be made under this Agreement shall also include any*

deduction or set off for:

i) deductions required by the Law; and

ii) amount claimed by NTPC, if any, from the SPD, through an invoice to be payable by the SPD, and not disputed by the SPD within fifteen (15) days of receipt of the said Invoice and such deduction or set-off shall be made to the extent of the amounts not disputed. It is clarified that NTPC shall be entitled to claim any set off or deduction under this Article, after expiry of the said fifteen (15) Days period.

iii) The SPD shall open a bank account at (the "SPD's Designated Account") for all Tariff Payments (including Supplementary Bills) to be made by NTPC to the SPD, and notify NTPC of the details of such account at least ninety (90) Days before the dispatch of the first Monthly Bill. NTPC shall also designate a bank account at Delhi ("NTPC's Designated Account") for payments to be made by the SPD to NTPC, if any, and notify the SPD of the details of such account ninety (90) Days before the Scheduled Commissioning Date. NTPC and the SPD shall instruct their respective bankers to make all payments under this Agreement to the SPD`s Designated Account or NTPC`s Designated Account, as the case may be, and shall notify either Party of such instructions on the same day."

33. Article 10.4 of the PPA provides as under:

"10.4 Payment Security Mechanism

Letter of Credit (LC):

10.4.1 In case of Category (i) Purchase, namely the sale of power to Discoms through back to back Power Sale Agreement, subject to opening and maintenance of Letter of Credit by the Discom(s) (as per terms of PSA) in favour of NTPC, NTPC shall extend to the SPD, in respect of payment of its Monthly Bills and/or Supplementary Bills, a monthly unconditional, revolving and irrevocable LC ("Letter of Credit"), which may be drawn upon by the SPD in accordance with this Article. In case of Category (ii) purchase, such LC shall be opened by NTPC;

10.4.2 Subject to Article 10.4.1, not later than one (1) Month before the start of supply, NTPC through a scheduled bank shall extend a Letter of Credit in favour of the SPD, to be made operative from a date prior to the Due Date of its first Monthly Bill under this Agreement. The Letter of Credit shall have a term of twelve (12) Months and shall be renewed annually, for an amount equal to:

i) for the first Contract Year, equal to the estimated average monthly billing;
ii) for each subsequent Contract Year, equal to the average of the monthly billing of the previous Contract Year.

10.4.3 The SPD shall not draw upon such Letter of Credit prior to the Due Date of the relevant Monthly Bill and/or Supplementary Bill, and shall not make more than one drawal in a Month.

10.4.4 If at any time, such Letter of Credit amount falls short of the amount specified in Article 10.4.2 due to any reason whatsoever, NTPC shall restore such shortfall within *seven (7) days, however, in case of Category (i) Purchase, the same shall be restored on back to back basis upon the Discoms restoring the Letter of Credit.*

10.4.5 NTPC shall cause the scheduled bank issuing the Letter of Credit to intimate the SPD, in writing regarding establishing of such irrevocable Letter of Credit.

10.4.6 NTPC shall ensure that the Letter of Credit shall be renewed not later than ten (10) days prior to its expiry, subject however that in case of Category (i) Purchase, the same shall be renewed on back to back basis upon the Discoms renewing the Letter of Credit.

10.4.7 All costs relating to opening and maintenance of the Letter of Credit shall be borne by NTPC.

10.4.8 If NTPC fails to pay undisputed Monthly Bill or Supplementary Bill or part thereof within and including the Due Date, then, subject to Article 10.4.6, the SPD may draw upon the Letter of Credit, and accordingly the bank shall pay without any reference or instructions from NTPC, an amount equal to such Monthly Bill or Supplementary Bill or part thereof, if applicable, in accordance with Article 10.3.3 above, by presenting to the scheduled bank issuing the Letter of Credit, the following documents:

i) a copy of the Monthly Bill or Supplementary Bill which has remained unpaid to SPD and;

ii) a certificate from the SPD to the effect that the bill at item (i) above, or specified part thereof, is in accordance with the Agreement and has remained unpaid beyond the Due Date;"

34. Clause (10) of Regulation 9 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2020 (hereinafter referred to as "the Trading Licence Regulations") provides as under:

"9. (10) The Trading Licensee shall make payment of dues by the agreed due date to the seller for purchase of the agreed quantum of electricity through an escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller. Such escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller shall be equivalent to:

(a) one point one (1.1) times the average monthly bill amount (estimated average of monthly billing amounts for three months or actual monthly billing amount for preceding three months as the case may be) with a validity of one year for long term contracts;

(b) one point zero five (1.05) times of contract value for short term contracts."

35. The above provisions provide for payment security mechanism to be complied with by the parties to the present Petition. Accordingly, the provisions of Articles 10.3 and 10.4 of the PPAs and Clause (10) of Regulation 9 of the Trading Licence Regulations shall be abided by all the concerned parties to the present Petition.

36. The Petitioner, NTPC has submitted that in addition to tariff, there will be trading margin of Rs. 0.07/kWh (as mutually agreed between the parties) to be recovered from the distribution licensees in terms of the PSAs. In this regard, Clause (1)(d) of Regulation 8 of the Trading Licence Regulations provides as under:

> "*For transaction under long term contracts, the trading margin shall be decided mutually between the Trading Licensee and the seller:"*

37. The above provision gives choice to the contracting parties to mutually agree on trading margin for long-term transaction.

38. However, Proviso to Regulation 8(1)(d) of the Trading Licence Regulations provides as under:

> "*8(1) (d) * * * * **
>
> *Provided that in contracts where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh."*

39. Regulation 8(1)(f) of the Trading Licence Regulations provides as under:

> "*For transactions under Back to Back contracts, where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh."*

40. The above two provisions are exceptions to the main provision as regards trading margin. Distribution licensees have agreed to a trading margin of Rs.0.07/kWh as agreed in the PSAs, which is in consonance with Regulation 8(1)(d) of the Trading Licence Regulations. Therefore, in case of failure by NTPC to provide escrow arrangement or irrevocable, unconditional and revolving letter of credit to the solar generators, trading margin shall be limited to Rs.0.02/kWh as specified in Regulation 8(1)(d) and Regulation 8(1)(f) of the Trading Licence Regulations.

41. In summary, in terms of Section 63 of the Act, the Commission adopts the tariff (as at paragraph 31 of this order) for the solar project as the same has been discovered through transparent competitive bidding process in terms of the Guidelines and shall remain valid throughout the period covered in the PSAs and PPA.

42. Petition No. 126/AT/2021 is disposed of in terms of the above.

Sd/-	sd/-	sd/-
(P.K. Singh)	**(Arun Goyal)**	**(P. K. Pujari)**
Member	**Member**	**Chairperson**