

**15 -ാം കേരള നിയമസഭ**

**13 -ാം സമ്മേളനം**

**നക്ഷത്ര ചിഹ്നം ഇല്ലാത്ത ചോദ്യം നം. 713**

**10-02-2025 - ൽ മറുപടിയ്ക്ക്**

**റെഗുലേറ്ററി കമ്മീഷൻ ഉത്തരവിനെതിരെ കെ.എസ്.ഇ.ബി.എൽ നൽകിയ അപ്പീൽ**

ചോദ്യം		ഉത്തരം	
ശ്രീ. എൽദോസ് പി. കുന്നപ്പിള്ളിൽ		ശ്രീ. കെ. കൃഷ്ണൻകുട്ടി (വൈദ്യുതി വകുപ്പ് മന്ത്രി)	
(എ)	യു ഡി എഫ് കാലത്തെ ദീർഘകാല കരാറുകൾ റദ്ദാക്കിയ വൈദ്യുതി റെഗുലേറ്ററി കമ്മീഷന്റെ 10/05/2023 ലെ ഉത്തരവിനെതിരെ കെ.എസ്.ഇ.ബി.എൽ ട്രൈബ്യൂണലിന് മുമ്പാകെ അപ്പീൽ നൽകിയിരുന്നോ; എങ്കിൽ നൽകിയ അപ്പീൽ രേഖകളുടെ പകർപ്പ് ലഭ്യമാക്കാമോ;	(എ)	കെ.എസ്.ഇ.ആർ.സി-യുടെ 10-5-2023 ലെ ഉത്തരവ് അടിയന്തരമായി സ്റ്റേ ചെയ്യണമെന്ന് ആവശ്യപ്പെട്ട് കെ.എസ്.ഇ. ബി.എൽ ബഹുമാനപ്പെട്ട അപ്പലേറ്റ് ട്രൈബ്യൂണലിനെ (APTEL) സമീപിച്ചിരുന്നു. അപ്പീൽ രേഖകളുടെ പകർപ്പ് <b>അനുബന്ധമായി ഉൾപ്പെടുത്തിയിട്ടുണ്ട്.</b>
(ബി)	പ്രസ്തുത അപ്പീൽ പിന്നീട് പിൻവലിക്കാനുണ്ടായ സാഹചര്യം വിശദമാക്കാമോ?	(ബി)	സംസ്ഥാന സർക്കാർ 10.10.2023-ലെ കത്ത് മുഖേന വൈദ്യുതി നിയമം 2003ലെ 108-ാം വകുപ്പ് പ്രകാരം സംസ്ഥാന റെഗുലേറ്ററി കമ്മീഷന് കെ.എസ്.ഇ.ബി.ലിമിറ്റഡ് സമർപ്പിച്ച പെറ്റീഷനുമേൽ പുറപ്പെടുവിച്ച ഉത്തരവ് പുന: പരിശോധിക്കാനും ഹർജി വീണ്ടും പരിഗണിക്കാനും നിർദ്ദേശം നൽകിയിരുന്നു.  അപ്പലേറ്റ് ട്രൈബ്യൂണൽ മുമ്പാകെ അപ്പീൽ നിലനിൽക്കേ ബഹു. കമ്മീഷന് ഉത്തരവ് പുന:പരിശോധന സാധ്യമല്ലാത്തതിനാൽ ഗവൺമെന്റിന്റെ നിർദ്ദേശം പരിഗണിച്ച് ടി വിഷയത്തിൽ കെ.എസ്.ഇ.ബി.ലിമിറ്റഡ് അപ്പലേറ്റ് ട്രൈബ്യൂണൽ മുൻപാകെ, സംസ്ഥാന റെഗുലേറ്ററി കമ്മീഷൻ 10.05.2023ന് പുറപ്പെടുവിച്ച ഉത്തരവിനെതിരെ, നൽകിയ ഹർജി ആവശ്യമെങ്കിൽ വീണ്ടും പരിഗണിക്കാമെന്ന ബഹു. അപ്പലേറ്റ് ട്രൈബ്യൂണലിന്റെ ഉറപ്പിന്റെ അടിസ്ഥാനത്തിൽ 31.10.2023-ന് പിൻവലിക്കുകയുണ്ടായി.

സെക്ഷൻ ഓഫീസർ

**IN THE HON'BLE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI  
(APPELLATE JURISDICTION)**

**APPEAL NO \_\_\_\_\_ OF 2023**

**IN THE MATTER OF:**

Kerala State Electricity Board Ltd.

.....Appellant

Versus

Kerala State Electricity Regulatory Commission & Ors.

..... Respondents

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APPELLANT  
KERALA STATE ELECTRICITY BOARD LTD.

Through

PRABHAS BAJAJ  
ADVOCATE FOR THE APPELLANT  
607, ADISHWAR BUILDING  
34, FIROZESHAH ROAD, NEW DELHI - 110001  
MOB: +91-9810067648  
[prabhasbajaj@gmail.com](mailto:prabhasbajaj@gmail.com)

NEW DELHI  
25.05.2023

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KERALA STATE ELECTRICITY BOARD LTD.

Through

PRABHAS BAJAJ  
ADVOCATE FOR THE APPELLANT  
607, ADISHWAR BUILDING  
34, FIROZESHAH ROAD, NEW DELHI - 110001  
MOB: +91-9810067648  
[prabhasbajaj@gmail.com](mailto:prabhasbajaj@gmail.com)

NEW DELHI  
25.05.2023

## SYNOPSIS & LIST OF DATES

1. The present appeal is being filed on behalf of the Appellant – Kerala State Electricity Board Ltd. (KSEBL) against the judgment / order dated 10.05.2023 passed by the Ld. Kerala State Electricity Regulatory Commission (KSERC) in OP No. 05/2021 [ hereinafter referred to as the “Impugned Judgment” ]. By its Impugned Judgment, the Ld. KSERC has been pleased to erroneously reject the Petition i.e. OP No. 05/2021 filed by the Appellant, praying for final orders by the Ld. KSERC in relation to the approval of 4 Power Supply Agreements (PSAs) entered between the Appellant and respective generators, namely, the following:-
  - (i) PSA for 115 MW capacity (under Bid-1) with Jhabua Power Ltd.
  - (ii) PSA for 150 MW capacity (under Bid-2) with Jindal Power Ltd.
  - (iii) PSA for 100 MW capacity (under Bid-2) with Jhabua Power Ltd.
  - (iv) PSA for 100 MW capacity (under Bid-2) with Jindal India Thermal Power Ltd.
2. The aforesaid PSAs had been executed by the Appellant with the respective generators pursuant to the bidding process(es) carried out by the Appellant in the year 2014, inviting Bids from Generating Companies for supplying power for the State of Kerala. It is submitted that for procuring power at competitive tariff, the bidding process had been carried out by the Appellant in terms of the Design, Build, Finance, Own & Operate (DBFOO) Guidelines dated 08.11.2013, issued by the Government of India under section 63 of the Electricity Act, 2003.
3. It is submitted that two separate bidding processes had been carried out by the Appellant for procurement of 850 MW power, in the following manner:-

	<u>Quantum</u>	<u>Date of RFQ (Request for Quotation)</u>	<u>Date of commencement of supply.</u>
Bid-1	450 MW	05.03.2014	December 2016
Bid-2	400 MW	25.04.2014	October 2017

4. It is submitted that pursuant to the bidding process, a situation had emerged where the Lowest Bidder (L1) in both the bid processes respectively, had not bid for the entire quantum of power in the said bidding processes. In the Bid-1 process, the lowest bidder, namely, Jindal Power Ltd. (JPL) had submitted its bid for supply of 200 MW power at a tariff of Rs. 3.60 per unit. In Bid-2, the lowest bidder, namely, BALCO had submitted its bid for supply of 100 MW power at the tariff of Rs. 4.29 per unit.
5. In such a scenario where the L-1 bidders had not submitted the bid for the entire quantum, Clause 1.1.4 of the RFP (in terms of the DBFOO Guidelines issued by the Government of India) had envisaged the tendering authority to invite other bidders to match the tariff quoted by the L-1 bidder for supply of the balance quantum of power under the said bidding process. For ready reference, clause 1.1.4 of the RFP is reproduced as under:-

*“1.1.4 Applicants may bid for the capacity specified in Clause 1.1.1, or a part thereof, not being less than 25% (twenty five per cent) of such capacity. Provided, however, that the Utility may, in its sole discretion, accept only those Bids which match the lowest Bid.”*
6. Further, in a scenario where none of the other bidders agreed for matching the L-1 tariff for supply of balance quantum of power, the guidelines and the RFP did not lay down any specific provision for dealing with such a situation. It is respectfully submitted that during any tender process, there may be instances and / or situations which may not get covered by any provision of the tender document or the guidelines as such a situation may not have been envisaged in the said tender document or guidelines. It is the settled position of law that if the tendering authority is faced with any such situation, it shall be opened to the tendering authority to adopt any fair or transparent method to deal with such situation for proceeding further with the tender process.
7. In the present case, the Appellant - KSEBL had sought clarifications from the Central Government on various occasions in relation to the

process to be followed in situations which are not covered under the guidelines, especially in a situation where the L1 Bidder does not bid for the entire quantum of power. However, at the relevant time, no such clarifications were received by the Appellant from the Central Government.

8. Having regard to the urgent need and necessity for procurement of power by the State, and upon finding the tariff quoted by the bidders in the DBFOO process to be competitive and beneficial in comparison with alternate sources of power available at that point of time, and also having regard to the necessity to enter into PSAs for making applications for Long Term Access (LTA) Corridor [ which were becoming available at that point in time ], KSEBL proceeded with the bidding process in the following manner:-

- (i) In Bid-1, the other bidders, i.e. L-2 to L-4 bidders were invited to match the tariff of the L-1 Bidder [ Rs. 3.60 / unit ], for the balance quantum of power. However, none of the other Bidders agreed to match the tariff of the L1 Bidder. The tariff quoted by the L-2 bidder was for Rs. 4.15 per unit for a quantum of 115 MW.
- (ii) In Bid-2, the other bidders, i.e., L-2 to L-6 bidders were invited to match the tariff of the L-1 bidder i.e. Rs. 4.29 per unit. Out of the said other bidders, the L-2 to L-5 bidders agreed to match the tariff of the L-1 Bidder and based on the said agreement, Power Supply Agreements (PSAs) were executed between the Appellant and the L-1 to L-5 bidders in Bid-2.
- (iii) After the opening of Bid-2, the tariff quoted by the L-2 bidder in Bid-1 (Rs. 4.15 per unit) was found to be lesser than the tariff of the L-1 bidder in Bid-2 process (Rs. 4.29 per unit). Thus, a decision was taken in the interest of procuring cheaper power for the State, to enter into Power Supply Agreement (PSA) with the L-2 bidder of Bid-1 for the quantum of 115 MW.

9. In view of the above, the following PSAs were executed between the Appellant and the respective generators under the said two bidding processes carried out as per the DBFOO Guidelines:-

Sl. No.	Generator	Region	Power (MW)	Tariff (Rs./kWh)	PSA Date	Date of start of supply
<b><u>Bid-1</u></b>						
1	Jindal Power Limited	WR	200	3.60	29-12-2014	Dec-16
2	Jhabua Power Limited	WR	115	4.15	31-12-2014	Dec-16
<b><u>Bid-2</u></b>						
3	Bharat Aluminium Co. Ltd	WR	100	4.29	26-12-2014	Oct-17
4	Jindal India Thermal Power Ltd	ER	100	4.29	29-12-2014	Oct-17
5	Jhabua Power Limited	WR	100	4.29	26-12-2014	Oct-17
6	Jindal Power Limited	WR	150	4.29	29-12-2014	Oct-17
7	East Coast Energy Private Ltd *	SR	100	4.29	02-02-2015	Oct-17
	<b>Total</b>		865			

*\*The PSA for 100 MW capacity executed with East Coast Energy Pvt. Ltd. was subsequently terminated as the plant had not achieved the CoD.*

10. The outcome of the bidding process as well as the signing of the PSAs was placed by the Appellant before the Ld. KSERC from time to time. Further, in terms of Regulation 78 of the KSERC (Terms & Conditions for Determination of Tariff) Regulations, 2014, the Appellant had filed a Petition being OP No. 13/2015 before the Ld. KSERC for approval of the said PSAs.

11. By its order dated 30.08.2016, the Ld. KSERC had granted approval for the PSAs between the Appellant and the L-1 bidders of Bid-1 and Bid-2 respectively, namely, Jindal Power Ltd. and BALCO. However, the decision in relation to the other bidders in Bid-1 and Bid-2 was deferred by the Ld. KSERC by its said order dated 30.08.2016. The Appellant was directed to obtain the views of the Government of India and the Government of Kerala in relation to the process followed by the KSEB while awarding the contract to these other Bidders. The Ld. KSERC, *inter alia*, observed that there has been a deviation from the DBFOO guidelines, while carrying out the bidding process.
12. The Appellant promptly addressed communications to the Government of India as well as the Government of Kerala, seeking their views in relation to the issues highlighted by the Ld. KSERC in its order dated 30.08.2016. The views received from the Government of India as well as from the Government of Kerala, from time to time, were duly placed by the Appellant before the Ld. KSERC. It has been the contention of the Appellant that there has been no deviation from the DBFOO Guidelines in the bidding process carried out by the Appellant. The Guidelines have been followed scrupulously, and wherever the guidelines did not contain any provision for dealing with the situation which had emerged subsequent to the bidding process, a fair and transparent methodology has been adopted by the Appellant (KSEBL) while keeping in mind the requirement of public interest which is subserved by procurement of cheaper power for the consumers in the State of Kerala.
13. The Central Government, by its communication dated 18.11.2016, had clearly observed that the issues highlighted by the Ld. Commission may not constitute “*deviations*” and that the approval of the Central Government is only required in relation to any deviation from the Guidelines and not for any practice followed by the procurer i.e. the Appellant, for the bidding evaluation process. The relevant extract of the



communication dated 18.11.2016 of Government of India is reproduced as under for ready reference:-

4. The deviations as pointed out by KSERC would have been got vetted and approved by the Central Government before issuance of RFQ, RFP and PSA and not at this stage. As per the Guidelines, deviations on the provisions of the bidding documents are approved, if necessary, and not the actions taken by the Utility as per practice or precedent.

5. In view of the above, Govt. of Kerala/KSEB Ltd may take action as appropriate in consultation with KSERC.

14. The Government of India had left it to the Ld. Commission to take a decision in relation to the said bidding process conducted by KSEBL, and the PSAs executed with the respective generators. However, the decision in relation to the approval of the said PSAs, i.e., the PSAs with the Bidders other than the L-1 Bidders in Bid-1 and Bid-2 - was deferred and kept pending by the Ld. KSERC. In the meanwhile, on account of the urgent requirement of power by the State of Kerala, the Appellant was constrained to approach the Ld. Commission, from time to time, seeking approval of the said PSAs. By orders dated 22.12.2016 and 22.10.2017, the Ld. KSERC granted "Provisional Approval" for procurement of power from the said PSAs.
15. It is extremely significant to submit that after the Provisional Approval was granted by the Ld. Commission that the Appellant has procured power under these PSAs. During this entire period, while the Appellant (KSEBL) submitted all communications received by it from the Government of Kerala or Government of India, communicating their views on the matter, promptly before the Ld. Commission, the issue of approval of these PSAs was kept pending by the Ld. Commission for all these years.
16. In the year 2019, when the Appellant filed petitions seeking approval of the fuel surcharge under the PSAs with the said generators, two orders were passed by the Ld. Commission dated 14.02.2020 [ for the First Quarter i.e. April 2019 to June 2019 ] and 27.04.2020 [ for the Second Quarter i.e. July 2019 to September 2019 ]. In these two orders,

- observations were made by the Ld. Commission to the effect that – it had not approved the 3 PSAs [ i.e. PSAs with the L-2 to L-4 Bidders in Bid-2 ], and the claim for fuel surcharge under these 3 PSAs was not allowed.
17. As mentioned hereinabove, after receiving approval from the Ld. Commission that the Appellant had commenced procurement of power from the Generators under all the said PSAs. In terms of the approval granted by the Ld. Commission, the Appellant had paid the tariff to these generators in terms of the respective PSAs. However, through these two orders passed in the fuel surcharge petitions in the year 2020, the Appellant was deprived from recovering these payments as part of the tariff payable by the consumers.
  18. In this background, the Appellant was constrained to file Review Petitions seeking review of the observations made by the Ld. Commission in its orders dated 14.02.2020 and 27.04.2020 to the effect that the PSAs in question had not been approved by the Commission.
  19. In the Review Petitions, the Appellant also prayed that the Commission may pass final orders in OP No. 13/2015, i.e., the petition seeking approval of the said PSAs - which had been kept pending by the Commission since 2015. The Review Petitions were rejected by the Ld. Commission by, *inter alia*, observing that the prayer for passing of final orders cannot be allowed in a Review Petition as there was no such prayer in the original petition.
  20. Faced with the aforesaid observations of the Ld. Commission, the Appellant was constrained to file Petition OP No. 05/2021 before the Ld. Commission, praying for passing of final orders in relation to the 3 PSAs - on 12.11.2020.
  21. In the meanwhile, one of the generators, viz. M/s Jindal India Thermal Power Ltd. filed an appeal before this Hon'ble Tribunal against the orders dated 14.02.2020 and 27.04.2020 passed by the Ld. Commission. This Hon'ble Tribunal passed an interim order dated 20.11.2020 in the said appeal (DFR No. 369/2020), *inter alia*, directing

that the State Commission shall decide the fresh petition filed by KSEBL (OP No. 05/2021) expeditiously. Further, this Hon'ble Tribunal granted an order of *status quo ante* for the dispensation prevailing immediately anterior to the orders dated 14.02.2020 and 27.04.2020 passed by the Ld. State Commission.

