

KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

Present: Shri. Preman Dinaraj, Chairman

Petition No. OP 09/2020

In the matter of : Petition for granting approval for the modification in the Standard bid documents for the procurement of 200 MW from solar PV plants through competitive bidding route on all India basis.

Petitioner : Kerala State Electricity Board Limited

Petitioner represented by : Sri. K G P Nampoothiri, E E
Smt. Sangeetha S, E E
Sri. Edward P Bonafice, A E E
Smt. Manju K R, A E E

Order dated 25.08.2020

1. KSEB Ltd, on 14.10.2019 filed a petition before the Commission for granting approval for the modification in the Standard Bid documents for the procurement of 200 MW power from solar PV plants through competitive bidding route on all India basis.
2. Summary of the petition is given below.
 - (1) Commission, as per the 'Guidelines for Tariff based Competitive Bidding process for procurement of power from Grid connected solar PV power projects notified by the Ministry of Power (MoP), Government of India, granted approval, vide order dated 19.11.2018, in O.P.No. 56/2018, for inviting bids on reverse e-bidding for procuring 200MW from solar PV plants to be established within the State of Kerala
 - (2) KSEB had floated tender through tariff based competitive bidding in DEEP portal of MSTC Ltd on 02.03.2019. M/s CIAL Infrastructures Ltd., was the lone bidder with a bid quantity of 10 MW participated in the bid.

- (3) Clause 8.6 of the bidding guidelines dated 03.08.2017 notified by the MoP, GoI provide as follows.
- “8.6. To ensure competitiveness, the minimum number of qualified Bidders should 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.”*
- (4) In view of the poor response of the Solar Power Generators (SPGs) in the State, KSEB Ltd cancelled the tender dated 02.03.2019.
- (5) In order to achieve the solar RPO obligation of the utility and to ensure better participation, KSEBL decided to float a revised tender for the procurement of 200 MW solar power from Ground Mounted Power Plants situated anywhere in India with preference to plants to be set up within the State of Kerala.
- (6) In order to materialise the bidding process, KSEB Ltd decided to modify the bidding documents, RfS and draft PPA, earlier approved by the Commission vide the order dated 19.11.2018, so that power can be procured from ground mounted solar plants situated anywhere in India with preference to Kerala bidders (up to 10% of the requisitioned capacity) who prefer to match the quoted rates at the end of the e-reverse auction process.
- (7) KSEB Ltd in the petition dated 14.10.2019 has proposed deviations on the following clauses in the Standard Bidding Documents based on the bidding guidelines dated 3rd August 2017, its subsequent amendments dated 14th June 2018 and amendment dated 3rd January 2019.
- (a) Interconnection point or injection point (definition 24 of the RFS and Definition 33 of the PPA).
 - (b) Delivery point (definition 19 of the RFS and Definition 23 of the PPA).
 - (c) Ceiling rate (Clause 16.1.3 of the RFS)
 - (d) Technical criteria (Clause 3.3.1 of the RFS)
 - (e) Billing procedure (Clause 10.1.2 of the PPA)
 - (f) Criterion and the capital cost adopted for fixing the Net worth, EMD and Performance Bank Guarantee)
 - (g) Provisions for giving preference for Kerala bidder (Definition 26 of the RFS)
 - (h) Reverse auction process (Clause 20.2 of the RFS)
 - (i) Payment security (clause 5.3.1 of the guidelines)
 - (j) Bidding guidelines (clause 6.1 of the guidelines).
 - (k) Metering point (clause 16.5 of the guidelines)

3. In the mean time, MNRE vide the notification dated 22nd October 2019 (after filing the present petition by KSEB Ltd), made amendments to the following clauses in the guidelines for Tariff based Competitive Bidding process for procurement of power from Grid connected Solar PV Power Projects.
- (i) Para 2.1.1(c) Intermediary procurer and end procurer
 - (ii) Para 3.2.3(a) Land acquisition
 - (iii) Para 5.3.2(a) Payment security by Intermediary procurer to SPG
 - (iv) Para 5.3.2(b) Payment security by End procurer to Intermediary procurer
 - (v) Para 5.4 Force Majeure
 - (vi) Para 5.5.2 Offtake constraints due to Backdown
 - (vii) Para 5.6.1 Generator Event of default and consequences thereof.
 - (viii) Para 5.6.2 Procurer Event of default and consequences thereof.
 - (ix) Para 10. Contract award and conclusion.
 - (x) Para 12. Financial closure
 - (xi) Para 14.3 Commissioning schedule

Hence the Commission vide the letter dated 24.12.2019 directed KSEB Ltd to resubmit the petition for approval of the bidding documents RFS and draft PPA duly incorporating the amendments made by MNRE, GoI vide the notification dated 22.10.2019.

4. In compliance of the direction of the Commission, KSEB Ltd on 06.03.2020, submitted the revised bidding documents RfS and draft PPA for the procurement of 200 MW power from Solar PV plants through competitive bidding route on all India basis.

Commission admitted the petition as OP 09/2020.

5. Commission, vide the letter dated 04.06.2020 has communicated the following preliminary observations and comments on the on the bidding documents submitted by KSEB Ltd, and directed to re-submit the bidding documents after incorporating the same.

(1) Definition -13- Rfs and Definition 16 of the draft PPA – “Commercial Operation Date (COD)”

It is not clear from the definition of the COD as to who will issue the commissioning certificate. Normally CoD is declared by the generating company management. Is there any deviation from this procedure . Hence the definition of COD may be modified accordingly.

(2) Definition 14 of the Rfs. “Conflict of Interest”.

In order to give more clarity, in the existing definition of “Conflict of Interest” the words ‘ownership or Direction ship’ maybe inserted after the words ‘..common company..... ‘

(3) Intermediate Procurer (to be inserted under RfS)

Though the term 'Intermediate Procurer' is widely used in the 'RfS' documents, the term is not defined in the bidding documents.

Hence it is directed that, KSEB Ltd shall define the "Intermediate Procurer" after definition 25 in the RfS

(4) Cure period (to be inserted under draft PPA)

Though the term 'Cure period' is used under Article 13.1 of the draft PPA, the term is not defined in the draft PPA.

Hence it is suggested that, in order to avoid dispute during the operations of the PPA, the term 'cure period' may be defined in the draft PPA.

(5) Delivery point (definition 19 of the RfS and definition 23 of the draft PPA)

As per the order **No. 23/12/2016- R&R dated 6th November 2019**, of the Ministry of Power, Gol, inter-state transmission charges and losses are fully exempted for solar and wind projects commissioned till 31st December 2022, for a period of '25 years', for power procurement to meet their RPO. Accordingly, KSEB shall draw at its boundary/receiving substation, the contracted quantum of solar energy injected by the SPG at the delivery point without paying any transmission charges and losses.

The first proviso to the definition of 'delivery point' in the bidding documents Rfs and draft PPA has to be modified, duly considering the order No. 23/12/2016- R&R dated 6th November 2019, of the Ministry of Power, Gol.

(6) Metering point (Definition 33 of the RfS and definition 45 of the draft PPA).

Definition 33 of RfS may be changed as follows;

The point at which energy supplied to KSEBL is measured, which shall be the interconnection point as defined in definition 24.

Definition 45 of draft PPA may also be modified in line with the above.

(7) Definition 51 – Solar Power Generator

The definition of Solar Power Generator (SPG) may be included in the PPA also.

(8) Clause 1.1.2 of the RfS

From the Clause 1.1.2 of the RfS, it is not clear from the RfS documents that, if an existing company is the selected bidder, whether they can proceed without incorporating a company under Companies Act 1956/2013. Hence, KSEB Ltd may clarify if there is a precondition to form a new company and modify the Clause 1.1.2 of the bidding documents accordingly.

(9) Clause 1.2.5 of the RfS

As already mentioned, as per the order **No. 23/12/2016- R&R dated 6th November 2019**, of the Ministry of Power, Govt, inter-state transmission charges and losses are fully exempted for solar and wind projects commissioned till 31st December 2022, for a period of '25 years', from where DISCOMs procure power to meet their RPO. Accordingly, KSEB shall get at its boundary/receiving substation, the entire solar energy injected by the SPG at the delivery point without paying the any transmission charges and losses.

The Clause 1.2.5 of the RfS shall be modified accordingly.

(10) Clause 1.3 of the RfS, Scheduled Commissioning Date (SCD)

The Clause 1.3 may be modified as per the Clause 14.3 of the amended bidding guidelines dated 22.10.2019.

(11) Clause 1.4.3 of the RfS and Article 4.2 of the draft PPA. Penalty in case the project generate and supplies energy less than the energy corresponding to the minimum CUF agreed by the SPG.

The Clause 5.2.1(a) of the MoP bidding guidelines prescribe the procedure for imposing penalty on SPG in case the project generate and supplies energy less than the energy corresponding to the minimum CUF agreed by the SPG.

Hence the Clause 1.4.3 of the RfS document and Article 4.2 of the draft PPA shall be modified as per the Clause 5.2.1(a) of the MoP bidding guidelines.

(12) Clause 1.13.2 of the RfS document.

The Clause 1.13.2 of the RfS document may be modified as follows.

“1.13.2 There should be minimum two numbers of qualified Bidders. If the number of qualified bidders is less than two, even after three attempts of bidding, KSEB Ltd shall continue the bidding process only with the prior consent of the KSERC”.

(13) Clause 1.14 of the RfS. Selection of projects based on tariff and Clause 20.2 of the RfS ‘Bucket filling and preference for Kerala bidders’.

The Commission in the order dated 28.04.2020 in OP No. 04/2020 ordered as follows.

“The Commission, reiterate its original decision that, in case bucket filling has to be resorted to, KSEB Ltd shall ensure that all contracts awarded are exactly at the same price as that awarded to L1 bidder. No additional price on any account shall be considered or awarded by KSEB Ltd in such contracts. The Commission once again orders that, in all the bidding process, KSEB Ltd shall strictly follow the above procedures if bucket filling is resorted to.”

The Commission hereby direct that, the Clause 1.14 and 20.2 of the RfS shall be modified accordingly.

(14) Clause 1.17 of the RfS document

Schedule of Bidding Process shall be modified as per the Annexure-1 of the MoP Standard Bidding Guidelines (Amendment dated 03.01.2019)

(15) First proviso to Clause 3.1(a) of the RfS

The word “ single “ in the first line of the paragraph may be deleted.

The 2nd line in the second paragraph to clause 3.1(a) of the RfS may be modified as;

“ However, if the Successful Bidder is a Consortium or a foreign Company, then it will be mandatory for such Successful Bidder to incorporate a SPV/ project company **in India under relevant rules**, to execute the Power purchase Agreement. KSEB Ltd shall also clarify the following

- (i) Who will bear responsibility for non delivery / penalty ?
- (ii) What will be the Agreement with the bidder and JV?
- (iii) Is there any Tripartite agreement ?