22. The State Commission filed an appeal before the Hon'ble Supreme Court against the order dated 20.11.2020, passed by this Hon'ble Tribunal (being Civil Appeal No. 41/2021). In this said appeal, the Hon'ble Apex Court, by its order dated 27.01.2021, granted stay of the order dated 20.11.2020 of this Hon'ble Tribunal.
23. In the meanwhile, another order was passed by the Ld. State Commission, dt. 25.06.2022, observing that all 4 PSAs [ i.e. the PSA with L-2 Bidder of Bid-1 and the PSAs with L-2 to L-4 Bidders of Bid-2 ] are "unapproved" PSAs, and that the Appellant shall discontinue the procurement of power from these PSAs. Appeals have been filed by the respective generators against the said order dt. 25.06.2022 of the Ld. State Commission, and the said Appeals are pending before this Hon'ble Tribunal, wherein interim orders have been passed by this Hon'ble Tribunal for supply of power at the L-1 rate in terms of the said PSAs [ Appeal Nos. 167 / 2023, 253 / 2023 and 359 / 2023 ].
24. Subsequently, by its order dated 10.02.2023, the Hon'ble Apex Court disposed of the appeal filed by the Commission by, *inter alia*, directing as under:-

*"..... When the matter was taken up for hearing, a consensus has been arrived at between the parties that the interim order if decided by this Court either way is not going to ultimately decide the fate of O.A. No. 5 of 2021 pending before the Commission, which has to be independently decided on its own merits in accordance with law and interim orders always merge after the final decision is taken by the Commission.*

*In the given facts and circumstances, we consider appropriate to observe that the mechanism, which is in place after passing of the interim order of this Court dated 27.01.2021, shall continue and the electricity may be supplied by the respondents herein in terms of Power Supply Agreement on the*

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*same terms and conditions, which may be subject of the outcome of the pending O.A. No. 5 of 2021.*

*We expect that the Commission will take a call and decide O.A. No. 5 of 2021 as expeditiously as possible but in no case later than three months and both the parties shall cooperate in getting expeditious disposal of the pending O.A.*

*We further make it clear that the present interim arrangement shall continue up to the date of the disposal of O.A. No. 5 of 2021 and for a further period of two weeks thereafter. We direct the parties to appear before the Commission on 20.02.2023 at 10.30 a.m.*

*The present appeal stands disposed of in the above terms.*

*We have not expressed any opinion on merits of the case and the Commission may decide the pending O.A. on its own merits in accordance with law.”*

25. In terms of the order dated 10.02.2023 passed by the Hon'ble Supreme Court, the Petition OP No. 05/2021 was finally heard by the Ld. State Commission and the orders were reserved on 11.04.2023. On 16.05.2023, the impugned judgment dated 10.05.2023 was uploaded on the website of the Ld. KSERC, whereby the Ld. KSERC has rejected the petition of the KSEBL, i.e., Petition OP No. 05/2021.
26. It is the respectful submission of the Appellant (KSEBL) that the impugned judgment of Ld. KSERC suffers from patent and glaring errors. The Ld. Commission has failed to appreciate the contentions on behalf of the Appellant that there was no deviation in the bidding process carried out under the DBFOO Guidelines. The process of L-1 matching i.e. inviting other bidders to match the tariff of L-1 bidder, for the balance quantum of power, is specifically envisaged under the Guidelines including in Clause 1.1.4 of the RFP. The Ld. Commission has also failed to even consider, much less appreciate, the copious and voluminous data / evidence submitted on behalf of the Appellant demonstrating that the adoption of tariff under these PSAs – has also been sub-serving the public interest, as the tariff for procurement of

- power under the said PSAs is lower as compared to the tariff from alternate sources of power available to the Appellant at the point of time [ i.e. when the bidding process was carried out ] and is lower than alternate sources even in the present scenario.
27. The principles of law laid down by the Hon'ble Apex Court through its various judgments, *inter alia*, in relation to the flexibility available to the tendering authority to deal with a situation where the guidelines/tender do not envisage any particular scenario – and the methodology so adopted is fair, transparent and in public interest - have been completely omitted from consideration by the Ld. Commission. Despite voluminous evidence and data having been filed by the Appellant before the State Commission, the Ld. Commission has erroneously observed that no factual evidence was presented by the Appellant to substantiate its contentions.
  28. The Ld. Commission, in its impugned judgment has also made entirely baseless and unsustainable observations against the Appellant, *inter alia*, to the effect that the Appellant has created financial implications for the consumers in the State of Kerala. All such observations made by the Ld. State Commission are not only contrary to the record, but are based on assumptions / premises. The Ld. Commission has failed to appreciate that after the approval(s) was granted by the Ld. Commission that the power was procured by the Appellant from these generators.
  29. The impugned judgment shall have grave consequences not only for the Appellant but also for the consumers in the State of Kerala. The interest of the consumers has been completely over-looked / omitted from any consideration whatsoever while passing the impugned judgment.
  30. Hence, the Appellant is constrained to file the present appeal challenging the impugned judgment dated 10.05.2023 passed by the Ld. KSERC in OP No. 05 / 2021 (uploaded on the website of the Commission on 16.05.2023).

### **LIST OF DATES**

2011-2012	<p>From the year 2011-12 onwards, the State of Kerala had been facing huge power and energy shortage and load shedding and power restrictions. The internal generation was not sufficient to meet the demand and there was severe congestion in the transmission corridor for drawal of power by the Southern Region from other parts of the country. One of the reasons for this congestion was the limited Available Transfer Capacity (ATC) between the Northern, Eastern and Western Grids on the one hand and the Southern Grid on the other hand. During that period, Short Term Open Access (STOA) applications of the Appellant for drawing power from various generators - were being denied on grounds of corridor constraints. The Southern Regional Load Despatch Centre (SRLDC) denied 547 STOA applications of the Appellant for drawal of power, during the said period from 2011-12 to 2014-15.</p> <p>The Ld. State Commission, taking into consideration the said problems being faced by State of Kerala, had issued directions to KSEBL for taking steps to procure power on the basis of long term contracts through bidding process, instead of resorting to power procurement on short-term basis.</p> <p>KSEBL decided to contract power on long term basis in such a manner so as to file LTA Applications latest by December 2014, in order to be eligible for processing along with all other applications received by CTU in second half of 2014. For this purpose, the bidding process for entering into Power Purchase Agreements for long term procurement of power - was also to get completed before December 2014.</p>
08.11.2013	<p>The Ministry of Power (MoP), Government of India issued new Guidelines for Tariff Based Competitive Bidding for</p>

	<p>procurement of electricity from Thermal Power Stations set up on DBFOO [ Design Build Finance Own and Operate ] basis, thereby also repealing the erstwhile guidelines notified in 2005 for Case-1 bidding. These Guidelines are hereinafter referred to as the “DBFOO Guidelines”.</p>
17.12.2013	<p>Government of Kerala, vide letter dated 17.12.2013, also directed the Appellant – KSEBL to adopt the above DBFOO Guidelines for long term procurement of power, for meeting the energy demands of the State.</p> <p>Transmission corridor of around 661 MW capacity was to become available only by June 2016. Further, the demand during the monsoon months from June 2016 onwards was estimated to be manageable with the availability of 400 MW MTOA contracts. However, during the subsequent summer, as the demand would have peaked, additional power was required. Considering all these factors, the Appellant decided to fix the Start Date of supply of 450 MW power as December 2016 (out of the total requirement of 850 MW).</p> <p>The 400 MW power contracted on Medium Term basis [ PPA for 300 MW with NVVN and PPA for 100 MW with PTC – as submitted hereinabove ] was to expire by February 2017. The Angul-Srikakulam 765KV line was expected to commission in 2017 and the Hyderabad-Wardha 765KV line was expected to commission in 2017-18. Considering the addition in capacity of the transmission corridor due to the commissioning of these transmission lines, along with the further availability of existing transmission corridor due to the expiry of medium term contracts of Tamil Nadu [ PPA of 150 MW with EMCO was to expire on 31.05.2017 and PPA of 59.5 MW with Jindal Power Ltd. was to expire on 31.08.2017 ], the Start Date for supply for the balance 400 MW out of the</p>

	<p>total requirement of 850 MW was decided as October 2017, i.e. after the end of the South West Monsoon period.</p> <p>Since the DBFOO guidelines provides for only one delivery date (CoD) to be prescribed in a Bid and since two delivery dates were found to have become necessary, based on the assessment of the transmission corridor availability, it became imperative to invite two separate bids with two separate start dates.</p>
30.07.2014	For seeking guidance from the MoP, based on queries received in the pre-bid meeting, the bid documents were also forwarded by the Appellant to the MoP on 30.07.2014.
06.08.2014	After vetting the Bid Documents sent by the Appellant – KSEBL, the MoP, Government of India gave its response on 06.08.2014, wherein no fault / deviation was found with any of the stipulations in the Bid documents and the MoP commented only on one aspect – i.e. that different sources of fuel cannot be specified in one bid [this stipulation was also rectified subsequently while issuing the RfP to the qualified Bidders].
23.08.2014	KSEBL had also sought clarifications from MoP on 23.08.2014 on handling a situation wherein L1 bidder may not submit a Bid for the entire Bid quantum and may submit a Bid only for a portion of the entire Bid quantum.
05.09.2014	RFP was issued by KSEBL for Bid-1.
01.10.2014	RFP was issued by KSEBL for Bid-2.
17.12.2014	The Appellant communicated the outcome of the process including the discovered price, to the MoP, Govt. of India, by its letter dated 17-12-2014. It is respectfully submitted that no response to this letter was received from the MoP, Govt. of India.
18.12.2014	The Appellant, vide its letter dated 18.12.2014, also informed



	the Ld. State Commission about the outcome of competitive bidding process initiated by KSEBL.
20.12.2014	Government of Kerala, vide order G. O. (Ms.) No. 45/2014/PD dated 20.12.2014 accorded sanction for the long term power procurement of 200 MW @ Rs. 3.60 per kWh and 115 MW @Rs. 4.15 per kWh as on Bid Date from L1 and L2 bidders respectively of Bid 1 and for 550 MW @ Rs. 4.29 per kWh as on Bid Date from L1 to L5 bidders of Bid 2.
26.12.2014	7 PSAs were executed by the Appellant with the respective generators, from 26.12.2014 to 02.02.2015. Subsequently, the PSA dt. 02.02.2015 with East Coast Energy Pvt. Ltd. came to be terminated.
20.04.2015	Appellant filed Petition (OP 13/2015) before the Ld. State Commission for the adoption of tariff as per Section 63 of the 2003 Act.
05.05.2015	By a communication dated 05.05.2015 [ i.e. after a period of about 9 months from the date when the clarifications were sought by the Appellant ], MoP issued the clarification on the queries raised by the Appellant by way of modification in the DBFOO guidelines.
27.01.2016	On 07.12.2015, the Ld. State Commission had sought certain further information from the Appellant. The said information was furnished by the Appellant to the Ld. State Commission on 27.01.2016.
30.08.2016	The Ld. State Commission passed an order in the said Petition on 30.08.2016 wherein, <i>inter alia</i> , the Ld. State Commission approved the PSAs and adopted the Tariff of L1 bidders under Bid 1 and Bid 2 namely 200 MW from Jindal Power Ltd (Bid-1) and 100 MW from BALCO (Bid-2) and observed that the power purchase from the remaining bidders would be approved after getting remarks from the

	Government of Kerala and approval of the bidding process from MoP.
07.09.2016	KSEBL, on 07.09.2016, furnished all the required details to facilitate the Government of Kerala to take a considered decision. On 15.09.2016, the Government of Kerala sent a communication to the Government of India, seeking its approval for the procedure adopted.
03.11.2016 and 15.11.2016	By its letters dated 03.11.2016 and 15.11.2016, KSEBL sought the approval of Government of Kerala and the Ld. State Commission respectively for scheduling 115 MW power from M/s. Jhabua Power Ltd. (L2 bidder of Bid 1) from December 2016.
18.11.2016	The Central Government, by its communication dated 18.11.2016, observed that the issues highlighted by the Ld. Commission may not constitute “ <i>deviations</i> ” and that the approval of the Central Government is only required in relation to any deviation from the Guidelines and not for any practice followed by the procurer i.e. the Appellant, for the bidding evaluation process.
30.11.2016 / 22.12.2016	Government of Kerala approved the procurement vide GO (Rt) No.238/2016/PD dated 30.11.2016. Further, the Ld. State Commission, vide order dated 22.12.2016, also gave its provisional approval for the PSA of the L2 bidder under Bid-1 i.e. 115 MW from Jhabua Power Ltd.
10.05.2017, 03.07.2017, 22.09.2017	The matter of approval of the balance PSAs under Bid 2 was again taken up by the Appellant with the Government of Kerala vide letters dated 10-05-2017, 03-07-2017 and 22-09-2017.
21.10.2017	Government of Kerala, vide order dated 21-10-2017, permitted KSEBL to draw power from the entire DBFOO contracts, pending detailed consideration of the matter. It

	was also stated that final orders in the matter shall be issued in due course.
22.12.2017	Vide order dated 22.12.2017, the Ld. State Commission also allowed the Appellant to draw the contracted power from the PSAs executed under the DBFOO Guidelines, in view of the order of the State Government vide GO (Ms) No. 22/2017/PD dated 21.10.2017.
08.07.2017	The Ld. State Commission, vide the order dated 08.07.2019 in OA No. 15/2018 in the matter of approval of the 'ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22', has approved the source-wise details of the power purchase and cost from various sources including 'Central Generating Stations (CGS)' and also the power purchase under long term contracts from private IPPs. However, citing that the required approvals from Government of India and the State Government were awaited, for estimating the ARR & ERC for the control period, the rate of power from BALCO, which is the L1 of Bid 2, was considered provisionally by the Ld. State Commission in respect of other generators in Bid 2 (350 MW).
11.12.2019	The MoP, Government of India, vide its letter dated 11.12.2019, reiterated its observations made in its earlier communication dt. 18.11.2016.
26.12.2019	This communication dt. 11.12.2019 of the MoP was also intimated by the Appellant to the Ld. State Commission, by letter dated 26-12-2019.
14.02.2020	The Ld. State Commission, by its order dated 14.02.2020, while approving the fuel surcharge petition for the first quarter, did not approve the fuel surcharge for procuring power from the above sources and ordered that excess amount incurred for procuring power from these three

	generators shall not be considered during truing up process.
27.04.2020	Vide order dated 27.04.2020, while approving the fuel surcharge petition for the second quarter, the Ld. State Commission did not approve the fuel surcharge for procuring power from the above sources and ordered that excess amount incurred for procuring power from these three generators shall not be considered during truing up process.
14.08.2020	KSEBL, vide Review Petitions dated 30.03.2020 and 04.06.2020 sought review of the above-mentioned orders and prayed for permission for passing on of additional fuel cost incurred against PSAs with Jindal India Thermal Power Ltd, Jindal Power Ltd and Jhabua Power Ltd under Bid-2 of DBFOO and to issue appropriate directions on the drawal of power contracted against these PSAs if the Ld. State Commission is not inclined to pass over the liabilities of 350 MW PSAs executed on DBOO basis under Bid 2. By a common order dated 14.08.2020, the Review Petitions filed by the Appellant (KSEBL) i.e. RP 2/2020 and RP 4/2020, were dismissed by the Ld. State Commission.
12.11.2020	The Appellant filed a petition before the Ld. State Commission requesting the Ld. State Commission to pass final orders with respect to drawal of the 350 MW of contracted power under DBFOO Bid-2 (Jindal Power Ltd. - 150 MW, Jhabua Power Ltd. – 100 MW and Jindal India Thermal Power Ltd. – 100 MW). The petition got numbered as OP 05/2021.
20.11.2020	One of the generators (JITPL) filed an Appeal before this Hon'ble Tribunal, numbered as DFR No. 369 of 2020, challenging the orders dated 14.02.2020, 27.04.2020 and 14.08.2020 passed by Ld. KSERC. This Hon'ble Tribunal, by its order dated 20.11.2020 passed in the Appeal filed by

	<p>JITPL, had been pleased to <i>inter alia</i> grant stay of the orders dated 14.02.2020 and 27.04.2020 passed by Ld. KSERC on the subject of fuel surcharge and restore the status quo ante of the dispensation prevailing immediately anterior thereto. Further, by the consent of all parties, this Hon'ble Tribunal had been pleased to <i>inter alia</i> direct that the Petition filed by KSEBL before the Ld. KSERC, shall be heard and decided expeditiously by the Ld. KSERC.</p>
02.12.2020	<p>A communication dated 02.12.2020 had been issued by the Ld. State Commission wherein, <i>inter alia</i>, the Appellant was asked to once again deposit the Court Fee for the approval of the PSAs [ which, as per the applicable Regulations, amounts to Rs. 21.625 lakhs ]. Further, the office of the Ld. State Commission called upon the Appellant to change the Prayer in its petition from the prayer for "Final Decision" on the pending application to a fresh prayer for "Approval" of the PSAs [ even when the earlier application - OP No. 13/2015 had remained pending before the Ld. State Commission since 2015 ].</p>
14.12.2020	<p>The Appellant responded to the notice dt. 02.12.2020 by its letter dt. 14.12.2020. In its response letter dt. 14.12.2020, it has, <i>inter alia</i>, been stated by Appellant that it had already deposited the Court Fee of Rs. 21.625 lakhs for the approval of the PSAs while filing Application - OP No. 13/2015 in the year 2015 [ at the rate of Rs.100 per MW per annum for 865 MW capacity for the 25 year contracts, in terms of the Regulations ]. The said Application has remained pending before the Ld. State Commission. The Fresh Petition has been filed before the Ld. State Commission for a final decision on the very same application which has remained pending since 2015. For the</p>

	Fresh Petition No. 1983 / 2020 filed by the Appellant [ praying for final disposal of the pending Application OP No. 13/2015 ], the applicable Court Fee of Rs. 10,000/- had also been deposited.
20.01.2021	The Fresh Petition was numbered as OP No. 05/2021 and was listed for hearing vide the notice dated 20.01.2021 issued by the Ld. State Commission.
27.01.2021	The Ld. State Commission filed an Appeal before the Hon'ble Supreme Court (Civil Appeal No. 41/2021) against the interim order dated 20.11.2020 of this Hon'ble Tribunal. In the said appeal, the Hon'ble Supreme Court vide its order dated 27.01.2021 stayed the interim order dated 20.11.2020 of this Hon'ble Tribunal.
27.10.2021	Government of Kerala, vide G.O. (Rt) No.163 / 2021 / POWER dated 27.10.2021, has constituted a Committee to examine the bidding process and purchase agreements entered into by KSEBL under DBFOO guidelines based on the comments of the statutory agencies and the possibility of terminating/renegotiating the Power Purchase Agreement in the best interest of the State on a request pending before it from KSEBL to approve the deviations in the bidding process leading to the present PPAs. The Committee shall submit report to the Government.
25.06.2022	In the Multi Year Tariff (MYT) order dated 25.06.2022, for the years 2022-23 to 2026-27, the Ld. State Commission approved only 300 MW of power (L1 of Bid I & II) only for the next control period from 2022-23 to 2026-27 out of 765 MW of power contracted through DBFOO contracts. The Ld. Commission has, <i>inter alia</i> , observed in its order dated 25.06.2022 that it cannot permit KSEBL to continue scheduling of power from the four provisionally approved/

	<p>unapproved contracts. The Ld. Commission permitted KSEBL to make necessary arrangements for procuring 465 MW of equivalent power on medium term basis through competitive bidding as per Section 63 of the Electricity Act, 2003. Alternatively, KSEBL has been directed to make necessary arrangements for procuring 465 MW from power plants through competitive bidding route from generators who have been assigned coal linkage as per the SHAKTI policy of the Central Government.</p> <p>Appeals have been filed by the respective generators against the said order dt. 25.06.2022 of the Ld. State Commission, and the said Appeals are pending before this Hon'ble Tribunal, wherein interim orders have been passed by this Hon'ble Tribunal for supply of power at the L-1 rate in terms of the said PSAs [ Appeal Nos. 167 / 2023, 253 / 2023 and 359 / 2023 ].</p>
10.02.2023	Vide its order dt. 10.02.2023, the Hon'ble Supreme Court was been pleased to dispose of the Appeal (C.A. 41 / 2021) filed by the Ld. State Commission, directing the Commission, <i>inter alia</i> , to decide OP No. 05/2021 expeditiously and not later than 3 months.
22.03.2023	The Appellant (KSEBL) filed an Amendment Application before the Ld. State Commission, praying for amendment of the prayer clause, to include all 4 PSAs which were described as "unapproved PSAs" by the Ld. State Commission in its order dt. 25.06.2022.
29.03.2023, 30.03.2023, 11.04.2023	In terms of the order dated 10.02.2023 passed by the Hon'ble Supreme Court, the Petition No. OP 5/2021 was finally heard by the Ld. State Commission on 29.03.2023, 30.03.2023 and 11.04.2023. Orders were reserved on 11.04.2023. On 10.04.2023, the Appellant (KSEBL) had filed

	its Written Submissions before the Ld. KSERC.
12.04.2023	The Ld. KSERC, after reserving the orders on 11.04.2023, issued its Daily Order dt. 12.04.2023 wherein, <i>inter alia</i> , the Appellant was required to file its final submissions alongwith an Affidavit, within a period of 7 days.
17.04.2023	As directed by the Ld. KSERC, on 17.04.2023, the Appellant (KSEBL) filed a Supplementary Affidavit before the Ld. Commission.
10.05.2023 / 16.05.2023	On 16.05.2023, the Impugned Judgment dated 10.05.2023 was uploaded on the website of the Ld. KSERC, whereby the Ld. KSERC has rejected the petition of the KSEBL, i.e., Petition No. 5/2021.
24.05.2023	Hence, the present Appeal.



**MEMO OF PARTIES**  
**BEFORE THE HON'BLE APPELLATE TRIBUNAL FOR ELECTRICITY**  
**AT NEW DELHI**  
**APPEAL NO \_\_\_\_\_ OF 2023**

**BETWEEN:**

Kerala State Electricity Board Ltd.  
through its Resident Engineer  
Vydyuthi Bhavanam  
Thiruvananthapuram  
Email: [trac@kseb.in](mailto:trac@kseb.in)  
Ph. No.: - 0471-2514554

.....Appellant

Versus

1. Kerala State Electricity Regulatory Commission  
Represented by its Secretary  
K.P.F.C. Bhavanam,  
C.V. Raman Pillai Road, Vellayambalam  
Thiruvananthapuram, Kerala – 695010.  
E-mail: [kserc@erckerala.org](mailto:kserc@erckerala.org)  
Ph. No.: - 0471-2735544

.....Respondent No.1

2. Jhabua Power Limited  
Through its Managing Director  
Unit No.307, Third Floor, ABW Tower, M.G Road,  
Gurugram, Haryana - 122002  
Email: [info@jhabuapower.co.in](mailto:info@jhabuapower.co.in)  
Ph.No.: +91-120-4948000

.....Respondent No.2

3. Jindal India Thermal Power Limited  
Through its Managing Director  
Plot No.2, Pocket-C, Second Floor, Nelson Mandela Road,  
Vasant Kunj, New Delhi - 110070  
Email: [jitpl.ra@jindalgroup.com](mailto:jitpl.ra@jindalgroup.com)  
Ph.No.: +91-11-43552390

.....Respondent No.3

4. Jindal Power Limited,  
Through its Managing Director  
Jindal Centre,  
12, Bhikaji Cama Place, New Delhi - 110066.  
E mail: [info@jindalpower.com](mailto:info@jindalpower.com)  
Ph.No.: +91-11-26188340

.....Respondent No.4

PRABHAS BAJAJ  
ADVOCATE FOR THE APPELLANT  
607, Adishwar Building,  
34, Firozeshah Road, New Delhi – 110001  
MOB: +91-9810067648  
[prabhasbajaj@gmail.com](mailto:prabhasbajaj@gmail.com)

NEW DELHI  
DATE: 24.05.2023

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY****NEW DELHI****[APPELLATE JURISDICTION]**

APPEAL NO. OF 2023

**IN THE MATTER OF:**

Appeal against the order dt. 10.05.2023 passed by the Kerala State Electricity Regulatory Commission in OP No. 05 / 2021.

**AND****IN THE MATTER OF:**

Kerala State Electricity Board (KSEB),  
through its Resident Engineer  
Vydyuthi Bhavanam, Pattom,  
Thiruvananthapuram,  
Kerala - 695 004

Email: [trac@kseb.in](mailto:trac@kseb.in)

Ph. No.:- 0471-2514554

..... Appellant

Versus

1. Kerala State Electricity Regulatory Commission

Represented by its Secretary

K.P.F.C. Bhavanam,

C.V. Raman Pillai Road, Vellayambalam

Thiruvananthapuram, Kerala – 695010.

E-mail: [kserc@erckerala.org](mailto:kserc@erckerala.org)

Ph. No.:- 0471-2735544.

2. Jhabua Power Limited

Through its Managing Director

Unit No.307, Third Floor, ABW Tower, M.G Road,

Gurugram, Haryana - 122002

Email: [info@jhabuapower.co.in](mailto:info@jhabuapower.co.in)

Ph.No.: +91-120-4948000.

3. Jindal India Thermal Power Limited  
Through its Managing Director  
Plot No.2, Pocket-C, Second Floor, Nelson Mandela Road,  
Vasant Kunj, New Delhi - 110070  
Email: [jitpl.ra@jindalgroup.com](mailto:jitpl.ra@jindalgroup.com)  
Ph.No.: +91-11-43552390.
  
4. Jindal Power Limited,  
Through its Managing Director  
Jindal Centre,  
12, Bhikaji Cama Place, New Delhi - 110066.  
E mail: [info@jindalpower.com](mailto:info@jindalpower.com)  
Ph.No.: +91-11-26188340.

..... Respondents

### **APPEAL UNDER SECTION 111 OF THE ELECTRICITY ACT, 2003**

#### **MOST RESPECTFULLY SHOWETH:**

##### **1. DETAILS OF APPEAL:**

The present appeal is being filed by the Appellant against the order dated 10.05.2023 passed by the Ld. Kerala State Electricity Regulatory Commission in OP No. 05 / 2021 – Kerala State Electricity Board Ltd. Vs. Jhabua Power Ltd. & Ors. A copy of the impugned order dated 10.05.2023 passed by the Ld. Kerala State Electricity Regulatory Commission in OP No. 05 / 2021 is annexed with this Appeal as **ANNEXURE A1**.

##### **2. DATE ON WHICH THE ORDER APPEALED AGAINST IS COMMUNICATED AND PROOF THEREOF, IF ANY:**

The impugned order was passed by the Ld. Kerala State Electricity Regulatory Commission in OP No. 05 / 2021 on 10.05.2023.

### 3. THE ADDRESS OF THE APPELLANT FOR SERVICE AS SET OUT HEREUNDER:

1. Kerala State Electricity Board (KSEB),  
through its Resident Engineer  
Vydyuthi Bhavanam, Pattom,  
Thiruvananthapuram-695 004.  
Ph.No.: 0471-2514554, 9446008570  
Email: [trac@kseb.in](mailto:trac@kseb.in)

Address of the counsel:

Prabhas Bajaj, Advocate  
607, Adishwar Building,  
34, Firozeshah Road, New Delhi - 110001  
Email: [prabhasbajaj@gmail.com](mailto:prabhasbajaj@gmail.com)  
Ph.No.: +91-9810067648

### 4. DETAILS OF THE RESPONDENTS:

1. Kerala State Electricity Regulatory Commission  
Represented by its Secretary  
K.P.F.C. Bhavanam,  
C.V. Raman Pillai Road, Vellayambalam  
Thiruvananthapuram – 695010, Kerala  
E-mail: [kserc@erckerala.org](mailto:kserc@erckerala.org)  
Ph. No.:- 0471-2735544.
2. Jhabua Power Limited  
Through its Managing Director  
Unit No.307, Third Floor, ABW Tower, M.G Road,  
Gurugram, Haryana - 122002  
Email: [info@jhabuapower.co.in](mailto:info@jhabuapower.co.in)  
Ph.No.: +91-120-4948000.

3. Jindal India Thermal Power Limited

Through its Managing Director

Plot No.2, Pocket-C, Second Floor, Nelson Mandela Road,

Vasant Kunj, New Delhi - 110070

Email: [jitpl.ra@jindalgroup.com](mailto:jitpl.ra@jindalgroup.com)

Ph.No.: +91-11-43552390.

4. Jindal Power Limited,

Through its Managing Director

Jindal Centre,

12, Bhikaji Cama Place, New Delhi - 110066.

E mail: [info@jindalpower.com](mailto:info@jindalpower.com)

Ph.No.: +91-11-26188340.

**5. JURISDICTION OF THE APPELLATE TRIBUNAL:**

The Appellant declares that the subject matter of the order, against which the Appellant has appealed, is within the jurisdiction of the Hon'ble Tribunal in terms of Section 111 of the Electricity Act, 2003.

**6. LIMITATION:**

The impugned order had been passed on 10.05.2023 by the Ld. Kerala State Electricity Regulatory Commission and uploaded on its website on 16.05.2023. In view of the above, the appeal is within the period of limitation and there is no delay in filing of the Appeal.

**7. FACTS OF THE CASE:**

- 7.1 It is most respectfully submitted that the Appellant - KSEBL is an integrated State Public Sector power utility company constituted by the State Government of Kerala. KSEBL is carrying out the functions of Generation, Transmission and Distribution of electricity, through three separate strategic units in the State of Kerala. The distribution unit has

been meeting the energy requirements of the consumers by optimally scheduling power from own generating stations of KSEBL as well as purchasing power from various sources prudently and economically, keeping in view the needs and requirements of the consumers of the State and in such a manner that the benefit is passed on to the consumers of the State.

- 7.2 It is most respectfully submitted that from the year 2011-12 onwards, the State of Kerala had been facing huge power and energy shortage and load shedding and power restrictions. The internal generation was not sufficient to meet the demand and there was severe congestion in the transmission corridor for drawal of power by the Southern Region from other parts of the country. One of the reasons for this congestion was the limited Available Transfer Capacity (ATC) between the Northern, Eastern and Western Grids on the one hand and the Southern Grid on the other hand. During that period, Short Term Open Access (STOA) applications of the Appellant for drawing power from various generators - were being denied on grounds of corridor constraints. The Southern Regional Load Despatch Centre (SRLDC) denied 547 STOA applications of the Appellant for drawal of power, during the said period from 2011-12 to 2014-15.
- 7.3 Further, the MTOA application of the Appellant, for the PPAs for capacity of 400 MW executed by it in 2013 for drawing power with effect from 01.03.2014 [ PPA for 300 MW capacity with NTPC Vidyut Vyapar Nigam (NVVN) and PPA for 100 MW capacity with PTC India Ltd. ] - was also denied on the grounds of corridor constraints. The Central Transmission Utility (CTU) also denied 38 MTOA applications of the Appellant for drawal of power during this period, citing the reason that MTOA applications have lesser priority as compared to Long Term Access applications, as per the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in Inter-State Transmission and Related Matters) Regulations, 2009 [ hereinafter referred to as the 2009

Connectivity Regulations ] which stipulate that long term contracts shall have the highest priority in grant of open access. For ready reference, Regulation 10 of the 2009 Connectivity Regulations is reproduced as under:-

**“10. Relative priority**

*(1) Applications for long-term access or medium-term open access shall be processed on first-come-first-served basis separately for each of the aforesaid types of access:*

*Provided that applications received during a month shall be construed to have arrived concurrently;*

*Provided further that while processing applications for medium-term open access received during a month, the application seeking access for a longer term shall have higher priority;*

*Provided also that in the case of applications for long-term access requiring planning or augmentation of transmission system, such planning or augmentation, as the case may be, shall be considered on 30th of June and 31st of December in each year in order to develop a coordinated transmission plan, in accordance with the perspective transmission plans developed by the Central Electricity Authority under section 73 of the Act;*

*Provided also that if an intra-State entity is applying for long-term access or medium-term open access, concurrence of the State Load Despatch Centre shall be obtained in advance and submitted along with the application to the nodal agency. The concurrence of the State Load Despatch Centre shall be in such form as may be provided in the detailed procedure.*

*(2) Where necessary infrastructure required for energy metering and time-block-wise accounting already exists and required transmission capacity in the State network is available, the State Load Despatch Centre shall convey its concurrence to the applicant within ten working days of receipt of the application.”*

- 7.4 That the Kerala State Electricity Regulatory Commission [ hereinafter referred to as the “Ld. State Commission” – i.e. Respondent No.1 ], taking into consideration the said problems being faced by the State of Kerala, had issued directions to the Appellant for taking steps to procure power on the basis of long term contracts through bidding process, instead of resorting to power procurement on short-term basis. In one such order



dated 30.04.2013 passed by the Ld. State Commission in OP No. 2 of 2013, the Ld. State Commission issued, *inter alia*, the following directions to the Appellant:-

*“..... The Board shall streamline the power purchase functions in a professional manner and take advantage of the market functions effectively. The Board should finalize long term contracts for power purchase including the Case-1 bidding immediately. The Board should take timely advance action for booking corridors so that power restrictions are reduced to the minimum levels in the ensuing months.....”*

- 7.5 It is most respectfully reiterated that as per the 2009 Connectivity Regulations issued by CERC, the procurement of power tied up on Long Term basis through Long Term Access (LTA) has priority over Medium Term Open Access (MTOA) and Short Term Open Access (STOA). Further, in the case of LTA applications, it is mandatory for the CTU to build and / or provide Long Term Access either through the available existing corridor or by constructing new transmission lines.
- 7.6 That before constructing any new transmission lines, the CTU has to undertake a system study. Such system studies are carried out only twice a year [ in June and December ] by clubbing the applications received in that year upto that month. The maximum time limit for commencement of LTA is specified in the 2009 Connectivity Regulations as - 3 years & 9 months from the date of receipt of the application by the CTU.
- 7.7 It is most respectfully submitted that having regard to the huge and rapidly growing electricity deficit in the State of Kerala and also considering the regulatory provisions in relation to priority for grant of open access etc. [ including the factum of the MTOA Applications and STOA Applications of the Appellant having been rejected a number of times ], the Appellant - KSEBL decided to contract power on long term basis in such a manner so as to file LTA Applications latest by December 2014, in order to be eligible for processing along with all other applications received by CTU in second half of 2014. For this purpose, the bidding process for entering

into Power Purchase Agreements for long term procurement of power - was also to get completed before December 2014.

- 7.8 It is most respectfully submitted that in the meanwhile, vide resolution dated 08.11.2013, the Ministry of Power (MoP), Government of India issued new Guidelines for Tariff Based Competitive Bidding for procurement of electricity from Thermal Power Stations set up on DBFOO [ Design Build Finance Own and Operate ] basis, thereby also repealing the erstwhile guidelines notified in 2005 for Case-1 bidding. These Guidelines are hereinafter referred to as the “DBFOO Guidelines”. It is most respectfully submitted that the DBFOO Guidelines and the Standard Bidding Documents [ which form a part of the Guidelines ] have been notified by the Ministry of Power, Government of India in exercise of powers under Section 63 of the Electricity Act, 2003 [ the “2003 Act” ].
- 7.9 Along with the DBFOO Guidelines, the Ministry of Power, Government of India also issued model documents comprising the Model Request for Qualification (MRFQ), the Model Request for Proposal (MRFP) and the Model Power Supply Agreement (MPSA), collectively called the Standard Bidding Documents (SBDs) - to be adopted by distribution licensees for procurement of electricity from power producers selected through a process of open and transparent competitive bidding in terms of the DBFOO Guidelines. A copy of the DBFOO Guidelines dt. 08.11.2013 issued by the Government of India alongwith the Model RFP under the said Guidelines, is annexed herewith and marked as **ANNEXURE A2**.
- 7.10 It is most respectfully submitted that in the DBFOO Guidelines, the duration of the contract / Power Purchase Agreement executed under these Guidelines is fixed as 25 years. One of the objectives is to ensure that having regard to the assured purchase of 25 years, the tariff of power quoted by the generators is reasonable. The entire contractual scheme in the DBFOO bid documents has been designed and notified, having regard to the contractual period of 25 years.

- 7.11 It is most respectfully submitted that the Government of Kerala, vide letter dated 17.12.2013, also directed the Appellant – KSEBL to adopt the above DBFOO Guidelines for long term procurement of power, for meeting the energy demands of the State. In terms of the letter dated 17.12.2013 of the Government of Kerala, KSEBL took a decision on 21.02.2014 for procurement of power on long term basis and in terms of the DBFOO Guidelines. A copy of the communication dt. 17.12.2013 issued by Government of Kerala is annexed herewith and marked as **ANNEXURE A3.**

**DECISION TO INVITE 2 SEPARATE BIDS WITH 2 SEPARATE DATES FOR COMMENCEMENT OF SUPPLY OF POWER – BASED ON THE ESTIMATED DATES OF AVAILABILITY OF TRANSMISSION CORRIDOR**

- 7.12 It is most respectfully reiterated, as submitted hereinabove, that having regard to the urgent need and requirement of power in the State of Kerala as well as the need for avoiding load shedding and load restrictions in the State of Kerala, KSEBL had decided that it would be required to procure 850 MW of power from Generating Stations outside the State of Kerala, to meet the peak demand and energy requirements of the State. Further, the decision was taken to procure 850 MW power on long term basis and in terms of the DBFOO Guidelines.
- 7.13 That as per the 2009 Connectivity Regulations of CERC, the applications for open access are granted on 'First Cum First Serve Basis'. At that point of time, Long Term Access applications totaling to capacity of 2488.5 MW by other Southern states (including Tamil Nadu) were pending before the CTU, which had not yet been granted on account of non-availability of transmission corridor. Further, at that point of time, other constituents of the Southern Region were also in the process of contracting power on long term basis, to the tune of 5400 MW i.e. Andhra Pradesh (2400 MW), Telangana (2000 MW) and Karnataka (1000 MW).
- 7.14 As per the deliberations during various Standing Committee meetings for power system planning held by the Central Electricity Authority (CEA) during that period, as well as the meetings conducted by the Central

Transmission Utility (CTU) for processing of LTA applications, it was assessed that with the commissioning of the Raichur-Sholapur 765KV line in 2014-15, and Narendra-Kolhapur 765KV line in 2016, the transmission corridor availability for Southern Region was expected to increase gradually by around 2250 MW in 2016.

- 7.15 It was further noted that during November 2015 to June 2016, MTOA contracts totaling to capacity of about 900 MW - were to expire. Thus, around 3150 MW (2250 MW + 900 MW) of transmission corridor was expected to become available in 2016.
- 7.16 Considering the pending LTA applications of 2488.5 MW before CTU as on 21.02.2014 [ the date of the decision of KSEBL to invite bids under the DBFOO Guidelines for procurement of power on long term basis ], around 661 MW capacity of corridor was expected to become available from June 2016 onwards, as against 850 MW being the assessed requirement of the State of Kerala.
- 7.17 It is most respectfully submitted that as per the DBFOO Guidelines, after entering into Power Purchase Agreements, if the power could not be evacuated, the buying entity is bound to pay 50% of the fixed charges to the supplier [ Clause 21.4.3 of the PSA ]. Therefore, the Start Date of supply under the DBFOO contracts had to be carefully fixed, after duly considering the future availability of transmission corridors.

**Start Date of Supply of 450 MW power – from December 2016**

- 7.18 That as submitted hereinabove, transmission corridor of around 661 MW capacity was to become available only by June 2016. Further, the demand during the monsoon months from June 2016 onwards was estimated to be manageable with the availability of 400 MW MTOA contracts. However, during the subsequent summer, as the demand would have peaked, additional power was required. Considering all these factors, the Appellant decided to fix the Start Date of supply of 450 MW power as December 2016 (out of the total requirement of 850 MW).