(16) Clause 3.1(d) of the RfS

In the second sentence to clause 3.1(d) of the RfS, the words 'under intimation to KSEBL ' may be replaced with 'after obtaining consensus from KSEB L"

(17) Clause 3.4.1 NET-WORTH of the RfS

The formula given in the RfS document is not as per the definition 57 of the Companies Act, 2013, which is extracted below.

"(57) —net worth means the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation;"

(18) Clause 3.4.1(ii) of the RfS

Insert the following at the beginning of the paragraph;

"If the project is to be implemented through a newly formed consortium SPV or ..

(19) Clause 3.41(iii) of the RfS

Insert the following at the beginning of the paragraph;

" In the case of a consortium or newly formed SPV,...

(20) Clause 3.4.4

It is mentioned under clause 3.4.4 of the RfS that, the details specified under item (i) to (iii) has to be submitted as "Qualification Requirements" as per the Format-4 specified therein. However, under Format-4, there is no provision to submit the details such as "solvency certificate from Nationalised / Scheduled bank or from revenue authorities specifying the solvency amount...."

Hence, it is directed that, KSEB Ltd shall modify the Format - 4 of the RfS to provide such details by the bidders.

(21) Additional Insertion under clause 3.4.4 of the RfS.

In order to give more clarity, add the paragraph 13.1 of the bidding guidelines under clause 3.4.4 of the bidding documents.

Also add paragraph 7.4 of the MoP bidding guidelines to ensure that, if the successful bidder is a foreign company, it shall comply with all the laws and provisions related to Foreign Direct Investment in India.

(22) Clause 6 of the RfS

The rate of EMD may be revised at Rs 5.00 lakh per MW instead of Rs 4.00 lakh/MW specified under clause 6 of the RfS document.

(23) Clause 8 of the RfS

The second sentence in the RfS may be modified as follows;

“A Bidder who submits or participates in more than one Bid shall cause all his Bids with Bidder’s participation to be disqualified’.

(24) Clause 16.1.1, Step I- Responsiveness Check

KSEB Ltd shall include the paragraph 8.2 and 8.3 of the Standard Bidding guidelines for ‘Bid-responsiveness Check’.

(25) Clause 16.1.1. Conditions specified for deciding the Bid to be “Non- responsive”.

The conditions specified in the RfS for declaring the Bid to be “Non - responsive” is not as prescribed under paragraph 7.1 in the bidding guidelines. Hence the conditions for declaring the Bids to be ‘Non-responsive” shall be modified as per paragraph 7.1 of the MoP Bidding guidelines.

(26) Clause 16.1.3, Step-III- Evaluation of Financial Bid.

Paragraphs 10.2 and 10.3 of the Standard Bidding guidelines shall be suitably incorporated under clause 16.1.3.

(27) Clause 16.1.3, Step-III- Evaluation of Financial Bid

Third sentence under 2nd paragraph of Article 16.1.3 shall be modified as;

“Financial Bid not in conformity with the requirement of this RFS or containing any deviation from this tendered conditions shall be rejected”.

(28) Clause 19. E-reverse auction process

Incorporate the paragraph 8.6 of the MoP bidding guidelines as an evaluation criteria under Clause 19 of the RfS.

(29) Clause 20.2 of the RfS. 'Bucket filling and preference for Kerala bidders'.

The Commission in the order dated 28.04.2020 in OP No. 04/2020 ordered as follows.

"The Commission, reiterate its original decision that, in case bucket filling has to be resorted to, KSEB Ltd shall ensure that all contracts awarded are exactly at the same price as that awarded to L1 bidder. No additional price on any account shall be considered or awarded by KSEB Ltd in such contracts. The Commission once again orders that, in all the bidding process, KSEB Ltd shall strictly follow the above procedures if bucket filling is resorted to."

The Commission hereby direct that, the Clause 20.2 of the RfS shall be modified accordingly.

(30) Clause 23.5 of the RfS

The Clause 23.5 of the RfS is contradiction to the Paragraph 14.3 of the Standard Bidding Guidelines (Amendment dated 22.10.2019).

Further, delay in adoption of tariff due to the delay in timely submission of all the relevant details before the Commission for the adoption of the tariff shall be at the shoulder of the licensee.

The clause 23.5 of the RfS shall be modified suitably, duly considering the above.

(31) SI No.9 of Format-18 of the RfS

It may be specified in the SI No.9 of the Format-18 that, the Solar PV Cells and Modules shall conform to the 'Approved List of Models and Manufacturers" (ALMM), notified by the MNRE as per the Office Memorandum dated 02.01.2019.

(32) SI No. 9(c) of Format-18 of the RfS Concentrator PV modules.

SI No. 9(c) shall be modified as per the Annexure-II item No.1.2 of the bidding guidelines.

(33) SI No. 10.Format-18 of the RfS. Power conditioners/ Inverters and Generating Station.

Anti- Islanding Protection shall be conform to “IEEE 1547/ IEC 62116/ UL 1741 or equivalent BIS standards.

The item 3 ‘Other Sub-systems / Components: specified under Annexure-II of the bidding guidelines shall be included as a condition under SI No.10 of the Format-18.

(34) SI No.14 of the Format-18 of the RfS. “Performance Monitoring”.

Add the para 7 & 8 of the Annexure-II of the Standard bidding guidelines under this head.

(35) SI No.15 of the Format-18 of the RfS. “ Test Certificate”.

Add para-4 of the Annexure-II of the Standard bidding guidelines under this head.

(36) Insert as SI No.17 of the Format-18 of the RfS “Warranty”

Add a new sub clause as SI No.17 of the Format 18 of the RfS, as per the para-5 of the Annexure-II of the bidding guidelines.

(37) Insert as SI No.18 of the Format-18 of the RfS “Identification and Traceability ”

Add a new sub clause as SI No.18 of the Format 18 of the RfS, as per the para-6 of the Annexure-II of the bidding guidelines.

Draft Power Purchase Agreement

(38) Article 2.2 of the draft PPA

In the first line the word ‘**25th anniversary**’ may be substituted with the word ‘**25 years**’.

(39) Article 4.5.2 of the draft PPA regarding Open Access/ Losses etc

There is lack of clarity of about injection, transmission losses and delivery or receipt for the purposes of billing and payment by KSEB Ltd.

As per the order **No. 23/12/2016- R&R dated 6th November 2019**, of the Ministry of Power, Gol, inter-state transmission charges and losses are fully exempted for solar and wind projects commissioned till 31st December 2022, for a period of ‘25 years’, from where DISCOMs procure power to meet their RPO. Accordingly, KSEB shall get at its boundary/receiving substation, the entire solar energy injected by the

SPG at the delivery point without paying the any transmission charges and losses.

The Article 4.5.2 of the draft PPA shall be modified accordingly.

(40) Article 4.11 of the draft PPA. Liquidated damages.

The Article 4.11 'liquidated damages' clause shall be completely revised especially the word 'damage'. Further, no rate or penalty specified there in.

(41) Article 5.1.6 of the draft PPA

The last of the Article 5.1.6 'or such period as extended from time to time' may be deleted.

(42) Insert new Article 5.2.4

The paragraph 14.3(iii) of the Standard Bidding Guidelines may be included as Article 5.2.4 of the draft PPA. The paragraph 14.3(iii) is extracted below for ready reference.

(iii). It is presumed that in terms of Clause 10.4 of these Guidelines, the tariff will be adopted by the Appropriate Commission within 60 days of such submission. However, notwithstanding anything contained in these Guidelines, any delay in adoption of tariff by the Appropriate Commission, beyond 60 (sixty) days, shall entail a corresponding extension in scheduled commissioning date."

(43) Article 10.4.1 of the draft PPA

In the Article 10.4.1, the word 'standby' may be deleted.

(44) Article 11.1.1 of the draft PPA

In the Article 11.1.1, after the words 'events and circumstances', the words 'or the consequence thereof' may be added.

Further, after the word 'reasonable care', the words 'or complied with prudent utility practices' may be added.

The conditions of 'Force Majeure', specified as (1) to (5) may be completely redrafted duly considering the paragraphs 5.4.1 to 5.4.8.2 of the Standard Bidding Guidelines (Amendment dated 22.10.2019).

6. Hearing on the petition was conducted on 09.06.2020 through video conference. Sri. K.G.P. Nampoothiri, presented the petition on behalf KSEB Ltd. During the hearing KSEB Ltd submitted that, KSEB Ltd is in the process of incorporating the observation and comments of the Commission in the bid documents and the revised bid documents shall be submitted to the Commission within two weeks.

7. Subsequently, KSEB Ltd vide the letter dated 22.06.2020, submitted its remarks on the following '6' items out of the '44' observations and comments of the Commission dated 04.06.2020 detailed under **paragraph 5 above**.

- (i) Sl No.6 : Metering point

Remarks of KSEB Ltd is extracted below.

'The term interconnection point is well defined in the bidding document (Definition 22 of RFS and Definition 34 of PPA) prior to the definition of metering point. It is also submitted that any cross reference of definitions is not a standard practice in such documents. Hence KSEBL is of the view that no change in definition of metering point is required.'

- (ii) Sl. No.11: Clause 1.4.3 of the RfS and Article 4.2 of the draft PPA. Penalty in case the project generates and supplies energy less than the energy corresponding to the minimum CUF agreed by the SPG.

Remarks of KSEB Ltd on this issue is extracted below.

As per Cause 5.2.1 (a) of the MoP bidding guidelines:

"in case the project generates and supplies energy less than the energy corresponding to the minimum CUF on yearly basis, the Solar Power Generator will be liable to pay to the Procurer, penalty for the shortfall in availability below such contracted CUF level. The amount of such penalty will be in accordance with the terms of the PPA, which shall ensure that the Procurer is offset for all potential costs associated with low generation and supply of power under the PPA, subject to a minimum of 25% (twenty-five per cent) of the cost of this shortfall in energy terms, calculated at PPA tariff".

It is felt that the process of quantifying the cost associated with low generation and supply of power by the SPG, on yearly basis, is dispute prone and potentially lead to legal tussles, KSEBL has suggested billing the shortfall below minimum CUF at 25% of PPA tariff. However, in case Hon'ble Commission insists on an alternate mechanism for penalty, KSEBL will adhere to the same."

- (iii) Sl. No.13: Clause 1.14 of the RfS. Selection of projects based on tariff and Clause 20.2 of the RfS 'Bucket filling and preference for Kerala bidders'.

Remarks of KSEB Ltd on this issue is extracted below.