**Start Date of Supply of 400 MW power – from October 2017**

- 7.19 The 400 MW power contracted on Medium Term basis [ PPA for 300 MW with NVVN and PPA for 100 MW with PTC – as submitted hereinabove ] was to expire by February 2017. The Angul-Srikakulam 765KV line was expected to commission in 2017 and the Hyderabad-Wardha 765KV line was expected to commission in 2017-18. Considering the addition in capacity of the transmission corridor due to the commissioning of these transmission lines, along with the further availability of existing transmission corridor due to the expiry of medium term contracts of Tamil Nadu [ PPA of 150 MW with EMCO was to expire on 31.05.2017 and PPA of 59.5 MW with Jindal Power Ltd. was to expire on 31.08.2017 ], the Start Date for supply for the balance 400 MW out of the total requirement of 850 MW was decided as October 2017, i.e. after the end of the South West Monsoon period.
- 7.20 It is most respectfully submitted that since the DBFOO guidelines provides for only one delivery date (CoD) to be prescribed in a Bid and since two delivery dates were found to have become necessary, based on the assessment of the transmission corridor availability, it became imperative to invite two separate bids with two separate start dates. Further, as submitted hereinabove, in order to get priority in the allocation of scarce transmission corridor capacity, the applications were to be filed latest by December 2014, after completing all the bid formalities.
- 7.21 That in view of the minimum time period of about 6 months specified in the Guidelines for the bid process, it became necessary to float both the bids during first half of 2014 itself. As per DBFOO guidelines, the minimum time for completing the tender procedures was about 6 months (Qualification Stage – 60 days, Bidding Stage – 105 days). Based on these time limits, it was assessed that the tender procedures would be completed before December 2014 and the LTA applications for the same could be submitted by December 2014 so that availability of corridor can be ensured for the Start Dates specified in the bids.

- 7.22 Accordingly, KSEB Ltd. decided to invite two separate bids as per the DBFOO guidelines, for the procurement of RTC power from Thermal Power Stations set up on DBFOO basis for a period of 25 years –
- a. Bid-1 for 450 MW through RFQ issued on 05.03.2014; and
  - b. Bid-2 for 400 MW through RFQ issued on 25.04.2014.
- 7.23 It is most respectfully submitted that for seeking guidance from the MoP, based on queries received in the pre-bid meeting, the bid documents were also forwarded by the Appellant to the MoP on 30.07.2014. A copy of the communication dt. 30.07.2014 issued by KSEBL to Government of India is annexed herewith and marked as **ANNEXURE A4**.
- 7.24 It is most respectfully submitted that after vetting the Bid Documents sent by the Appellant – KSEBL, the MoP, Government of India gave its response on 06.08.2014, wherein no fault / deviation was found with any of the stipulations in the Bid documents and the MoP commented only on one aspect – i.e. that different sources of fuel cannot be specified in one bid [this stipulation was also rectified subsequently while issuing the RfP to the qualified Bidders]. Apart from this, no other deviations were found or point out by MoP. A copy of the communication dt. 06.08.2014 from Government of India to KSEBL is annexed herewith and marked as **ANNEXURE A5**.
- 7.25 It is most respectfully submitted that KSEBL had also sought clarifications from MoP on 23.08.2014 on handling a situation wherein L1 bidder may not submit a Bid for the entire Bid quantum and may submit a Bid only for a portion of the entire Bid quantum. A copy of the communication dt. 23.08.2014 from KSEBL to Government of India is annexed herewith and marked as **ANNEXURE A6**.
- 7.26 It is most respectfully reiterated that on the aforesaid issue of the procedure to be followed in case the L1 Bidder does not submit a Bid for the entire Bid quantum, KSEBL repeatedly sought clarifications from the MoP [ including through its letter dt. 16.09.2014 ], however, no clarification or response was received from the MoP on this issue. A copy

of the communication dt. 16.09.2014 from KSEBL to Government of India is annexed herewith and marked as **ANNEXURE A7**.

7.27 A copy of the RFP dated 05.09.2014 issued by KSEBL (for Bid-1) is annexed herewith and marked as **ANNEXURE A8**. A copy of the RFP dated 01.10.2014 issued by KSEBL (for Bid-2) is annexed herewith and marked as **ANNEXURE A9**.

7.28 It is most respectfully submitted that in Bid-1, the L-1 Bidder had submitted a Bid only for 200 MW capacity at Rs. 3.60 / unit. Further, the L-2 Bidder in Bid-1 had submitted a Bid for 115 MW capacity of Rs.4.15 / unit. The tariff quoted by the L-2 Bidder in Bid-1 was lesser than the tariff quoted by the L-1 Bidder in Bid-2. The Bids were awarded to the L-1 Bidder and L-2 Bidder in Bid-1 for a total capacity of 315 MW.

7.29 It is most respectfully submitted that in Bid-2, the L-1 Bidder (BALCO) submitted the Bid for the quantum of 100 MW and quoted the tariff of INR 4.29 / kWh. For meeting the minimum necessary requirement of about 850 MW – which was urgently required by KSEBL to meet the electricity deficit in the State of Kerala, the Appellant – KSEBL invited the L2 to L6 bidders to match the tariff offered by the L-1 Bidder. The L2 to L5 Bidders matched the tariff quoted by the L-1 Bidder for offered quantum of 100 MW, 100 MW, 150 MW and 100 MW respectively. As such, under Bid-2, the Bids were awarded to the L-1 to L-5 Bidders for a total capacity of 550 MW at the same tariff which was quoted by the L-1 Bidder. The said procedure of L-1 matching was carried out by the Appellant, *inter alia*, having regard to the following:-

- (i) It is a standard procurement practice.
- (ii) Calling another tender at that stage (after price discovery during October-November 2014) for meeting the balance requirement of power would have consumed at least another 6 months (as per the minimum time limits fixed under the MoP Guidelines) and filing of LTA applications latest by December 2014 [ which had become the imminent necessity for meeting the power demand of the consumers

of the State ] would not have been possible. Non-Filing of the LTA application by December 2014 would have led to losing the priority in booking of the transmission corridor which was becoming available at that point in time [ which would have been granted to the other applications expected from AP, Telangana and Karnataka on completion of their bids under process ] and would have, therefore, led to delay in supply availability. This would have resulted in severe shortage of power in the State of Kerala from the year 2016 onwards.

- (iii) The DBFOO Guidelines did not prohibit bid matching for the balance quantum [ i.e. the quantum remaining after awarding the contract to the L1 Bidder ]. The MoP had not issued any clarification on the said aspect, despite repeated requests by KSEBL.
- (iv) Clause 1.1.4 of the RFP specifies that the Applicants may bid for the capacity specified in Clause 1.1.1 (Clause 1.1.1 refers to bid quantum i.e. 450 MW under Bid 1 and 400 MW under Bid2), or a part thereof, not being less than 25% (twenty five per cent) of such capacity. Provided, however, that the Utility may, in its sole discretion, accept only those Bids which match the lowest Bid.

7.30 It is respectfully reiterated that the grant of Long Term Access (LTA) by the Central Transmission Utility (CTU) was based on 'first come first serve' basis. The States of Andhra Pradesh, Karnataka and Telangana had invited long term tenders for 5400 MW on DBFOO basis. Based on DBFOO timelines, the tender processes of these Southern states were expected to complete in the first half of 2015. In case of re-tendering by KSEBL at that stage, the Bid for balance quantity would have also gotten completed only by June 2015. In such a situation, the LTA applications of KSEBL for such quantum would have been processed in the June 2015 window alongwith applications from other Southern states and chances of getting the corridor availability by October 2017 would have been completely lost, on account of insufficient corridor availability during that time frame.



- 7.31 It is most respectfully submitted that immediately upon completion of the Bid Process, the Appellant communicated the outcome of the process including the discovered price, to the MoP, Govt. of India, by its letter dated 17-12-2014. It is respectfully submitted that no response to this letter was received from the MoP, Govt. of India. A copy of the communication dt. 17.12.2014 from KSEBL to Government of India is annexed herewith and marked as **ANNEXURE A10**.
- 7.32 It is respectfully submitted that the Appellant, vide its letter dated 18.12.2014, also informed the Ld. State Commission about the outcome of competitive bidding process initiated by KSEBL. A copy of the communication dt. 18.12.2014 from KSEBL to the Ld. State Commission is annexed herewith and marked as **ANNEXURE A11**.
- 7.33 It is most respectfully submitted that the Government of Kerala, vide order G. O. (Ms.) No. 45/2014/PD dated 20.12.2014 accorded sanction for the long term power procurement of 200 MW @ Rs. 3.60 per kWh and 115 MW @Rs. 4.15 per kWh as on Bid Date from L1 and L2 bidders respectively of Bid 1 and for 550 MW @ Rs. 4.29 per kWh as on Bid Date from L1 to L5 bidders of Bid 2. A copy of the Order dt. 20.12.2014 issued by Government of Kerala is annexed herewith and marked as **ANNEXURE A12**.
- 7.34 It is most respectfully submitted that as per the 2009 Connectivity Regulations, in the application for grant of LTA, the source of power, quantum of injection and quantum of drawal have to be specified. For submitting the LTA Applications, entering into Power Supply Agreements (PSAs) was necessary for KSEBL to ensure that the application is submitted to the CTU in December 2014 itself [ prior to the anticipated LTA applications of Telangana, Karnataka and Andhra Pradesh ] and for grant of LTA in the desired time periods.
- 7.35 Having received the approval from the State Government of Kerala on 20.12.2014, for submitting the LTA Applications within the stipulated time periods, the Appellant entered into the PSAs for the long-term

procurement of 865 MW electricity for a period of 25 years from 1<sup>st</sup> December 2016 and 1<sup>st</sup> October 2017 respectively, with the L-1 and L-2 bidders of Bid-1 and L-1 to L-5 bidders of Bid-2. The details of the PSAs executed by the Appellant are as under:-

**PPA based on DBFOO**

Sl. No.	Power Supplier	Region	Power (MW)	Tariff (Rs./kWh)	PSA Date	Date of start of supply.
1	Jindal Power Limited	WR	200	3.60	29-12-2014	Dec-16
2	Jhabua Power Limited	WR	115	4.15	31-12-2014	Dec-16
3	Bharat Aluminium Co. Ltd	WR	100	4.29	26-12-2014	Oct-17
4	Jindal India Thermal Power Ltd	ER	100	4.29	29-12-2014	Oct-17
5	Jhabua Power Limited	WR	100	4.29	26-12-2014	Oct-17
6	Jindal Power Limited	WR	150	4.29	29-12-2014	Oct-17
7	East Coast Energy Private Ltd *	SR	100	4.29	02-02-2015	Oct-17
	<b>Total</b>		865			

*\*Since East Coast Energy Private Ltd. was located in SR and is not affected by transmission corridor congestion between NEW [ Northern, Eastern, Western ] and Southern grids, PSA with East Coast was executed subsequently.*

7.36 It is most respectfully submitted that the applications for Long Term Access for drawing these power were made before Central Transmission Utility on 30-12-2014 and 31-12-2014 by generators located in regions other than Southern Region, in view of the transmission constraints prevailing between NEW [ Northern, Eastern, Western ] grid and the Southern Region, as submitted hereinabove.

**MANDATORY STIPULATION IN THE PSAs FOR OBTAINING APPROVAL OF LD. STATE COMMISSION**

7.37 It is most respectfully submitted that while executing the PSAs with the aforesaid entities, it was specifically stipulated in the PSA that the provisions thereof would come into effect only upon grant of approval by the Ld. State Commission. This stipulation is contained, *inter alia*, in Article 4.1.2 (c) of the PSA and was fully known to and agreed by all the

said entities. It is respectfully submitted that this stipulation of approval by the Ld. State Commission is a statutory requirement / pre-condition as also stipulated in the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 [ hereinafter referred to as the “KSERC Tariff Regulations of 2014” ], relevant provision whereof is extracted below:-

**“78. Approval of power purchase agreement/arrangement. –**

*(1) Every agreement or arrangement for procurement of power by the distribution business/licensee from the generating business/company or licensee or from other source of supply entered into after the date of coming into effect of these Regulations shall come into effect only with the approval of the Commission:*

*Provided that the approval of the Commission shall be required in accordance with this regulation in respect of any agreement or arrangement for power procurement by the distribution business/licensee from the generating business/company or licensee or from any other source of supply on a standby basis:*

*Provided further that the approval of the Commission shall also be required in accordance with this regulation for any change to an existing agreement or arrangement for power procurement, whether or not such existing agreement or arrangement was approved by the Commission.”*

7.38 It is most respectfully reiterated that the outcome of the bid process had been submitted by the Appellant to the Ld. State Commission on 18.12.2014. Further, in terms of the provisions of the KSERC Tariff Regulations of 2014, as extracted above, for seeking approval of the Ld. State Commission and for making the PSAs effective, on 26.02.2015, the Appellant filed copies of the PSAs executed by it with the generators before State Commission, i.e. the PSAs were filed immediately after the PSA with the generator located in the Southern Region was also executed on 02.02.2015.

7.39 It is most respectfully submitted that on 16.03.2015, the Ld. State Commission directed the Appellant to file a separate petition captioned as a petition for adoption of tariff under Section 63 of the 2003 Act. Accordingly, on 20.04.2015, Appellant filed Petition (OP 13/2015) before

the Ld. State Commission for the adoption of tariff as per Section 63 of the 2003 Act.

#### **CLARIFICATION ISSUED BY MoP IN 2015**

- 7.40 It is most respectfully submitted that by a communication dated 05.05.2015 [ i.e. after a period of about 9 months from the date when the clarifications were sought by the Appellant ], MoP issued the clarification on the queries raised by the Appellant by way of modification in the DBFOO guidelines. A copy of the clarification dt. 05.05.2015 issued by Government of India is annexed herewith and marked as **ANNEXURE A13**. Relevant extract of the said clarification dt. 05.05.2015 is reproduced as under:-

*“..... 3.3.3 In the event that the lowest bidder withdraws or is not selected for any reason in the first instance or capacity required is not met by lowest bidder (“the first round of bidding”) the utility may invite all the remaining bidders to revalidate or extend their respective bid security, as necessary, and match the Bid of the aforesaid Lowest Bidder (“the second round of bidding”). If in the second round of bidding, only one Bidder matches the Lowest Bidder, it shall be the selected Bidder. If two or more Bidders match the second lowest bidder in the second round of bidding, then the Bidder whose Bid was lower as compared to other Bidder(s) in the first round of bidding shall be the selected bidder.....”*

#### **GRANT OF LTA TO KSEBL**

- 7.41 It is most respectfully submitted that on account of the uncertainty prevailing in the power sector at that point time, on the issue of processing and grant of, *inter alia*, LTA, the Appellant had filed petitions (Petition No.92/MP/2014 & Petition No.249/MP/2015) before the Ld. CERC for seeking directions for processing of applications and grant of LTA etc. It is most respectfully submitted that in terms of the orders passed by the Ld. CERC in those cases, the CTU granted LTA to KSEBL as per the applications made by it.

#### **ORDERS PASSED BY THE LD. STATE COMMISSION**

- 7.42 It is most respectfully reiterated that on 20.04.2015, the Appellant had filed the Petition (OP 13/2015) before the Ld. State Commission for the

adoption of tariff as per Section 63 of the 2003 Act in relation to the PSAs entered in terms of the DBFOO Guidelines. On 07.12.2015, the Ld. State Commission had sought certain further information from the Appellant. The said information was furnished by the Appellant to the Ld. State Commission on 27.01.2016. A copy of the communication dt. 27.01.2016 sent by the Appellant to the Ld. State Commission is annexed herewith and marked as **ANNEXURE A14**.

7.43 That thereafter, the Ld. State Commission passed an order in the said Petition on 30.08.2016 wherein, *inter alia*, the Ld. State Commission approved the PSAs and adopted the Tariff of L1 bidders under Bid 1 and Bid 2 namely 200 MW from Jindal Power Ltd (Bid-1) and 100 MW from BALCO (Bid-2) and observed that the power purchase from the remaining bidders would be approved after getting remarks from the Government of Kerala and approval of the bidding process from MoP. It was also observed by the Ld. State Commission that a copy of the order would be sent to the Government of Kerala by the Ld. State Commission with a request to communicate their views after duly considering the relevant facts and legal provisions and in view of the State Government's order GO(MS) No.45/2014/PD dated 20-12-2014 sanctioning the purchase of 865 MW of power by KSEB Ltd. on DBFOO basis. A copy of the order dt. 30.08.2016 passed by the Ld. State Commission is annexed herewith and marked as **ANNEXURE A15**.

7.44 It is most respectfully submitted that after passing of the order dated 30.08.2016 by the Ld. State Commission, KSEBL, on 07.09.2016, furnished all the required details to facilitate the Government of Kerala to take a considered decision. On 15.09.2016, the Government of Kerala sent a communication to the Government of India, seeking its approval for the procedure adopted.

7.45 It is most respectfully submitted that in the meanwhile, in view of the failure of monsoon and deficit rainfall in 2016-17 and the power shortage estimated during the summer months from Feb-2017 to May 2017, there

was an urgent necessity to operationalize the PSAs for procurement of power to meet the electricity demands of the State of Kerala. By its letters dated 03.11.2016 and 15.11.2016, KSEBL sought the approval of Government of Kerala and the Ld. State Commission respectively for scheduling 115 MW power from M/s. Jhabua Power Ltd. (L2 bidder of Bid 1) from December 2016. A copy of the communication dt. 03.11.2016 from KSEBL to Government of Kerala is annexed herewith and marked as **ANNEXURE A16**. A copy of the communication dt. 15.11.2016 from KSEBL to Government of Kerala is annexed herewith and marked as **ANNEXURE A17**.

- 7.46 The Central Government, by its communication dated 18.11.2016, observed that the issues highlighted by the Ld. Commission may not constitute “*deviations*” and that the approval of the Central Government is only required in relation to any deviation from the Guidelines and not for any practice followed by the procurer i.e. the Appellant, for the bidding evaluation process. The relevant extract of the communication dated 18.11.2016 of Government of India is reproduced as under for ready reference:-

4. The deviations as pointed out by KSERC would have been got vetted and approved by the Central Government before issuance of RFQ, RFP and PSA and not at this stage. As per the Guidelines, deviations on the provisions of the bidding documents are approved, if necessary, and not the actions taken by the Utility as per practice or precedent.

5. In view of the above, Govt. of Kerala/KSEB Ltd may take action as appropriate in consultation with KSERC.

- 7.47 A copy of the communication dt. 18.11.2016 issued by the Government of India is annexed herewith and marked as **ANNEXURE A18**.
- 7.48 It is most respectfully submitted that Government of Kerala approved the procurement vide GO (Rt) No.238/2016/PD dated 30.11.2016. Further, the Ld. State Commission, vide order dated 22.12.2016, also gave its provisional approval for the PSA of the L2 bidder under Bid-1 i.e. 115 MW from Jhabua Power Ltd. A copy of the Order dt. 30.11.2016 issued by Government of Kerala is annexed herewith and marked as **ANNEXURE**

**A19.** A copy of the order dt. 22.12.2016 passed by the Ld. State Commission is annexed herewith and marked as **ANNEXURE A20**.

7.49 It is most respectfully submitted that as a result, PSAs for 415 MW capacity were approved / provisionally approved by the Ld. State Commission (315 MW under Bid-1 and 100 MW under Bid-2) and the balance PSAs for 450 MW capacity under Bid-2 were yet to be approved, out of which the PSA for 100 MW capacity executed with East Coast Energy Pvt. Ltd. ceased to exist, since the plant has not achieved CoD. Therefore, as on that date, the balance PSAs (Bid-2) awaiting approval from the Ld. State Commission, were for a capacity of 350MW, and are as listed below:-

- (i) Jindal India Thermal Power Ltd (100MW);
- (ii) Jindal Power Ltd (150 MW);
- (iii) Jhabua Power Ltd ( 100 MW).

7.50 It is most respectfully submitted that the matter of approval of the balance PSAs under Bid 2 was again taken up by the Appellant with the Government of Kerala vide letters dated 10-05-2017, 03-07-2017 and 22-09-2017. Copies of the communications dt. 10.05.2017, 03.07.2017 and 22.09.2017 issued by KSEBL to the Government of Kerala are annexed herewith and marked as **ANNEXURE A21 (Colly.)**.

7.51 It is most respectfully submitted that Government of Kerala, vide order dated 21-10-2017, permitted KSEBL to draw power from the entire DBFOO contracts, pending detailed consideration of the matter. It was also stated that final orders in the matter shall be issued in due course. A copy of the order dt. 21.10.2017 issued by the Government of Kerala is annexed herewith and marked as **ANNEXURE A22**.

7.52 Further, vide order dated 22.12.2017, the Ld. State Commission also allowed the Appellant to draw the contracted power from the PSAs executed under the DBFOO Guidelines, in view of the order of the State Government vide GO (Ms) No. 22/2017/PD dated 21.10.2017. The Ld. State Commission also clarified that it would consider approving the

power purchase proposal including the tariff for the pending approvals only after the State Government accords the final approval for the entire power purchase under DBFOO. A copy of the order dt. 22.12.2017 issued by the Ld. State Commission is annexed herewith and marked as **ANNEXURE A23**.

- 7.53 It is respectfully reiterated that all the Bidders under Bid-2 were selected only after they matched their tariff as on Bid Date with the L-1 Bidder, which rate has been adopted and approved by the Ld. State Commission in respect of the L-1 Bidder viz. M/s. BALCO, vide order dated 30.08.2016. Based on the above, KSEBL has been scheduling power from these suppliers. Further, it is reiterated that the rate of power contracted through DBFOO contracts are lower even than the tariff determined by Ld. CERC for stations commissioned during that time and it has enabled substantial reduction in average power purchase cost of KSEBL. It is most respectfully submitted that since the commencement of supply under these PSAs, KSEBL is making monthly tariff payments as per the terms and conditions specified in the PSAs.
- 7.54 It is further respectfully submitted that the terms and conditions of all the PSAs entered with the bidders under DBFOO framework are the same and are strictly in compliance and conformity with the Standard Bid Documents notified by MoP, Government of India as part of the DBFOO Guidelines under Section 63 of the 2003 Act.
- 7.55 It is most respectfully submitted that the Ld. State Commission, vide the order dated 08.07.2019 in OA No. 15/2018 in the matter of approval of the 'ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22', has approved the source-wise details of the power purchase and cost from various sources including 'Central Generating Stations (CGS)' and also the power purchase under long term contracts from private IPPs. While doing so, the Ld. State Commission has considered scheduling entire power from PSAs of Bid-2. However, citing that the required approvals from Government of India and the State Government were awaited, for



estimating the ARR & ERC for the control period, the rate of power from BALCO, which is the L1 of Bid 2, was considered provisionally by the Ld. State Commission in respect of other generators in Bid 2 (350 MW). The relevant portion of the said order dated 08.07.2019 is extracted below:-

***“.....Purchase of power from projects under DBFOO***

*5.104 Hence the Commission has considered scheduling power from the three projects of Bid-2, ie., 100 MW of power from M/s Jindal India Thermal Power Ltd, New Delhi, 100 MW of power from M/s Jhabua Power Limited and 150 MW of power M/s Jindal Power Limited for the limited purpose of estimating the ARR&ERC for the control period. Since the required approvals from Gol and State Government is still awaited, the Commission is constrained to use the rate equivalent to the cost of power from Balco, which is the L1 of Bid 2.*

*The Commission emphasizes that this consideration is only for the purposes of estimating the cost of power provisionally in the ARR and shall not be construed as an approval of the power purchase, rate or of the PPA itself as per Section 63 of the Act which can be considered only after the fulfilment of conditions specified by the Commission in its order dated 31-8-2016. It is relevant here to note that the Commission in their Order on suomotu determination of Tariff dated 17-4-2017 had approved Rs.4.00 per unit for the purchase of additional quantity of power for meeting the deficit from traders and exchanges.....”*

7.56 A copy of relevant extracts of the order dt. 08.07.2019 passed by the Ld. State Commission in OA No. 15/2018 is annexed herewith and marked as **ANNEXURE A24**.

7.57 It is most respectfully submitted that the quantum of energy availability approved from these contracts by the Ld. State Commission, as per the MYT order, is submitted below:-

Trader/Source	Contracted capacity	2019-20 to 2021-22
	MW	Annual Energy at Kerala periphery (MU)
<b><u>Approved PSAs</u></b>		

Jindal Power Ltd.	200	1431.81
Jhabua Power Ltd.	115	822.57
BALCO	100	718.32
<b>Sub Total-1</b>	<b>415</b>	<b>2972.70</b>
<b><u>Allowed scheduling under Bid-2</u></b>		
Jindal Power Limited	150	1073.86
Jindal India Thermal Ltd	100	721.90
Jhabua Power Limited	100	715.28
<b>Sub Total-2</b>	<b>350</b>	<b>2511.04</b>
<b><u>Grand Total</u></b>	<b>765</b>	<b>5483.74</b>

7.58 Further, the Ld. State Commission vide its communication dated 06.08.2019 communicated to the Appellant the month wise details of the energy schedule approved from each of the CGS and long term contracts during the MYT period from 2018-19 to 2021-22. The said schedule was provided to enable KSEBL to file a petition for recovery of fuel surcharge on a quarterly basis invoking the powers under Regulations 86 and 87 of KSERC (Terms and conditions for determination of Tariff) Regulations, 2018.

7.59 It is most respectfully submitted that this letter communicated from the Ld. State Commission included the month-wise schedule approved for the 350 MW DBFOO contracts for scheduling for each month of the control period 2018-19 to 2021-22. The schedule approved for the first 2 quarters of 2019-20 are as submitted below:-

Source	April (MU)	May (MU)	June(MU)	July (MU)	August (MU)	September (MU)
Jindal Power (Bid 1)	123.12	127.22	123.12	127.22	127.22	123.12

Jindal Power (Bid 2)	92.34	95.42	92.34	95.42	95.42	92.34
Jindal Thermal (Bid 2)	61.56	63.61	61.56	63.61	63.61	61.56
Jhabua Power (Bid 1)	70.79	73.15	70.79	73.15	73.15	70.79
Jhabua Power (Bid 2)	61.56	63.61	61.56	63.61	63.61	61.56
BALCO (Bid 2)	61.56	63.61	61.56	63.61	63.61	61.56

7.60 It is most respectfully submitted that by its letter dated 07.11.2019, the Appellant - KSEBL appraised Government of Kerala on the matter of expediting the appropriate decision on the PSAs awaiting approval of the Ld. State Commission.

7.61 That in the meanwhile, the MoP, Government of India, vide its letter dated 11.12.2019, reiterated its observations made in its earlier communication dt. 18.11.2016 and, *inter alia*, stated as under:-

*“.....deviations as pointed out by KSERC would have been got vetted and approved by the Central Government before issuance of RFQ, RFP and PSA and not at this stage. Govt. of Kerala/KSEB Ltd. May take action as appropriate in consultation with KSERC.....”*

7.62 A copy of the communication dt. 11.12.2019 issued by the Ministry of Power, Government of India is annexed herewith and marked as **ANNEXURE A25**.

7.63 It is most respectfully submitted that this communication dt. 11.12.2019 of the MoP was also intimated by the Appellant to the Ld. State

Commission, by letter dated 26-12-2019. A copy of the communication dt. 26.12.2019 from the Appellant to the Ld. State Commission is annexed herewith and marked as **ANNEXURE A26**.

**ORDER DATED 14.02.2020 PASSED BY LD. KSERC**

- 7.64 It is most respectfully submitted that Regulation 86 of the KSERC (Terms and Conditions for determination of Tariff) Regulations, 2018 allows the distribution licensee to recover [ through fuel surcharge ], the difference between the actual cost of fuel and the cost of fuel approved in Aggregate Revenue Requirement by the Commission for the generation of electricity in the generating stations owned by the distribution business/licensee; and (ii) the difference on account of the change in cost of fuel, between the actual cost of power purchase and the cost of power purchase as approved by the Commission in the Aggregate Revenue Requirement.
- 7.65 It is most respectfully submitted that on 27.09.2019 and 19-11-2019, KSEBL filed petitions for the approval of the fuel surcharge for the period from April 2019 to June 2019 (First Quarter) and from July 2019 to September 2019 (Second Quarter) respectively and requested the Ld. State Commission to approve the additional financial liability incurred by KSEBL due to the variation in power purchase cost resulting from the variation in cost of fuel for the period from April to September 2019 for the procurement / generation of energy from various thermal sources with which KSEBL has contracted power including the generators under Bid-2 from which Government of Kerala as well as the Ld. State Commission had permitted drawal of power.
- 7.66 It is most respectfully submitted that the Ld. State Commission, by its order dated 14.02.2020, while approving the fuel surcharge petition for the first quarter, did not approve the fuel surcharge for procuring power from the above sources and ordered that excess amount incurred for procuring power from these three generators shall not be considered during truing up process. The relevant portion of the order is extracted below:-

*“..... The Commission, vide the letter dated 22.12.2017 allowed KSEB Ltd to schedule the above contracted power, in view of the order of the State Government GO (Ms) No. 22/2017/PD dated 21.10.2017,. The Commission had in the said letter clearly mentioned that, the approval of the power purchase mentioned above including the rate of the DBFOO contracts shall be given, only after getting approvals from Government of India for the deviations from the standard bidding documents issued by Ministry of Power, Government of India and after getting the approval of the Government of Kerala on the entire power purchase under DBFOO.*

*While approving the ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22, the Commission stated as follows.*

*“Hence the Commission has considered scheduling power from the three projects of Bid-2, ie., 100 MW of power from M/s Jindal India Thermal Power Ltd, New Delhi, 100 MW of power from M/s Jhabua Power Limited and 150 MW of power M/s Jindal Power Limited for the limited purpose of estimating the ARR&ERC for the control period. Since the required approvals from Gol and State Government is still awaited, the Commission is constrained to use the rate equivalent to the cost of power from Balco, which is the L1 of Bid 2. The Commission emphasises that this consideration is only for the purposes of estimating the cost of power provisionally in the ARR and shall not be construed as an approval of the power purchase, rate or of the PPA itself as per Section 63 of the Act which can be considered only after the fulfilment of conditions specified by the Commission in its order dated 31-8-2016”.*

*The Commission noticed from the invoices and other documents submitted by KSEB Ltd that, the actual tariff paid by KSEB Ltd for procuring power from these three sources were much higher and amounted to Rs.22.38 crore more when compared to the L1 rate of Rs.4.15 per unit paid to BALCO which is the L1 of Bid-2. As mentioned above, the Commission vide its order dated 22.12.2017 had allowed KSEB Ltd, to schedule the contracted power from these three generators subject to conditions and while approving the ARR & ERC and tariff for the MYT period 2018-19 to 2021-22, the Commission had considered the rate equivalent to the cost of power from BALCO for estimating the cost of power provisionally from these three generators. The Commission reiterate that, during the truing up of accounts for the respective financial years, such excess amount incurred for procuring power from these three generators shall not be considered, unless KSEB Ltd gets the approval of power purchase from Government of India for the deviations from the guidelines and on getting the approval of the*

*Government of Kerala on the entire power purchase under DBFOO.....”*

7.67 A copy of the Order dt. 14.02.2020 passed by the Ld. State Commission is annexed herewith and marked as **ANNEXURE A27**.

7.68 Similarly vide order dated 27.04.2020, while approving the fuel surcharge petition for the second quarter, the Ld. State Commission did not approve the fuel surcharge for procuring power from the above sources and ordered that excess amount incurred for procuring power from these three generators shall not be considered during truing up process. The relevant portion of the order is extracted below:

*“..... The Commission noticed from the invoices and other documents submitted by KSEB Ltd that, the actual tariff paid by KSEB Ltd for procuring power from these three sources were much higher and amounted to Rs.22.75 crore more when compared to the L1 rate of Rs.4.31 per unit paid to BALCO which is the L1 of Bid-2. The Commission further notes that the additional payment under the three DBFOO contracts amounts to Rs 45.13 crore for the first six months of the FY 2019-20. As mentioned above, the Commission vide its order dated 22.12.2017 had allowed KSEB Ltd, to schedule the contracted power from these three generators subject to conditions and while approving the ARR & ERC and tariff for the MYT period 2018-19 to 2021-22, the Commission had considered the rate equivalent to the cost of power from BALCO for estimating the cost of power provisionally from these three generators. The Commission reiterate that, during the truing up of accounts for the respective financial years, excess amount, if any, incurred for procuring power from these three generators shall not be considered, unless KSEB Ltd gets the approval of power purchase from Government of India for the deviations from the guidelines and on getting the approval of the Government of Kerala on the entire power purchase under DBFOO.....”*

7.69 A copy of the Order dt. 27.04.2020 passed by the Ld. State Commission is annexed herewith and marked as **ANNEXURE A28**.

7.70 It is most respectfully submitted that KSEBL, vide Review Petitions dated 30.03.2020 and 04.06.2020 sought review of the above-mentioned orders and prayed for permission for passing on of additional fuel cost incurred against PSAs with Jindal India Thermal Power Ltd, Jindal Power

Ltd and Jhabua Power Ltd under Bid-2 of DBFOO and to issue appropriate directions on the drawal of power contracted against these PSAs if the Ld. State Commission is not inclined to pass over the liabilities of 350 MW PSAs executed on DBOO basis under Bid 2.

- 7.71 It is most respectfully submitted that by a common order dated 14.08.2020 in the Review Petitions filed by the Appellant (KSEBL) i.e. in RP 2/2020 and RP 4/2020, the Ld. State Commission, *inter alia*, held as under:-

*“Orders of the Commission*

*24. Commission, after detailed examination of the Review Petitions RP No.02/2020 and RP No.04/2020 as per the provisions of the Electricity Act, 2003 and Regulations in force as detailed in the preceding paragraphs, here by orders the following.*

*(1) The first prayer of the petition RP No. 02/2020 ‘to review the order dated 14.02.2020 in Petition OA No. 29/2019 and allow passing on the additional fuel cost incurred against PSAs with Jindal India Thermal Power Ltd, Jindal Power Ltd and Jhabua Power Ltd under Bid 2 of DBFOO’ is hereby rejected.*

*(2) The first prayer of the petition RP No. 04/2020 ‘to review the order dated 27.04.2020 in Petition OA No. 02/2020 and allow passing on the additional fuel cost incurred against PSAs with Jindal India Thermal Power Ltd, Jindal Power Ltd and Jhabua Power Ltd under Bid 2 of DBFOO’ is hereby rejected.*

*(3) Second prayer of both the Review Petitions RP No. 02/2020 and RP No. 04/2020 is ‘to “(2) To issue appropriate directions on the drawal of power contracted against these PSAs if Hon’ble Commission is not inclined to pass on the liabilities of 350MW PSAs executed on DBFOO basis under Bid 2.” This is a new issue raised by KSEB Ltd, which was neither included nor deliberated in the original petitions OA 29/209 and OA No. 02/2020. Hence this prayer cannot be decided through Review Petitions filed by KSEB Ltd and the prayer is rejected. The petitions RP 02/2020 and RP 04/2020 hereby disposed off.’*

- 7.72 A copy of the Order dt. 14.08.2020 passed by the Ld. State Commission is annexed herewith and marked as **ANNEXURE A29**.

- 7.73 It is most respectfully submitted that while rejecting the prayers in the Review petition, the Ld. State Commission, *inter alia*, observed that the prayer of the Appellant to issue appropriate directions on the drawal of power contracted against these PSAs [ if KSERC is not inclined to permit passing on of the liabilities of 350MW PSAs executed on DBFOO basis under Bid 2 ] is a new issue raised by KSEBL, which was neither included nor deliberated in the original petitions OA 29/2019 and OA No. 02/2020 and therefore this prayer cannot be decided through the Review Petitions filed by the Appellant.
- 7.74 It is most respectfully submitted that the KSEBL, vide letter dated 09.09.2020 communicated, *inter alia*, the order dated 14.08.2020 of the Ld. State Commission - to the generators and informed that with the order of the Ld. State Commission, the conditions precedent specified in the PSAs executed with these generators remain unfulfilled. KSEBL informed the generators including the Appellant that KSEBL would be filing a fresh petition before the Ld. State Commission seeking specific orders on the approval or otherwise of the respective PSAs. It was also intimated that KSEBL would be constrained to limit the payment against the monthly bills with respect to the power scheduled from these generators including that of the Appellant to the tariff rate of BALCO in the respective monthly bills, in compliance with the orders of the Ld. State Commission. The difference in amounts, if any, is sought to be settled in accordance with specific orders of the Ld. State Commission in the petition.
- 7.75 It is most respectfully submitted that on 12.11.2020, the Appellant filed a petition before the Ld. State Commission requesting the Ld. State Commission to pass final orders with respect to drawal of the 350 MW of contracted power under DBFOO Bid-2 (Jindal Power Ltd. - 150 MW, Jhabua Power Ltd. – 100 MW and Jindal India Thermal Power Ltd. – 100 MW). The petition got numbered as OP 05/2021. A copy of the Petition being OP No. 05/2021 filed by KSEBL before the Ld. State Commission is annexed herewith and marked as **ANNEXURE A30**.