"The order dated 28.04.2020 in OP No. 04/2020 referred to by the Hon'ble Commission is not in respect of a bid process, the guidelines for which were already notified by Gol as per Section 63 of the Act. In the instant case, already Gol has notified the statutory guidelines and L1 matching is not envisaged in the bidding guidelines and hence will be a deviation from the bidding guidelines. KSEBL had not requested for any deviation. Hon'ble Commission may kindly examine whether a deviation can be directed suo moto by the Commission in the statutory guidelines. The final decision of the Hon'ble Commission after examining the relevant legal provisions will be promptly implemented by KSEBL".

- (iv) SI No.16. Clause 3.1(d) of the RfS

KSEB Ltd's remarks on this issue is extracted below.

"As per MoP standard guidelines clause 13.2, "Any change in the shareholding after the expiry of 1 (one) year from the COD can be undertaken under intimation to procurer". Also this is subject to the condition that the management control remains within the same group of companies which restricts the bidding company from change of the management control on account of such share transfer. Here also KSEBL prefer to adhere to the bidding documents without any change in the clause 3.1(d)".

- (v) SI No.43 Article 10.4.1 of the draft PPA

Remarks of KSEB Ltd on this issue is extracted below.

"KSEBL makes prompt payment for power purchases through RTGS mode. Letter of credit (LC) facility can be provided as a payment security to the generator, to use in case KSEBL defaults payment within due date. Hence standby LC is incorporated by KSEBL. Providing a letter of credit that allows the generator to draw upon without waiting for RTGS payment could adversely affect the cash flow plan of KSEBL. It may also be noted that in respect of all PPAs KSEBL is providing only standby LC. KSEBL proposes no modification to the bidding documents in Article 10.4.1 of the draft PPA, submitted before."

- (vi) SI No.44. Article 11.1.1 of the draft PPA

KSEB Ltd's remark on this item is extracted below.

"The matter has already taken up with the Hon'ble Commission vide reference (2) above as a deviation from bidding guidelines and the same is reproduced below for favour of information of the Hon'ble Commission:

The Para at point No. 5.4:

"5.4. Force Majeure: The PPA shall contain provisions with regard to force majeure definitions, exclusions, applicability and available relief on account of Force Majeure, as per the industry standards."(Article 11 of Draft PPA of KSEBL).

The relevant clauses as per amended resolution applicable for modification in the Standard bid documents and deviation required is reproduced below:

5.4. ForceMajeure:

5.4.1. Definition of Force Majeure: A 'Force Majeure' (FM) would mean one or more of the following acts, events or circumstances or a combination of acts, events or circumstances or the consequence(s) thereof, that wholly or partly prevents or unavoidably delays the performance by the Party (the Affected Party) of its obligations under the relevant Power Purchase Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control,

directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.

5.4.8.2. Termination due to Non-Natural Force Majeure Event

- a) Upon occurrence of a Non-Natural Force Majeure Event, the Generator shall, at its discretion, have the right to terminate the PPA forthwith after the completion of the period of 180 (one hundred and eighty) Days from the date of the Force Majeure Notice.
- b) Notwithstanding anything in Article 5.4.6, on termination of the PPA pursuant to Article 5.4.8.2 (a):
- (i) the Procurer shall pay to the Generator, 'Force Majeure Termination Compensation' equivalent to the amount of the Debt Due and the 110% (one hundred and ten per cent) of the Adjusted Equity, as defined in these Guidelines, and takeover the Project assets.
- (ii) the Generator shall be eligible for undisputed payments under outstanding Monthly Bill (s), before the occurrence of Force Majeure Event."

Since as per the new amended resolution, in case of a non-natural Force Majeure event, the procurer shall pay to Generator compensation as in Clause 5.4.8.2(b) above and is bound to take over the project assets, and as the bidders from all over India can participate in the Bid and being a long term agreement, it is proposed that Force Majeure clause as in earlier tender document (draft PPA) may be retained in Article 11 of draft PPA and approval may please be granted for the deviation for not adopting the clause as per amended resolution regarding Force Majeure.

As taking over of the Projects especially of Generators situated outside Kerala in case of 'Force Majeure Termination' is not feasible and viable in a long term agreement, it is proposed that the deviation, for Clause 5.4 "Force Majeure" in the amended guidelines dated 22.10.2019, suggested by KSEBL in the additional submission dated 06.03.2020 may be considered and the observation in this regard dropped."

8. Commission examined the remarks of KSEB Ltd dated 22.06.2020 on the 'observations of the Commission on the bidding documents dated 04.06.2020. In this matter, Commission vide the letter dated 03.07.2020 communicated to KSEB Ltd as follows.

"

- (i) **Sl. No.6 : Metering point** (Definition 33 of the RFS and definition 45 of draft PPA).

Commission noted the remarks of KSEB Ltd, and allow to modify the bid documents as proposed.

- (ii) **Sl. No.11: Clause 1.4.3 of the RfS and Article 4.2 of the draft PPA. Penalty in case the project generates and supplies energy less than the energy corresponding to the minimum CUF agreed by the SPG.**

Observation and suggestions of the Commission

The Clause 5.2.1(a) of the bidding guidelines notified by MoP, GOI, provides that, 'the penalty for the shortfall in generation below the contracted CUF shall be fixed in such a way as to ensure that the procurer is to offset for all potential costs associated with low generation and supply of power under the PPA. 25% of the PPA tariff proposed by KSEB Ltd is the minimum penalty prescribed for such cases. Commission further noted that, the Clause 5.2.1(a) of the bidding guidelines provides that, the procurer is allowed to specify the terms for assessing the potential costs associated with shortfall in generation below the contracted level.

Considering these, it is suggested that, KSEB Ltd shall modify the draft PPA as per Clause 5.2.1(a) of the bidding guidelines of GOI, and also incorporate necessary provisions in the PPA to assess the penalty to be imposed on the generator due to low generation below the contracted CUF.

- (iii) **Sl. No.13: Clause 1.14 of the RfS. Selection of projects based on tariff and Clause 20.2 of the RfS 'Bucket filling and preference for Kerala bidders'**

Observations and decisions of the Commission

The paragraph 8.9 of the bidding guidelines dated 3rd August 2017 notified by the MoP, GOI, provides as follows.

"8.9 The detail procedure for evaluation of the bid and selection of the bidder shall be provide for in the RfS".

As extracted above, the bidding guidelines notified by the Central Government provides that, the procurer shall include the evaluation criteria and procedure for selection of bidder in the RfS. Hence, specifying the procedure for selection of bidders in the RfS is not termed as deviation from the bidding guidelines.

Hence, it is directed that, KSEB Ltd shall modify the Clause 1.14 and Clause 20.2 of the RfS, as suggested by the Commission vide the letter dated 04.06.2020.

- (iv) **Sl.No.16: Clause 3.1(d) of the RfS**

Commission noted the remarks of KSEB Ltd, and allow to modify the bid documents as proposed.

(v) **Sl. No.43: Article 10.4.1 of the draft PPA**

KSEB Ltd may modify the bid documents as proposed.

(vi) **Sl. No.44: Article 11.1.1 of the draft PPA:**

Commission examined the paragraph 5.4.8.2(b)(i) of the amendment on the bidding guidelines notified by the MoP, GoI dated 22.10.2019, and also the remarks of KSEB Ltd on adopting the same in the bidding documents.

Commission allow KSEB Ltd to modify the conditions of 'Force Majeure' in the bidding documents ***duly considering the paragraphs 5.4.1 to 5.4.8.2, but excluding the paragraph 5.4.8.2(b)(i) of the Standard Bidding Guidelines (Amendment dated 22.10.2019)***".

KSEB Ltd may modify the bidding documents and submit the same for approval, latest by 13.07.2020.

9. In compliance of the directions of the Commission, KSEB Ltd vide the letter dated 30.07.2020 submitted the modified bid documents, draft RFS and PPA, for the procurement of 200 MW solar power from Ground Mounted Power Plants situated anywhere in India with preference to plants to be setup within the State of Kerala.

Analysis and Decision

10. Commission examined in detail the petition filed by KSEB Ltd dated 14.10.2019, additional submission dated 06.03.2020, and other supporting documents as per the provisions in the Electricity Act, 2003, the Tariff Policy 2016 notified by the Central Government, the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power.
11. Commission vide the order dated 19.11.2018 in petition OP No. 56/2018, granted approval for inviting bids on reverse e-bidding for procuring 200MW power from Solar PV plants to be established in the State of Kerala. KSEB Ltd in this petition dated 14.10.2019 submitted that, though they floated tender through tariff based competitive bidding in DEEP portal of MSTC Ltd on 02.03.2019, the response was very poor and only one bidder participated in the bid, that too for a capacity of 10 MW only.

In view of the poor response of the bid dated 02.03.2019, KSEB Ltd cancelled the tender and decided to float revised tender for the procurement of 200 MW Solar Power from Ground Mounted Power Plants situated anywhere in India with preference to plants to be setup within the State of Kerala. KSEB Ltd vide

petition dated 14.10.2019, submitted the bidding documents RfS and draft PPA, by modifying the earlier approved bidding documents, for the approval of the Commission.

12. Section 63 of the Electricity Act 2003 permits the Distribution licensees to procure power through the transparent process of bidding in accordance with the guidelines issued by the Central Government and the Commission has to adopt such tariff determined through transparent process of bidding. The Section 63 of the Electricity Act 2003 is extracted below for ready reference.

“63. 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.”

13. Further, Clause 6.4.(2) of the Tariff Policy notified by the Central Government vide the resolution No. 23/2/2005-R&R dated 28.01.2016, in compliance of the Section 3 of the Electricity Act, 2003 provides as follows.

“6.2 States shall endeavor to procure power from renewable energy sources through competitive bidding to keep the tariff low, except from the waste to energy plants. Procurement of power by Distribution Licensee from renewable energy sources from projects above the notified capacity, shall be done through competitive bidding process, from the date to be notified by the Central Government.”

14. The Central Government vide the Resolution No. 23/27/2017-R&R dated 03.08.2017 has notified the ‘Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Projects’.

Subsequently, the Central Government vide the resolutions dated 14th June 2018, 3rd January 2019, 9th July 2019 and 22nd October 2019, made amendments in the original bidding guidelines dated 03.08.2017.

The clause 18 of the standard bidding guidelines dated 03.08.2017 stipulated as follows.

“18. DEVIATION FROM PROCESS DEFINED IN THE GUIDELINES

In case there is any deviation from these Guidelines and/or the SBDs, the same shall be subject to approval by the Appropriate Commission. The Appropriate Commission shall approve or require modification to the bid documents within a reasonable time not exceeding 90 (ninety) days.”