- 7.76 In the meanwhile, being aggrieved with the direction of Ld. KSERC for limiting / restricting the amount of fuel surcharge payable by KSEBL to the generating companies, one of the generators (JITPL) filed an Appeal before this Hon'ble Tribunal, numbered as DFR No. 369 of 2020, challenging the orders dated 14.02.2020, 27.04.2020 and 14.08.2020 passed by Ld. KSERC.
- 7.77 This Hon'ble Tribunal, by its order dated 20.11.2020 passed in the Appeal filed by JITPL, had been pleased to *inter alia* grant stay of the orders dated 14.02.2020 and 27.04.2020 passed by Ld. KSERC on the subject of fuel surcharge and restore the status quo ante of the dispensation prevailing immediately anterior thereto. Further, by the consent of all parties, this Hon'ble Tribunal had been pleased to *inter alia* direct that the Petition filed by KSEBL before the Ld. KSERC, shall be heard and decided expeditiously by the Ld. KSERC. The relevant portion of the order is extracted below:

*"..... During the hearing today, we were informed that the second Respondent i.e. Kerala State Electricity Board Ltd. (KSEBL) has approached the State Commission (first Respondent) by a fresh petition seeking approval for procurement of power from the Appellant and the PSA as also adoption of tariff discovered in bid process. The State Commission, we are further informed, has issued notice to the Appellant as well.*

*All sides through their respective counsel submitted that they would rather await the decision of the State Commission on the fresh petition referred to above. The Appellant, at the same time, seeks protection of its interest in the context of the impugned order dated 14.02.2020 on the fuel surcharge. The learned counsel representing KSEBL also expressed the difficulties that would arise as consequences flowing from the said order. In the facts and circumstances and bearing in mind also the fact that the approval of the State Commission for the PSA and the prayer for tariff adoption is still awaited, we feel it just and proper to direct stay against the operation of the impugned orders dated 14.02.2020 and 27.04.2020 on subject of fuel surcharge and, in the consequence, restoring status quo ante to the dispensation prevailing immediately anterior thereto, as an ad-interim arrangement, such ad-interim order to continue till the application*

*for stay and appeal are adjudicated upon after final hearing. We clarify that the appeal and application filed therewith will be taken up for final hearing after the decision on the fresh petition for approval/adoption has been rendered by the State Commission. Ordered accordingly. Since the matter is simmered too long before the State Commission, we would expect the State Commission to conclude the proceedings on the fresh petition expeditiously and render its decision as early as possible. Be listed on 15.02.2021. The State Commission will submit its status report well in advance.....”*

- 7.78 A copy of the order dt. 20.11.2020 passed by this Hon’ble Tribunal in Appeal DFR No. 369 / 2020 is annexed herewith and marked as **ANNEXURE A31**.
- 7.79 This Hon’ble Tribunal, vide the above order, had envisaged that the appeal and application filed by JITPL will be taken up for final hearing after the decision on the fresh petition filed by KSEBL has been rendered by the Ld. State Commission. This Hon’ble Tribunal further directed the Ld. State Commission to conclude the proceedings on the fresh petition expeditiously and render its decision as early as possible and listed the appeal on 15.02.2021.
- 7.80 It is respectfully submitted that when OP No. 05 / 2021 had been filed by the Appellant before the Ld. State Commission, a communication dated 02.12.2020 had been issued by the Ld. State Commission wherein, *inter alia*, the Appellant was asked to once again deposit the Court Fee for the approval of the PSAs [ which, as per the applicable Regulations, amounts to Rs. 21.625 lakhs ]. Further, the office of the Ld. State Commission called upon the Appellant to change the Prayer in its petition from the prayer for “Final Decision” on the pending application to a fresh prayer for “Approval” of the PSAs [ even when the earlier application - OP No. 13/2015 had remained pending before the Ld. State Commission since 2015 ]. A copy of the communication dt. 02.12.2020 issued by the Ld. State Commission is annexed herewith and marked as **ANNEXURE A32**.

- 8.1 The Appellant responded to the notice dt. 02.12.2020 by its letter dt. 14.12.2020. In its response letter dt. 14.12.2020, it has, *inter alia*, been stated by Appellant that it had already deposited the Court Fee of Rs. 21.625 lakhs for the approval of the PSAs while filing Application - OP No. 13/2015 in the year 2015 [ at the rate of Rs.100 per MW per annum for 865 MW capacity for the 25 year contracts, in terms of the Regulations ]. The said Application has remained pending before the Ld. State Commission. The Fresh Petition has been filed before the Ld. State Commission for a final decision on the very same application which has remained pending since 2015. For the Fresh Petition No. 1983 / 2020 filed by the Appellant [ praying for final disposal of the pending Application OP No. 13/2015 ], the applicable Court Fee of Rs. 10,000/- had also been deposited. A copy of the communication dt. 14.12.2020 issued by the KSEBL to the Ld. State Commission is annexed herewith and marked as **ANNEXURE A33**.
- 8.2 Subsequently, the response of the Appellant was accepted by the Ld. State Commission and whereafter the Fresh Petition was numbered as OP No. 05/2021 and was listed for hearing vide the notice dated 20.01.2021 issued by the Ld. State Commission. A copy of the hearing notice dt. 20.01.2021 issued by the Ld. State Commission is annexed herewith and marked as **ANNEXURE A34**.
- 7.81 In the meanwhile, the Ld. State Commission filed an Appeal before the Hon'ble Supreme Court (Civil Appeal No. 41/2021) against the interim order dated 20.11.2020 of this Hon'ble Tribunal. In the said appeal, the Hon'ble Supreme Court vide its order dated 27.01.2021 stayed the interim order dated 20.11.2020 of this Hon'ble Tribunal. A copy of the order dt. 27.01.2021 passed by the Hon'ble Supreme Court in Civil Appeal No. 41 / 2021 is annexed herewith and marked as **ANNEXURE A35**.
- 7.82 In the meanwhile, Government of Kerala, vide G.O. (Rt) No.163 / 2021 / POWER dated 27.10.2021, has constituted a Committee to examine the

bidding process and purchase agreements entered into by KSEBL under DBFOO guidelines based on the comments of the statutory agencies and the possibility of terminating/renegotiating the Power Purchase Agreement in the best interest of the State on a request pending before it from KSEBL to approve the deviations in the bidding process leading to the present PPAs. The Committee shall submit report to the Government. A copy of the order dt. 27.10.2021 issued by the Government of Kerala is annexed herewith and marked as **ANNEXURE A36**.

7.83 It is respectfully submitted that in the truing up orders of KSEBL for the years 2017-18, 2018-19, 2019-20 and 2020-21, the Ld. KSERC disallowed an amount of Rs. 313.03 Cr under power purchase cost for limiting the purchase rate of all the DBFOO Generators to L1 rate of respective years of Bid #1 and Bid #2. The rate of Power purchase from the L-2 Bidder under Bid #1 (contracted Capacity -115 MW) was also restricted to the L1 rate of Bid #1.

7.84 The summary of total disallowed amount as per the truing up orders of FY 2017-18 to FY 2020-21 is as follows:-

Source	2017-18 (Rs Cr)	2018-19 (Rs Cr)	2019-20 (Rs Cr)	2020-21 (Rs Cr)	Total (Rs. Cr)
Jhabua Power Ltd-Bid -1		13.19	11.66	10.66	35.51
Jindal Power Ltd- Bid II	14.92	46.35	35.47	11.12	107.86
Jhabua Power Ltd-Bid II	18.42	35.32	38.69	8.85	101.28
JITPL	9.3	34.16	19.57	5.35	68.38
<b>Total</b>	<b>42.64</b>	<b>129.02</b>	<b>105.39</b>	<b>35.98</b>	<b>313.03</b>

- 7.85 In the Multi Year Tariff (MYT) order dated 25.06.2022, for the years 2022-23 to 2026-27, the Ld. State Commission approved only 300 MW of power (L1 of Bid I & II) only for the next control period from 2022-23 to 2026-27 out of 765 MW of power contracted through DBFOO contracts.
- 7.86 It is submitted that the Ld. Commission has, *inter alia*, observed in its order dated 25.06.2022 that it cannot permit KSEBL to continue scheduling of power from the four provisionally approved/ unapproved contracts. The Ld. Commission permitted KSEBL to make necessary arrangements for procuring 465 MW of equivalent power on medium term basis through competitive bidding as per Section 63 of the Electricity Act, 2003. Alternatively, KSEBL has been directed to make necessary arrangements for procuring 465 MW from power plants through competitive bidding route from generators who have been assigned coal linkage as per the SHAKTI policy of the Central Government.
- 7.87 The Ld. Commission also directed that KSEBL shall file a separate petition for obtaining approval of the Ld. Commission for this purchase, including its quantity and adoption of its tariff, as per the provisions of the Electricity Act, 2003 and Tariff Regulations, 2021, once the competitive bidding process as mentioned above is completed.
- 7.88 The Ld. Commission, for the limited purposes of estimating the cost of power purchase for the MYT period, estimated the cost of power purchase for the 3263.29MU of power at Kerala periphery in lieu of the four unapproved DBFOO contracts at Rs 4.00/ kWh for the year 2022-23 and an escalation of 2% for the subsequent years of the MYT period. The Ld. Commission also clarified that this provisional rate of Rs 4.00/kWh is only for estimation purposes and the actual rate discovered through the competitive bidding process in accordance with Section 63 of the EA-2003 shall be adopted.
- 7.89 The relevant portion of the said MYT order dated 25.06.2022 is extracted hereinbelow for ready reference:-

*“.....6.112 In view of the foregoing facts and developments, the Commission cannot permit KSEB Ltd to continue scheduling of power from the following four provisionally approved/ unapproved contracts, (i) Purchase of 115MW of Power from Jhbua power Ltd of L2 of Bid-1, (ii) 150 MW from Jindal Power Ltd of Bid-2, (iii) 100MW from Jindal India Power Ltd and (iv) 100 MW of power from Jhabua Power Ltd of Bid-2.*

*6.113 The Commission noted that, as detailed under Table 6.69 above, during the MYT period 2022-23 to 2026-27, KSEB Ltd has proposed to schedule 465 MW and 3263.29 MU annually from the above four DBFOO contracts. As per the power requirement projected by KSEB Ltd in the present petition and in order to avoid any power shortage and other contingencies, the Commission hereby permits KSEB Ltd to make necessary arrangements for procuring 465 MW of equivalent power on medium term basis through competitive bidding as per Section 63 of the Electricity Act, 2003. Alternatively, KSEB Ltd may make necessary arrangements for procuring 465 MW from power plants through competitive bidding route who have assigned coal linkage as per the SHAKTI policy of the Central Government.*

*Once the competitive bidding process as mentioned above is completed by KSEB Ltd, they shall file a separate petition for obtaining approval of the Commission for this purchase including its quantity and adoption of its tariff as per the provisions of the Electricity Act, 2003 and Tariff Regulations, 2021.....”*

- 7.90 A copy of relevant extracts of the order dt. 25.06.2022 passed by the Ld. State Commission, is annexed herewith and marked as **ANNEXURE A37**.
- 7.91 It is respectfully submitted that the KSEBL vide letter dated 16.08.2022 conveyed, *inter alia*, the matter of disallowance by the Ld. State Commission in the truing up order for the FY 2017-18, 2018-19, 2019-20 and 2020-21 and the MYT order dated 25.06.2022 in respect of the unapproved DBFOO contracts - to the Government of Kerala, as the DBFOO issue is under the consideration of the Government.
- 7.92 Appeals have been filed by the respective generators against the said order dt. 25.06.2022 of the Ld. State Commission, and the said Appeals are pending before this Hon'ble Tribunal, wherein interim orders have

been passed by this Hon'ble Tribunal for supply of power at the L-1 rate in terms of the said PSAs [ Appeal Nos. 167 / 2023, 253 / 2023 and 359 / 2023 ]. Copies of the interim orders passed by this Hon'ble Tribunal in the said Appeals filed against the order dt. 25.06.2022 of the Ld. State Commission are annexed herewith and marked as **ANNEXURE A38 (Colly.)**.

- 7.93 It is respectfully submitted that vide its order dt. 10.02.2023, the Hon'ble Supreme Court was pleased to dispose of the Appeal (C.A. 41 / 2021) filed by the Ld. State Commission, with the following directions:-

*"The present appeal has been filed assailing the interim order passed by the Appellate Tribunal for Electricity dated 20.11.2020 and while issuing notice, this Court under its order dated 27.01.2021 granted ad interim stay of the order dated 20.11.2020 which is still in operation.*

*When the matter was taken up for hearing, a consensus has been arrived at between the parties that the interim order if decided by this Court either way is not going to ultimately decide the fate of O.A. No. 5 of 2021 pending before the Commission, which has to be independently decided on its own merits in accordance with law and interim orders always merge after the final decision is taken by the Commission.*

*In the given facts and circumstances, we consider appropriate to observe that the mechanism, which is in place after passing of the interim order of this Court dated 27.01.2021, shall continue and the electricity may be supplied by the respondents herein in terms of Power Supply Agreement on the same terms and conditions, which may be subject of the outcome of the pending O.A. No. 5 of 2021.*

*We expect that the Commission will take a call and decide O.A. No. 5 of 2021 as expeditiously as possible but in no case later than three months and both the parties shall cooperate in getting expeditious disposal of the pending O.A.*

*We further make it clear that the present interim arrangement shall continue up to the date of the disposal of O.A. No. 5 of 2021 and for a further period of two weeks thereafter.*

*We direct the parties to appear before the Commission on 20.02.2023 at 10.30 a.m.*

*The present appeal stands disposed of in the above terms.*

*We have not expressed any opinion on merits of the case and the Commission may decide the pending O.A. on its own merits in accordance with law.”*

- 7.94 A copy of the order dt. 10.02.2023 passed by the Hon’ble Supreme Court is annexed herewith and marked as **ANNEXURE A39**.
- 7.95 The Appellant (KSEBL) filed an Amendment Application before the Ld. State Commission, praying for amendment of the prayer clause, to include all 4 PSAs which were described as “unapproved PSAs” by the Ld. State Commission in its order dt. 25.06.2022. A copy of the Amendment Application dt. 22.03.2023 filed by the Appellant before the Ld. State Commission is annexed herewith and marked as **ANNEXURE A40**. Further, on 27.03.2023, the Appellant (KSEBL) filed a Convenience Compilation of documents before the Ld. State Commission.
- 7.96 That in terms of the order dated 10.02.2023 passed by the Hon’ble Supreme Court, the Petition No. OP 5/2021 was finally heard by the Ld. State Commission on 29.03.2023, 30.03.2023 and 11.04.2023. Orders were reserved on 11.04.2023. On 10.04.2023, the Appellant (KSEBL) had filed its Written Submissions before the Ld. KSERC. A copy of the Written Submissions dated 10.04.2023 filed by the Appellant (KSEBL) before the Ld. State Commission is annexed herewith and marked as **ANNEXURE A41**.
- 7.97 The Ld. KSERC, after reserving the orders on 11.04.2023, issued its Daily Order dt. 12.04.2023 wherein, *inter alia*, the Appellant was required to file its final submissions alongwith an Affidavit, within a period of 7 days. A copy of the Daily Order dt. 12.04.2023 passed by the Ld. State Commission is annexed herewith and marked as **ANNEXURE A42**.
- 7.98 As directed by the Ld. KSERC, on 17.04.2023, the Appellant (KSEBL) filed a Supplementary Affidavit before the Ld. Commission. A copy of the Supplementary Affidavit dt. 17.04.2023 filed by the Appellant before the



Ld. State Commission is annexed herewith and marked as **ANNEXURE A43**.

7.99 On 16.05.2023, the Impugned Judgment dated 10.05.2023 was uploaded on the website of the Ld. KSERC, whereby the Ld. KSERC has rejected the petition of the KSEBL, i.e., Petition No. 5/2021.

8. (a) **FACTS IN ISSUE:**

8.3 It is submitted that Section 63 of the 2003 Act provides for orders to be passed by the appropriate Commission for “adoption of tariff” discovered through a competitive bidding process in terms of the guidelines laid down by the Central Government. For ready reference, the provision of section 63 of the 2003 Act is reproduced as under:-

**“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.”*

8.4 It is submitted that the Ld. State Commission while exercising jurisdiction under Section 63 of the Act for adoption of tariff discovered through the bidding process – was only required to consider whether the bidding process has been carried out in a fair and transparent manner and in accordance with the guidelines laid down by the Government of India in terms of Section 63. It is submitted that the jurisdiction of the Ld. State Commission while considering a petition u/s 63 of the Act, had extended to the consideration of only these aspects.

8.5 It is submitted that the tariff determined through this process of competitive bidding through an open tender and where the process is found to be fair, transparent and in conformity with the guidelines of the Central Government - shall deserve to be adopted by passing of orders by the Ld. State Commission approving such tariff in accordance with Section 63.

- 8.6 Further, if any situation is found to be not covered under the guidelines of the Central Government, the Ld. State Commission was required to consider and examine whether in such a situation, the process adopted by the procuring entity has met with the principles of fairness and transparency. Such a consideration would fall squarely in the domain of the Ld. State Commission, and the Central Government has no role to play in this regard.
- 8.7 It is submitted that once the process is found to be in conformity with the principles of fairness and transparency, and the guidelines of the Central Government, the Ld. State Commission ought not to have permitted / entertained any contention with regards to the breakup of the tariff quoted by the Bidders in the bidding process (i.e. the components of Fixed Charge and Variable Charge separately), any submissions regarding the wisdom of the tendering authority to call for 2 Bids, or its decision to enter into long-term PSAs and also regarding comparison of the said tariff discovered through the tender process with the tariff being charge by any other entities in other state etc. While these factors may be relevant for any petition for determination of tariff u/s 62 of the 2003 Act - all such factors had not deserved any consideration by the Ld. State Commission and are entirely beyond the scope of the jurisdiction to be exercised under Section 63 of the 2003 Act.
- 8.8 That the scope and ambit of the jurisdiction exercised by the Ld. State Commission under Section 63 of the 2003 Act has also been interpreted, expounded and explained by the Hon'ble Supreme Courts in a number of judgments. The relevant paragraphs from some of the relevant judgments on this aspect are reproduced hereunder for ready reference of this Hon'ble Tribunal:-
- a. Judgment of the Hon'ble Supreme Court in ***Energy Watchdog v. CERC, (2017) 14 SCC 80***:-
- “..... 19. The construction of Section 63, when read with the other provisions of this Act, is what comes up for decision in the present appeals. It may be noticed that Section 63 begins*

*with a non obstante clause, but it is a non obstante clause covering only Section 62. Secondly, unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not “determine” tariff but only “adopts” tariff already determined under Section 63. Thirdly, such “adoption” is only if such tariff has been determined through a transparent process of bidding, and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. What has been argued before us is that Section 63 is a standalone provision and has to be construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. One thing is immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. Guidelines have been issued under this section on 19-1-2005, which guidelines have been amended from time to time. Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with Clause 4.*

*20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to “regulate” tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the*

Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. **It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.....**”

- b. Judgment of Hon'ble Supreme Court in **Tata Power Company Ltd. Transmission Vs. Maharashtra Electricity Regulatory Commission & Ors., 2022 SCC Online SC 1615:-**

“..... 95. Section 63 has five significant features : (i) Section 63 begins with a non-obstante clause. The non-obstante provision overrides Section 62 alone and not all the provisions of the Act; (ii) as opposed to Section 62 where the Commission is granted the power to determine the tariff, under the Section 63 route, the bidding process determines the tariff; (iii) the Commission is mandated to adopt such tariff that is determined by the bidding process; (iv) the Commission has the discretion to not adopt the tariff determined through the bidding process only if the twin conditions as mentioned in the provision are not fulfilled; and (v) the twin conditions are that (a) the bidding process must have been transparent; (b) the bidding process must have complied with the guidelines issued by the Central Government.

96. Section 63 indicates that the provision would be invoked after the tariff has been determined by the bidding process. There is nothing in Sections 62 or 63 that could lead us to interpret that Section 63 is the dominant route for

*determination of tariff. Both the provisions provide alternative modalities through which tariff can be determined. The non-obstante clause in Section 63 must be read in the context of Sections 61 and 62. **Section 62 bestows the Commission with wide discretion to determine tariff. Section 63 seeks to curtail this discretion where a bidding process for tariff determination has already been conducted. Section 63 contemplates that in such situations where the tariff has been determined through the bidding process, the Commission cannot by falling back on the discretion provided under Section 62 negate the tariff determined through bidding. This interpretation of Section 63 is fortified by the use of the phrase 'such' in Section 63 - the Commission is bound to 'adopt' 'such' tariff determined through bidding....."***

- 8.9 It is respectfully submitted that OP No. 05/2021 had deserved to be decided by the Ld. State Commission in accordance with the above-mentioned principles laid down by the Hon'ble Supreme Court with regard to the exercise of jurisdiction under Section 63 of the 2003 Act.
- 8.10 It respectfully submitted that in the facts of the present case, the bidding process under Section 63 of the 2003 Act has been carried out by the Appellant KSEBL entirely in accordance with law, in a completely fair and transparent manner and entirely in conformity with the DBFOO Guidelines laid down by the Government of India in this behalf.
- 8.11 It is respectfully submitted that during any tender process, there may be instances and / or situations which may not get covered by any provision of the tender document or the guidelines as such a situation may not have been envisaged in the said tender document or guidelines. It is the settled position of law that if the tendering authority is faced with any such situation, it shall be opened to the tendering authority to adopt any fair or transparent method to deal with such situation for proceeding further with the tender process. In this behalf, the Appellant places reliance on the principles of law laid down by the Hon'ble Courts including in the following judgments:-

- a. In ***Bharat Coking Coal Ltd. v. AMR Dev Prabha***, (2020) 16 SCC 759, the Hon'ble Apex Court, *inter alia*, held as under:-

“..... 46. With regard to other allegations concerning condonation of Respondent 6's delay in producing guarantees, we would only reiterate that there is no prohibition in law against public authorities granting relaxations for bona fide reasons. In *Shobikaa Impex (P) Ltd. v. Central Medical Services Society* [*Shobikaa Impex (P) Ltd. v. Central Medical Services Society*, (2016) 16 SCC 233], it has been noted that: (SCC p. 243, para 20)

“20. ... the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point.”