Further, Clause 3.1.1 of the bidding guidelines dated 03.08.2017 specifies the ‘Bid Documentation’, which is extracted below.”

“3.1.1. Bid Documentation:

a) Prepare the bid documents in accordance with these Guidelines and Standard Bidding Documents (SBDs) [consisting of Model Request for Selection (RfS)

Document, Model Power Purchase Agreement and Model Power Sale Agreement], notified by the Central Government, except as provided in sub clause (c) below.

b) Inform the Appropriate Commission about the initiation of the bidding process.

c) Seek approval of the Appropriate Commission for deviations, if any, in the draft RfS draft PPA, draft PSA (if applicable) from these Guidelines and/ or SBDs, in accordance with the process described in Clause 18 of these Guidelines.

i. However, till the time the SBDs are notified by the Central Government, for purpose of clarity, if the Procurer while preparing the draft RfS, draft PPA, draft PSA and other Project agreements provides detailed provisions that are consistent with the Guidelines, such detailing will not be considered as deviations from these Guidelines even though such details are not provided in the Guidelines.

ii. Further, in case of an ongoing bidding process, if the bids have already been submitted by bidders prior to the notification of these Guidelines and/or SBDs, then if there are any deviations between these Guidelines and/or the SBDs and the proposed RfS, PPA, PSA (if applicable), the RfS, PPA and the PSA shall prevail.

15. Commission noted that, though the Central Government notified the guidelines for tariff based competitive bidding process for procurement of power from grid connected SPV on 03.08.2017, the Central Government is yet to notify the Standard Bidding Documents including the document of 'Request for Selection (RfS) and draft Model PPA. However, the guidelines empower the procurers to prepare the RfS, draft PPA and other project documents consistent with the guidelines.

16. In the original petition dated 14.10.2019, KSEB Ltd submitted that, it had prepared the draft bidding documents including the 'request for selection, draft power purchase agreements etc, as per the procedures envisaged in the Resolution No. 23/27/2017-R&R dated 03.08.2017 the 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Projects' and its amendments upto 9th July 2019.

As discussed under paragraph 3 of this order, immediately after filing the petition by KSEB Ltd on 14.10.2019 for the approval of the bid documents, Central Government vide the Resolution dated 22.10.2019 notified certain major amendments in the bidding guidelines dated 03.08.2017. Considering the major changes in the amended guidelines dated 22.10.2019, Commission vide the letter dated 24.12.2019, directed KSEB Ltd to modify the bidding documents RfS and draft PPA incorporating the amendments dated 22.10.2019.

17. KSEB Ltd submitted the modified bid documents RfS and draft PPA vide the submission dated 06.03.2020.

18. Commission examined the bidding documents RfS and draft PPA as per the provisions of the 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Projects' notified by the Central Government vide the Resolution dated 03.08.2017 and its subsequent amendments dated 14th June 2018, 3rd January 2019, 9th July 2019 and 22nd October 2019.

Commission vide the letter dated 04.06.2020 has communicated its preliminary observations and suggestions to KSEB Ltd for incorporating in the bidding documents, which are detailed under **paragraph 5 above**.

Out of the 44 observations, KSEB Ltd vide the letter dated 22.06.2020 submitted certain remarks on six items for the consideration of the Commission. The details are given **under paragraph 7 above**.

Commission examined the remarks of KSEB Ltd, and vide letter dated 03.07.20120 communicated its decisions to KSEB Ltd on their remarks and directed to submit the modified bid documents latest by 13.07.2020.

In compliance of the direction of the Commission, KSEB Ltd, on 30.07.2020 submitted the modified bid documents RfS and draft PPA for the approval of the Commission.

- 19.** Commission examined the modified the bid documents submitted by KSEB Ltd and noted that most of the observations and suggestions of the Commission, discussed under paragraph - 5 and paragraph-8 of this order, is incorporated in the bidding documents. **However, the following modifications/ suggestions of the Commission, which is agreed by the KSEB Ltd to incorporate in the bidding documents are not incorporated.**

- (1) Item No 8 –Clause 3.1.(a) of RfS

The word “*single*” in the first line of both first and second paragraph of Clause 3.1.(a) of RfS may be deleted.

The second sentence in the first paragraph of Clause 3.1 (a) of RfS may be modified by replacing the portion “which are *not* formed by the companies” by “which are formed by the companies”

- (2) Item No 11 - Article 4.2of the PPA

The second paragraph may be modified as follows:

“ KSEBL shall on a quarterly basis review the supply of power under the contract and in case of shortfall, intimate the SPG that all efforts *have to* be taken *by the SPG* to supply power above the minimum CUF as per the contract, failing which penalty as above will be applicable”

(3) Item No 13- Clause 20.2 of RfS

Clause 20.2 (a) may be modified as follows:

“

- a. The bidders will be selected based on e-reverse bidding followed by e-reverse auction and L-1 price matching. If the entire requisitioned quantity is not met by the L1 bidder, the remaining quantity, if required can be met *from the other valid bidders strictly by matching the L1 rates, i.e., at the same price as that awarded to L1 bidder. No additional price on any account shall be considered or awarded in such cases.* The process of giving preference to Kerala bidders will be done manually after completion of the e-reverse auction process.”

At the end of clause 20.2.(d), add “in the initial bid”

(4) Item No.18 of the letter of the Commission dated 04.06.2020 (Ref Paragraph- 5 of this order)

“Clause 3.4.1(ii) of the RfS

Insert the following at the beginning of the paragraph;

“If the project is to be implemented through a newly formed consortium SPV or ..”