47. Even if there had been a minor deviation from explicit terms of the NIT, it would not be sufficient by itself in the absence of mala fide for courts to set aside the tender at the behest of an unsuccessful bidder. [*Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)*, (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106] This is because notice must be kept of the impact of overturning an executive decision and its impact on the larger public interest in the form of cost overruns or delays.....”

- b. In ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.***, (2016) 16 SCC 818, the Hon'ble Apex Court made the following significant observations:-

“..... 11. Recently, in *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)* [*Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)*, (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that

*the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.....*

*..... 15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.*

*16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by Nmrcl to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by Nmrcl was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.....”*

c. In **Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1**

**SCC 492**, the Hon'ble Supreme Court held as under:-

*“..... 6. In these proceedings, the Maharashtra State Electricity Board has filed an affidavit of its Technical Director. It is stated in this affidavit that the offer of M/s Raunaq International Ltd. was accepted on account of the price advantage to the Board, its offer being the lowest; and also in view of the adequate experience which M/s Raunaq International Ltd. possessed, having completed similar work in other 210 MW thermal power stations. This was done by relaxing the qualifying criterion which the Board said, it had the right to do, in view of clause 1.4 set out above. The Maharashtra State Electricity Board has also pointed out that M/s I.V.R. Construction Ltd. also do not satisfy all the qualifying criteria because they do not have two years' experience of such work which is prescribed under the qualifying criteria. Their total experience is of less than a year.*

7. Therefore, looking to the fact that relaxation of criteria would have been required in respect of M/s I.V.R. Construction Ltd. also and in view of the fact that the offer of M/s Raunaq International Ltd. is the lowest, if the Board has accepted the offer of M/s Raunaq International Ltd. after weighing their requirements against the qualifications of the two competing bidders, we fail to see how the High Court could have intervened and stayed the operation of the award of contract to M/s Raunaq International Ltd.

8. This is not a case where any mala fides have been alleged against any member of the Board. Nor is there any allegation of any collateral motive for awarding the contract to M/s Raunaq International Ltd. The only ground of challenge in the writ petition filed by M/s I.V.R. Construction Ltd. is that M/s Raunaq International did not fulfil the qualifying criterion of having laid such pipeline for a distance of 3 kms. But the challenger, M/s I.V.R. Construction Ltd. also does not fulfil the qualifying criterion. In these circumstances, we fail to see any basis for passing the impugned order.

9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:

- (1) the price at which the other side is willing to do the work;
- (2) whether the goods or services offered are of the requisite specifications;
- (3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;
- (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
- (5) past experience of the tenderer and whether he has successfully completed similar work earlier;
- (6) time which will be taken to deliver the goods or services; and often
- (7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However,



*because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.*

*10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work — thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.....*

*..... 15. Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene.....”*

- 8.12 It is respectfully submitted that the aforesaid principles squarely apply in the facts and circumstances of the present case.
- 8.13 It is submitted that the provisions of the RFP had clearly provided that in the event the L1 Bidder does not bid for the entire quantum of the said RFP, it would be open to the tendering authority to invite other bidders to match the tariff quoted by the L1 Bidder. In this behalf, there is a specific clause in the Model RFP document [ being an integral part of the DBFOO Guidelines issued by the Central Government ] being Clause 1.1.4 which is reproduced hereunder for ready reference:—

*“1.1.4 Applicants may bid for the capacity specified in Clause 1.1.1, or a part thereof, not being less than 25% (twenty five per cent) of such capacity. Provided, however, that the Utility may, in its sole discretion, accept only those Bids which match the lowest Bid.”*

- 8.14 It is respectfully submitted that in view of the aforesaid provision of Clause 1.1.4 specifically permitting the Appellant to adopt process of inviting other Bidders to match the L1 Bid – there can be no permissibility for any contention to the contrary to the effect that the Appellant KSEBL could not have invited other Bidders to match the L1 tariff for the balance quantum, especially having regard to the urgent requirement and need of the State of Kerala for entering into the Power Supply Agreements for procurement of power to meet the demand of the State.
- 8.15 It is respectfully submitted that the provision of Clause 1.1.4 has been omitted from the consideration of the Ld. State Commission while passing its order dated 30.08.2016 and has been misinterpreted by the Ld. State Commission in its Impugned Judgment dt. 10.05.2023.
- 8.16 Without prejudice to the above, it is respectfully submitted that even otherwise, the process of inviting other bidders to match the L1 tariff for the balance quantum of power to be procured by the State – is entirely in conformity with the requirements of fairness and transparency. In fact, this process ensures that the sanctity of the tariff quoted by the L1 bidder is maintained and the procurement of power under that bidding process is only on the said tariff which was quoted by the L1 bidder.
- 8.17 Such a situation is also envisaged by the guidelines issued by the Central Vigilance Commission (CVC) from time to time. The guidelines issued by the CVC clearly provide that in such a scenario where the entire quantum is not offered by the L1 bidder, it would be open for the concerned tendering authority to invite the other bidders to match the tariff quoted by the L1 bidder and such a process can never be termed as “negotiation”. For ready reference, the relevant guidelines/circulars issued by the CVC in this behalf are quoted as under: –

- a. Vide its circular dt. 15.03.1999, the CVC issued, *inter alia*, the following clarifications:-

“..... Sir,

Please refer to CVC's instructions issued under letter No.8(1)(h)/98(1) dated 18/11/98 banning post tender negotiations except with L-1 i.e., the lowest tenderer. Some of the organizations have sought clarifications from the Commission as they are facing problems in implementing these instructions. The following clarifications are, therefore, issued with the approval of Central Vigilance Commissioner.

(i) .....

(ii) .....

(iii) Another issue that has been raised is that many a time the quantity to be ordered is much more than L 1 alone can supply. In such cases the quantity order may be distributed in such a manner that the purchase is done in a fair transparent and equitable manner.”

- b. Subsequently, vide its Circular dt. 03.03.2007, the CVC issued the following clarifications:-

“..... (iv) As regards the splitting of quantities, some organisations have expressed apprehension that pre-disclosing the distribution of quantities in the bid document may not be feasible, as the capacity of the L-1 firm may not be known in advance. **It may be stated that if, after due processing, it is discovered that the quantity to be ordered is far more than what L-1 alone is capable of supplying and there was no prior decision to split the quantities, then the quantity being finally ordered should be distributed among the other bidders in a manner that is fair, transparent and equitable.** It is essentially in cases where the organisations decide in advance to have more than one source of supply (due to critical or vital nature of the item) that the Commission insists on pre-disclosing the ratio of splitting the supply in the tender itself. This must be followed scrupulously.

(v) Counter-offers to L-1, in order to arrive at an acceptable price, shall amount to negotiations. **However, any counter-offer thereafter to L-2, L-3, etc., (at the rates accepted by L-1) in case of splitting of quantities, as pre-disclosed in the tender, shall not be deemed to be a negotiation.....**”

8.18 Copies of the relevant circulars of the Central Vigilance Commission (CVC) are annexed herewith and marked as **ANNEXURE A44 (Colly.)**.

8.19 Further, the Central Government vide its communication dt. 05.05.2015 had also amended the DBFOO Guidelines to, *inter alia*, the following effect:-

“ .....

- v) Modification made regarding bucket filling approach: the provisions have been modified so that the Lowest Bidder shall be the selected Bidder and the remaining Bidders shall be kept in reserve and may, in accordance with the process specified in the RFP, be invited to match the Bid submitted by the Lowest Bidder in case such Lowest Bidder withdraws or is not selected for any reason or in case the capacity required is not fully met by the Lowest Bidder.

.....”

8.20 As submitted hereinabove, in the present case, Clause 1.1.4 of the RFP [ which is in accordance with Clause 1.1.4 of the Model RFP under the DBFOO Guidelines laid down by the Government of India ] clearly and unambiguously envisages the procedure of inviting other Bidders to match the L1 Bid, in case the L1 Bidder does not offer the entire capacity of power under the Bidding process. Further, the circulars of the CVC [ though not strictly applicable ] as well as the subsequent amendment dt. 05.05.2015 carried out by the Government of India – make it abundantly clear that the process of inviting other Bidders to match the tariff quoted by the L1 Bidder – is entirely in conformity with the principles of fairness and transparency.

8.21 It is respectfully reiterated that the aforesaid submissions clearly establish that the process of inviting other bidders to match the tariff of the L1 bidder for the balance quantum to be procured under the tendering process – is entirely in conformity with law and the principles laid down by the Hon’ble Apex Court in relation to any fair and transparent methodology to be adopted by the tendering authority when faced with any such situation.

- 8.22 In view of the above, it is respectfully submitted that the PSAs executed by the Appellant with the L2, L3 and L4 Bidders in the bidding process under Bid-2 are entirely in conformity with the mandate of Section 63 of the 2003 Act and had deserved to be approved by orders of the Ld. State Commission.
- 8.23 With respect to the L2 Bidder in the Bid-1 process [ Bid of Jhabua Power Ltd. for supplying 115 MW at the tariff of Rs. 4.15 / unit ], it is respectfully submitted that after the tariff of Rs.4.29 per unit had been discovered in the Bid-2 process as being the lowest tariff quoted by the L1 bidder in the Bid-2 process, it was seen that the tariff quoted by the L2 bidder in the Bid-1 process was even lower than this tariff of the L1 bidder discovered in Bid-2 process. The relevant dates in this behalf are depicted as under:-

**Bid-1 Process**

(for **450 MW** power,  
with commencement date for  
supply of power being  
**December 2016**)

**05.09.2014**: RfP published for  
Bid-1.

**31.10.2014**: Bids opened in Bid-1 process. The L1 Bidder (Jindal Power Ltd.) had quoted a tariff of Rs. 3.60 / unit.

**07.11.2014**: KSEBL invited the L2 Bidder to match the tariff quoted by L1 Bidder. L3 and L4 Bidders were also invited to match the tariff quoted by L1 Bidder.

**10.11.2014**: The L2 Bidder (Jhabua Power Ltd.) conveyed its inability to match the tariff quoted by L1 Bidder. The tariff quoted by L2 Bidder was Rs. 4.15 / unit.

**Bid-2 Process**

(for **400 MW** power,  
with commencement date for  
supply of power being  
**October 2017**)

**01.10.2014**: RfP published for  
Bid-2.

**14.11.2014:** Bids opened for Bid-2 process. The tariff quoted by the L-1 Bidder in Bid-2 process was Rs. 4.29/ unit.

**15.11.2014:** L1 Bidder (Jindal Power Ltd.) was requested to convey its willingness to increase the quantum offered by it, on the same tariff as per its Bid.

**18.11.2014:** L1 Bidder conveyed its inability to increase the quantum offered by it, on the tariff quoted by it.

**29.12.2014:** PSA was executed with L1 Bidder.

**31.12.2014:** PSA was executed with L2 Bidder.

8.24 It is respectfully submitted that on the opening of Bid-2, when it was seen that there is a possibility for the Appellant to secure procurement of power to the extent of 115 MW from the L2 Bidder in Bid-1, at the rate lesser than the lowest tariff discovered in the Bid-2 process, the Appellant found to be in the interest of the State to procure this cheaper power and therefore, entered into the PSA with the L2 bidder in the Bid-1 process. While arriving at this decision, the Appellant had also taken into consideration, *inter alia*, the following aspects:-

- (i) This fair, reasonable and transparent process [ which is otherwise a standard procurement practice ] was adopted by KSEBL in public interest and for averting any power crisis for the consumers in the State of Kerala.
- (ii) Inviting separate Tenders for meeting the balance quantum after opening bids during October-November 2014, would have inordinately delayed the procurement process and would have resulted in a power crisis for the consumers in the State of Kerala,

as it would have become impossible to file Long Term Access applications before CTU by December 2014 to ensure corridor availability.

- (iii) Further, by contracting power at the tariff rate of L-2 Bidder in Bid-1 process [ which is not only lower than the L-1 tariff in the Bid-2 process, but is also much lower than the tariff of other CGS and IPPs commissioned during that time ], KSEBL has saved a huge amount of money for the exchequer through power purchase cost saving.

8.25 It is respectfully submitted that the aforesaid facts clearly establish that the process followed by the Appellant in entering into the PSA with the L2 bidder in the Bid-1 process – is not only in conformity with the requirements of fairness and transparency but also is in public interest for procuring cheaper power in the interest of the consumers of the state. It is respectfully submitted that in terms of the principles laid down by the Hon'ble Apex Court, relevant paragraphs whereof have also been quoted hereinabove, such a decision was entirely within the jurisdiction of the tendering authority being the Appellant herein and the decision has been taken in public interest and entirely in conformity with law. The PSA of the Appellant with the L2 bidder in Bid-1 had also deserved approval by the Ld. State Commission.

**PENDENCY OF FINAL DECISION BY THE LD. STATE COMMISSION, ON THE APPROVAL OF THE PSAs**

8.26 It is respectfully reiterated that the Appellant had initially filed the petition being OP 13/2015 before the Ld. State Commission seeking approval of the power supply agreements executed between the Appellant and the respective generating companies under the Bid-1 and Bid-2 processes. It is respectfully submitted that in the said petition, an order dated 30.08.2016 had been passed by the Ld. State Commission, approving the PSA of the Appellant with the L1 bidders in Bid-1 and Bid-2 processes. With regard to the PSAs of the other bidders in the Bid-1 and Bid-2 processes, the decision had been deferred by the Ld. State

Commission by, *inter alia*, observing that the approval of the Central Government shall be required in this regard. For ready reference, relevant paragraphs of the order dated 30.08.2016 passed by the Ld. State Commission are reproduced as under: –

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

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

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

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

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

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

8.27 It is the respectful submission of the Appellant [ KSEBL ] that the petition had been kept pending and the final orders were to be passed by the Ld. State Commission. It is respectfully submitted that while the Appellant had addressed communications to the State Government as well as



Central Government, the communications received from the Central Government from time to time had also been placed before the Ld. State Commission, as directed by the Commission in para 40(6) of its order dt. 30.08.2016.

8.28 It is respectfully submitted that thereafter, since 2016, the issue of grant of approval has remained pending before the Commission. In the meanwhile, the Appellant sent several communications to the Govt. of Kerala as well as the Government of India to provide their views on the said issues. All communications received from the Govt. of Kerala and the Govt. of India have been submitted by the Appellant to the Commission. The following are some of the relevant dates in this regard:-

- a. After passing of the order dated 30.08.2016 by the Commission, the Appellant KSEBL, on **07.09.2016**, furnished all the required details to facilitate the Government of Kerala to take a considered decision.
- b. On **15.09.2016**, the Government of Kerala sent a communication to the Government of India, seeking its approval for the procedure adopted.
- c. The Central Government, vide its letter dt. **18.11.2016**, communicated its view, *inter alia*, stating as follows:-

“ .....

4. The deviations as pointed out by KSERC would have been got vetted and approved by the Central Government before issuance of RFQ, RFP and PSA and not at this stage. As per the Guidelines, deviations on the provisions of the bidding documents are approved, if necessary, and not the actions taken by the Utility as per practice or precedent.

5. In view of the above, Govt. of Kerala/KSEB Ltd may take action as appropriate in consultation with KSERC.

.....”

- d. In the most humble submission of the Appellant (KSEBL), even the Government of India in its communication dt. 18.11.2016 has not described the process conducted by KSEBL as a “deviation”, rather it has described the same as “*action taken by the Utility as per practice or precedent*”.

- e. The letter dt. 18.11.2016 of the Central Government was submitted before the Ld. State Commission.
- f. In the meanwhile, Government of Kerala approved the procurement under the PSA of the L2 bidder under Bid-1 i.e. 115 MW from Jhabua Power Ltd. vide GO (Rt) No.238/2016/PD dated **30.11.2016**.
- g. The Ld. State Commission, vide order dated **22.12.2016** also gave its provisional approval for the PSA of the L2 bidder under Bid-1 i.e. 115 MW from Jhabua Power Ltd.
- h. The matter of approval of the balance PSAs under Bid 2 was again taken up by the Appellant with the Government of Kerala vide letters dated **10.05.2017, 03.07.2017 and 22.09.2017**.
- i. Government of Kerala, vide order dated **21.10.2017**, permitted KSEBL to draw power from the entire DBFOO contracts, pending detailed consideration of the matter. It was also stated that final orders in the matter shall be issued in due course.
- j. Vide order dated **22.12.2017**, the Ld. State Commission also allowed the KSEBL to draw the contracted power from the PSAs executed under the DBFOO Guidelines, in view of the order of the State Government vide GO (Ms) No. 22/2017/PD dated 21.10.2017.
- k. The Ministry of Power (MoP), Government of India, vide its letter dated **11.12.2019**, reiterated the observations made in its earlier communication dt. 18.11.2016.
- l. The communication dt. 11.12.2019 was also submitted by the Appellant (KSEBL) to the Ld. State Commission, vide its letter dt. **26.12.2019**.

8.29 It is respectfully submitted that, as mentioned hereinabove, faced with the growing energy requirement of the consumers in the State of Kerala, while the issue of grant of approval to the PSAs had continued to remain pending before the Commission, the Appellant had been constrained to approach the Commission for permitting it to draw power under the said PSAs to meet the energy requirements of the consumers.

8.30 By orders dt. 22.12.2016 and 22.12.2017, the Ld. State Commission had granted the approval to the Appellant for drawl of power from the PSAs executed by it with Jhabua Power Limited (100 MW and 115 MW), Jindal Power Limited (150 MW) and Jindal India Thermal Power Limited (100 MW). Thereafter the Appellant had operationalized these PSAs and has been drawing power under the said PSAs in terms of the approval granted by the Ld. State Commission itself.

8.31 It is respectfully submitted that even in the subsequent decisions, the Ld. State Commission has observed that the final decision on approval of the PSAs has been postponed by the Ld. Commission. For ready reference, the relevant paragraph of the order dated 22.12.2016 passed by the Ld. State Commission is reproduced hereinbelow:—

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

8.32 It is respectfully submitted that the final decision having been postponed by the Ld. State Commission, the petition for approval of the PSAs had been kept pending by the Ld. State Commission and final orders were not passed with respect to the same. For the said relief of passing of final orders on the approval of the said PSAs, OP No. 05 / 2021 had been filed by the Appellant before the Ld. State Commission.