(5) Item No.19 of the letter of the Commission dated 04.06.2020 (Ref Paragraph- 5 of this order)

“Clause 3.41(iii) of the RfS

Insert the following at the beginning of the paragraph;

“ In the case of a consortium or newly formed SPV,...”

(6) Item No.40 (Article 4.11 of the PPA) of the letter of the Commission dated 04.06.2020 (Ref Paragraph- 5 of this order)

It was directed vide letter dated 4.6.2020 as follows;

“Article 4.11 of the draft PPA. Liquidated damages.

The Article 4.11 ‘liquidated damages’ clause shall be completely revised especially the word ‘damage’. Further, no rate or penalty specified there in.”

Since the above was not completely incorporated, KSEB Ltd may revise Article 4.10 and 4.11 of the draft PPA as follows:

Article 4.10 of PPA

Add at the beginning of the first paragraph

“The projects shall be commissioned within a period of 18 (eighteen) months from the date of execution of PPA.”

Also, add “*for not*” in between “supply of power and” and “making the contracted capacity” in the first paragraph of Article 4.10

Article 4.11 Liquidated damages

Add at the end of the paragraph “and as per Article 4.10 of the PPA”

- (7) Item No.41 of the letter of the Commission dated 04.06.2020 (Ref Paragraph- 5 of this order)

“Article 5.1.6 of the draft PPA

The last of the Article 5.1.6 ‘or such period as extended from time to time’ may be deleted.”

This was not incorporated. Hence the part of sentence containing “*or such period as extended from time to time as per the provisions of this agreement*” may be deleted.

- (8) Additional items (in the revised document) – Article 4.2 of draft PPA.

First paragraph of Article 4.2 of the PPA may be modified as follows, ensuring more clarity in the CUF to be maintained by SPG:

Individual Projects developed on conventional solar PV technology shall have a minimum CUF of 16% in any given contract year. If maximum CUF is declared by the generator at the time of bidding, the minimum CUF shall be 3% below the maximum declared CUF subject to the minimum CUF of 16% mentioned above. In case the project generates and supplies energy less than the energy corresponding to the minimum CUF, the solar power generator will be liable to pay to KSEBL, penalty for such shortfall below such contracted CUF level. SPG shall offset KSEBL for all potential costs (opportunity cost associated with shortfall in supply of contracted power, penalty for non-compliance of RPO obligation and other associated costs if any) associated with low generation and supply of power under the PPA, subject to a minimum of 25% (twenty five percent) of the cost of this shortfall in energy terms calculated at PPA tariff.

- (9) Additional items (in the revised document) – Article 11.7.2 (b) of draft PPA

“Article 5.4.6” may be replaced with “*Article 11.5*”

- (10) Additional items (in the revised documents) – exemption of transmission charges and losses

Ministry of Power, Government of India, vide notification dated 5th August 2020 has decided that no transmission charges and losses will be levied on solar, wind and solar – wind hybrid plants commissioned till 30th June 2023, by revising the earlier date of 31st December 2022. K S E B Ltd. while submitting the draft documents on 30.7.2020 has included the date as 31st December 2022 as per earlier notification dated 6th November 2019. Hence the revised date of 30th June 2023 on exemption of transmission charges and losses as per notification dated 5th August 2020 may be incorporated in the RfS and PPA, wherever it occurs.

- (11) Additional items (in the revised documents) – Clause 1.17 of draft RfS

Entry in the third column in Sl No 10 in the table under Clause 1.17 may be revised as “.....-2020 (140 days)”

Commission hereby direct that, KSEB Ltd shall incorporate the above suggestions of the Commission in the bid documents RfS and draft PPA for procuring 200 MW from solar PV through competitive bidding route on all India basis.

20. In the present petition for approval of bidding documents, KSEB Ltd has proposed the ceiling on tariff to be quoted by the bidders @ Rs 3.00/unit. However, Government of India, Ministry of New & Renewable Energy vide the letter dated 5th March 2020 conveyed that, “cap” or upper ceiling tariff will not be prescribed in future bids. Since the present petition for approval for bidding documents was originally submitted before the Commission on 14.10.2019, i.e, much before the present communications issued by the MNRE, GoI, Commission hereby permits KSEB Ltd to retain the ceiling on tariff to be quoted by the bidder @ Rs 3.00/unit.

Order of the Commission

21. The Commission, after examining the original petition dated 14.10.2019, revised bidding documents dated 06.03.2020, modified bidding documents dated 30.07.2020 and the deliberations of the subject petition during the hearings, hereby orders the following.

- (1) Grant approval to KSEB Ltd for inviting bids on reverse e-bidding for procuring 200 MW solar power from solar PV plants through competitive bidding route on all India basis, with a preference of 10% requisitioned quantum to plants to be setup within the State of Kerala.
- (2) Approve the modified bidding documents RfS and draft PPA submitted by KSEB Ltd on 30.07.2020, after incorporating the modifications detailed under paragraph 19 above.
- (3) A copy of the tendered documents including RfS and PPA be submitted to the Commission within 30 days of publishing of tender.
- (4) Immediately after the completion of the bid process, KSEB Ltd shall submit a petition complete in all respects for the adoption of tariff.

The petition disposed off.

Sd/-
Preman Dinaraj
Chairman

Approved for Issue,

Satheeshchandran.C.R
Secretary (i/c)