8.33 It is respectfully submitted that when OP No. 05 / 2021 had been filed by the Appellant before the Ld. State Commission, a communication dated 02.12.2020 had been issued by the Ld. State Commission wherein, *inter alia*, the Appellant was asked to once again deposit the Court Fee for the approval of the PSAs [ which, as per the applicable Regulations, amounts to Rs. 21.625 lakhs ]. Further, the office of the Ld. State Commission called upon the Appellant to change the Prayer in its petition from the prayer for “Final Decision” on the pending application to a fresh prayer for

“Approval” of the PSAs [ even when the earlier application - OP No. 13/2015 had remained pending before the Ld. State Commission since 2015 ].

- 8.34 The Appellant responded to the notice dt. 02.12.2020 by its letter dt. 14.12.2020. In its response letter dt. 14.12.2020, it has, inter alia, been stated by Appellant that it had already deposited the Court Fee of Rs. 21.625 lakhs for the approval of the PSAs while filing Application - OP No. 13/2015 in the year 2015 [at the rate of Rs.100 per MW per annum for 865 MW capacity for the 25 year contracts, in terms of the Regulations]. The said Application has remained pending before the Ld. State Commission. The Fresh Petition has been filed before the Ld. State Commission for a final decision on the very same application which has remained pending since 2015. For the Fresh Petition No. 1983 / 2020 filed by the Appellant [ praying for final disposal of the pending Application OP No. 13/2015 ], the applicable Court Fee of Rs. 10,000/- had also been deposited.
- 8.35 Subsequently, the response of the Appellant was accepted by the Ld. State Commission and whereafter the Fresh Petition was numbered as OP No. 05/2021 and was listed for hearing vide the notice dated 20.01.2021 issued by the Ld. State Commission.
- 8.36 In view of the above, it is respectfully submitted that the orders passed by the Ld. State Commission, from time to time, including the orders dated 30.08.2016, 22.12.2016 and 22.12.2017 were in the nature of interim orders. The Appellant was praying for final orders to be passed by the Ld. State Commission with regard to the approval of the 4 PSAs mentioned hereinabove.

#### **NO REQUIREMENT OF CENTRAL GOVERNMENT APPROVAL**

- 8.37 It is respectfully submitted that the observation of the Ld. State Commission in its order dated 30.08.2016 to the effect that the approval of the Central Government would be required for granting approval to the

PSAs in question – in the most humble submission of the Appellant KSEBL - is not in conformity with the settled principles of law.

- 8.38 It is respectfully reiterated that the principles of law laid down by the Hon'ble Apex Court have clearly held that even on an issue which is not envisaged in the guidelines of the Central Government, it falls squarely within the domain and jurisdiction of the Appropriate Commission to take a decision on the said issue having regard to the principles of fairness and transparency.

### **NO "DEVIATION"**

- 8.39 It is respectfully reiterated that there is no "deviation" from the guidelines of the Central Government, in the process adopted by the Appellant (KSEBL). The process of inviting other Bidders to match the tariff quoted by L1 Bidder – is directly provided for in the provision of Clause 1.1.4 of the Model RFP [ being an integral part of the DBFOO Guidelines ].
- 8.40 Further, inviting the L2 Bidder in Bid-1 [ having quoted a tariff lower than the tariff quoted by L1 Bidder in the Bid-2 ], is neither contrary to nor prohibited by the DBFOO Guidelines. Any situation not covered by a specific provision of the guidelines – it fell squarely within the jurisdiction of the Ld. State Commission to approve such a decision of the Appellant (KSEBL), the same being entirely in conformity with the principles of fairness, transparency and public interest.
- 8.41 It is submitted that this is also the position of the Central Government available on record through its communications dated 18.11.2016 and 11.12.2019. The communication dt. 18.11.2016 of the Central Government also, in the most humble submission of the Appellant, does not describe the process conducted by KSEBL as a "deviation" and rather, describes it as "*action taken by the Utility as per practice or precedent*". The Central Government clearly states that a decision on the same can be taken by the Ld. State Commission.
- 8.42 It is respectfully submitted that in the facts and circumstances of the present case, the process adopted by the Appellant KSEBL being entirely

in conformity with law and the principles of fairness and transparency, OP No. 05 / 2021 had deserved to be allowed by the Ld. State Commission and the 4 PSAs in question had deserved to be approved by the Ld. State Commission.

**APPROVAL OF THE PSAs SHALL BE IN PUBLIC INTEREST**

- 8.43 Without prejudice to the contention that the only aspect to be considered by the Ld. State Commission while exercising the jurisdiction under Section 63 of the 2003 Act would be to examine that the process adopted by the Appellant is in conformity with the Central Government's guidelines as well as the principles of fairness and transparency – it is respectfully submitted that even otherwise, the facts on the record would clearly establish that not only is the process entirely in conformity with law, the tariff discovered through the said process is entirely in public interest. The facts demonstrate that procurement of power on the said tariff has benefited the consumers of the state of Kerala.
- 8.44 It is respectfully submitted that while considering the aspect of public interest, the single determinative factor to be taken into consideration is - the tariff. It is submitted that the facts and circumstances at the time when the bidding process was carried out, and even subsequent thereto, clearly establish that the tariff discovered through the said bidding process has been entirely in public interest and in the interest of the consumers of the State of Kerala. In this behalf, the Appellant is relying on the following data which was also placed on record for consideration of the Ld. State Commission:—
- (i) The tariff from other alternate sources during the period 2014-15 when the bidding process had been carried out by the Appellant (KSEBL) had been much higher than the tariff discovered through the bidding process, as also submitted in paras 12, 32 and 33 of OP No. 05 / 2021, which are reproduced hereinbelow for ready reference:-

12. Since the increasing gap between demand and supply of the State is during peak hours and since solar power is infirm, procurement from solar sources was not considered. Further, the rate of solar power during 2014-15 was Rs.7.72/unit as determined by Central Electricity Regulatory Commission vide order dated 15-5-2014. Copy of the order is enclosed as **Exhibit-5**. Similarly procurement from wind energy sources was also not considered due to its infirm nature and the high tariff of Rs.4.79/unit for 2014-15 as determined by CERC vide the above order. MoP had not notified guidelines under section 63 of the EA,2003 for procuring power from renewable sources through bidding route during that period. Generation from KDPP, BSES and NTPC's RGCCPP station was not a viable option as the rate of power from these sources were above Rs.10.00/unit (BDPP: Rs.11.97/unit, KDPP: Rs. 10.03/unit , RGCCPP : Rs.14.97/unit) during that period. Short term market price variations were highly volatile and were not reliable. The price discovered in the short term power purchase bids invited by KSEBL during that period was in the range of Rs.4/unit to Rs.7.45/unit.
- 32 The above rates discovered in the bids were significantly lower than the rate of power prevalent during the said period from other sources as submitted below.

Source	Rate(Rs/unit)
KDPP, Kozhikode	10.03
BDPP,Kochi	11.97
RGCCPP, Kayamkulam	14.97
Medium term contracts -1 (2014 to 2017)	4.494
Medium term contracts -2 (2014 to 2017)	4.449
Short term contracts (2013-2014)	5.72

33. The rates obtained in DBFOO bids were reasonable on comparing the rates at which power purchase contracts were entered by other States during the said period. The rate at which power was tied up on long term basis by Tamilnadu during this period was Rs.4.91/unit and by Uttar Pradesh was Rs.4.49/unit.

(ii) Further, the tariff discovered through this Bidding process was also lower than the tariff determined by the Central Electricity Regulatory Commission (CERC) for the generating stations commissioned during that time. In this behalf, the contents of para 41 of OP No. 05 / 2021 are reproduced as under:-

41. It may kindly be reckoned that the rate of power contracted through DBFOO contracts are lower than the tariff determined by CERC for stations commissioned during that time. A comparison is shown below.

Comparison of tariff of DBFOO against tariff determined by CERC		
Station	2019-20	Tariff determination
Simhadri II (NTPC)	5.26	CERC
NTPL (JV b/w NLCIL & TANGEDCO)	5.03	CERC

Vallur(JV b/w NTPC & TANGEDCO)	6.14	CERC
Kudgi (NTPC)	5.99	CERC
DVC-Mejia	4.78	CERC
DVC Raghunathpur	4.99	CERC
MaithonPower Ltd.	4.66	CERC
Jindal Power Ltd. 1 (DBFOO)	3.93	DBFOO
JHABUA 1 (DBFOO)	4.07	DBFOO
BALCO (DBFOO)	4.33	DBFOO
Jindal India Thermal Power Ltd. (DBFOO)	4.54	DBFOO
Jindal Power Ltd. 2 (DBFOO)	4.60	DBFOO
JHABUA 2 (DBFOO)	4.79	DBFOO

- (iii) Further, as submitted in para 42 of OP No. 05 / 2021, the steps taken by the Appellant (KSEBL) during this period in getting corridor under MTOA and under LTA for DBFOO contracts, have enabled substantial reduction in average power purchase cost of KSEBL. For ready reference, para 42 of OP No. 05 / 2021 is reproduced as under:-

42. The steps taken by the petitioner during this period in getting corridor under MTOA for medium term contracts (originally denied by CTU) and for LTA DBFOO contracts have enabled substantial reduction in average power purchase cost of KSEBL, from Rs.5.01/unit existed in 2013-14 as submitted in table below.

Year	Average Purchase Cost (Rs/unit)	Power Cost
2012-13	4.95	
2013-14	5.01	
2014-15	4.63	
2015-16	4.08	
2016-17	3.88	
2017-18	4.02	
2018-19	4.36	
2019-20	4.24	

- (iv) It is submitted that the tariff for other States cannot be compared to the tariff discovered by KSEBL under DBFOO guidelines. Without prejudice to the foregoing, the tariff discovered in long term tenders by other States during the period in question are submitted below, clearly demonstrating that the tariff in the DBFOO contracts of KSEBL are much lower:-

Capacity Contracted under Case-I Bidding Route, 2013-14 & 2014-15 (Long Term)				
S.No.	State	Name of the Developer/Plant	Capacity (MW)	Levelized Tariff (₹ /KWh)
1	Gujarat	Adani Power Ltd, Mundra	50	4.67



2	Rajasthan	Maruti Clean Coal and Power Ltd	250	4.52
3	Rajasthan	DB Power Ltd	410	4.81
4	Rajasthan	Lanco Power Ltd, Dabandh	350	4.89
5	Uttar Pradesh	PTC India Ltd(TRN Energy Ltd)	390	4.89
6	Uttar Pradesh	LancoBabandh Power Ltd	424	5.07
7	Uttar Pradesh	KSK Mahanadi Power Company Ltd	1000	5.59
8	Uttar Pradesh	PTC India Ltd	361	5.73
9	Kerala	Jindal Power Ltd	200	3.6
10	Kerala	Jindal Power Ltd	150	4.29
11	Kerala	Jabua Power Ltd	115	4.15
12	Kerala	Jabua Power Ltd	100	4.29
13	Kerala	Bharat Aluminium Company Ltd	100	4.29
14	Kerala	Jindal Thermal Power Ltd	100	4.29
15	Kerala	Jindal Power Ltd.	100	4.29

- (v) A comparison of the tariff at Kerala periphery of DBFOO generators and Central Generating Stations (CGS) commissioned after DBFOO bids - clearly demonstrated that the average Tariff from DBFOO contracts has been much lower than the average Tariff from CGS stations commissioned after the said contracts.
- (vi) It further deserves to be considered that DBFOO contracts have enabled KSEBL to dispense away the scheduling of costly liquid fuel stations and costly short term purchases prevalent during the period 2011-12 to 2016-17.

- (vii) As per the calculations of the Appellant (KSEBL), if the DBFOO contracts had not been entered into at the relevant time, huge additional liability would have been incurred by the consumers of the State, for procurement of power through alternate sources [ i.e. the liquid fuel stations available in the State ], as also depicted in the following table:-

	<b>Annual energy</b>	<b>Average tariff (from 2016-17 to 2022-23) (Rs./unit)</b>
<b>Bid-1</b>	<b>MU</b>	
Jhabua Power Ltd.	822.57	4.10
<b>Bid-2</b>		
Jindal Power Ltd.	1073.86	4.57
Jindal India Thermal Power Ltd.	721.90	4.64
Jhabua Power Ltd.	715.28	4.82
Total Energy from the said 4 DBFOO PSAs	3333.61	
Weighted average tariff of DBFOO stations (Rs./unit)		4.52
Cost of power purchase from the said 4 DBFOO PSAs (Rs.Cr.)		1507.73
Annual energy sales (MU)	24000.00	
Impact in tariff with DBFOO purchase (Rs./unit)		<b>0.63</b>
Liability if the unapproved quantum is taken from liquid fuel stations (@ Rs.11/unit) (Rs.Cr.)		3666.97
Impact in tariff through scheduling liquid fuel stations in the State (Rs/unit)		<b>1.53</b>
<b>Additional liability that would have occurred if the said 4 DBFOO PSAs were not contracted (Rs/unit)</b>		<b>0.90</b>

- (viii) It is humbly submitted that the Ld. State Commission, while passing orders in OP No. 05 / 2021, was also required to consider the impact of the decision of the Ld. State Commission on the public interest in the present scenario. In this behalf, it would deserve to be considered that even with all contracts including the DBFOO PSAs, there is shortfall in meeting the energy requirement of the State and KSEBL had been compelled to resort to short term power

procurement even after entering into DBFOO contracts as submitted below:-

<b>Year</b>	<b>Short term (IEX/PXIL/TRADERS)</b>
	<b>Quantity</b>
	(MU)
2017-18 (Actual)	787.78
2018-19 (Actual)	476.99
2019-20 (Actual)	990.25
2020-21 (Actual)	261.73
2021-22 (Actual)	247.94

- (ix) It is further submitted that even with DBFOO contracts there is a shortfall of around 200-300MW in meeting the peak demand of the State, even after considering entire generation as shown below:-

<b>Year</b>	<b>Peak Demand (MW)</b>	<b>KSEBL Contracts (CGS+LTA) including DBFOO (MW)</b>	<b>Hydro (MW)</b>	<b>Shortage (MW)</b>
<b>2018-19</b>	4242	2282.44084	1700	259.5592
<b>2019-20</b>	4316	2282.44084	1700	333.5592
<b>2020-21</b>	4284	2293.59454	1700	290.4055
<b>2021-22</b>	4380	2293.59454	1700	386.4055

- (x) It is submitted that any situation where the Appellant (KSEBL) is not permitted to procure power under the said 4 PSAs shall lead to further shortage of 465 MW capacity of power, which shall be required to be met by other sources, where it is a matter of record that the prevalent tariff is also higher than the tariff stipulated in the said 4 PSAs. In this behalf, the Appellant had placed on record before the Ld. State Commission - the tariff determined in the tender for medium term procurement, recently carried out by PFC Consulting Ltd.
- (xi) The merit order stack of generating stations for surrender of power [stations with highest Variable Charge are surrendered first] for the period from August 2021 to March 2023 was also placed before the

Ld. State Commission - clearly demonstrating that the Variable Charge from the DBFOO PSAs is much lower than the Variable Charge from the PSAs of KSEBL with other generating stations.

- 8.45 It is respectfully submitted that all of the aforesaid data / evidence, has been completely overlooked / omitted from consideration by the Ld. State Commission and an entirely erroneous observation has been made to the effect that no factual evidence has been produced by KSEBL to support its contentions.
- 8.46 It is respectfully submitted that the aforesaid data clearly and unambiguously establishes that the tariff discovered through the said bidding process carried out by the Appellant KSEBL and the procurement of power through the 4 PSAs in question - has served the public interest and the interest of the consumers of State of Kerala.
- 8.47 However, in contradiction with the reality and without considering the facts and data available in the records of the Commission (True up accounts of KSEBL for the years 2016-17, 2017-18, 2018-19, 2019-20, 2020-21 and 2021-22) and also the data submitted by the Appellant showing how the power purchase cost of the Appellant has been significantly curtailed with the procurement from these DBFOO contracts, the Ld. Commission has arrived at entirely baseless conclusions and has erroneously [ in an entirely arbitrary manner, and based on erroneous assumptions ], made observations regarding the purported “financial liability” created under these contracts. A bare perusal of the impugned judgment demonstrates and establishes the following patent and grave errors committed by the Ld. Commission in arriving at such erroneous findings:-
- a. Inviting 2 bids for meeting the power crisis in the State is a sole discretion of the utility. Such a decision is not covered by any of the bidding guidelines. It is a project specific requirement which can be designed by the utility as per the MoP guidelines.

- b. The State Commission failed to consider the detailed submissions made by KSEBL regarding the transmission corridor availability and the availability of transmission corridor only in a phased manner from 2016 onwards, justifying the decision to invite 2 Bids with 2 different dates of commencement of supply of power.
- c. Estimating financial loss due to selecting L-2 bidder under Bid-1 by comparing with Rs. 3.60 / unit [ the L-1 of Bid-1 ] is an entirely erroneous and baseless exercise, in view of the fact that if L-2 bidder in Bid-1 was not selected, then the other option to meet the power crisis would have been to procure power at Rs.4.29/unit under Bid-2, or at a higher rate from other contracts which were entered subsequently. It was submitted before the Ld. State Commission that all the subsequent contracts have higher tariff rates than the L-2 rate of Bid-1, which would have only created more liability for consumers. It is to be noted that the L-1 Bidder of Bid-1 who quoted Rs. 3.60/unit had refused to offer more quantum. Therefore, the observations of the Ld. Commission seeking to quantify a “financial loss” by assuming that the rate of Rs. 3.60 / unit could have been availed for the entire quantum of power – is completely bereft of any consideration of all other realities and is entirely baseless.
- d. The Ld. Commission failed to consider the fact that selection of bidders can only be based on the ‘total tariff’ quoted by the bidders as per MoP guidelines and enhancement of Fixed Charge by the bidders cannot be a criteria for rejecting the bidder as long as total tariff is matched. KSEBL could not insist the bidders to match the FC and VC separately as such an exercise would have been contrary to the guidelines which provide for the lowest “Tariff” i.e. the composite tariff comprising of FC and VC.
- e. The Ld. State Commission failed to consider the fact that in a tariff-based bidding process, there cannot be a comparison of the split-up of tariff.

- f. The Ld. KSERC failed to consider the fact that the rate discovered in the bids are lower than the other power purchase contracts of KSEBL and has, thus, served public interest.

8.48 It is reiterated that the aforesaid submissions are without prejudice to the contention of the Appellant KSEBL that the bidding process being in conformity with the guidelines of the Central Government as well as the principles of fairness and transparency, the Ld. State Commission ought to have approved the PSAs executed pursuant to such bidding process and any other factor was not be required to be taken into consideration by the Ld. State Commission while exercising the jurisdiction under Section 63 of the 2003 Act.

#### **Implications of the Impugned Judgment**

8.49 As per the impugned order dated 10.05.2023, the Ld. KSERC has rejected the prayer of KSEBL to issue final orders with respect to the drawal of power from the unapproved PSAs of 465 MW (350MW under Bid-2 and 115MW under Bid-1). This has led to a grave situation for KSEBL and for the State in view of, *inter alia*, the following:-

- a. As per the order, the drawal of power from 465 MW DBFOO contracts, not approved by KSERC, shall have to be discontinued as KSEBL being a regulated entity cannot procure power from a source unapproved by KSERC.
- b. However, KSEBL, being the deemed distribution licensee of the State is mandated to provide 24 x 7 power to the consumers of the State.
- c. The State is already facing shortage in power availability for meeting its peak demand. For meeting the evening peak demand, KSEBL is already procuring power from the market to the order of 400 MW to 600 MW, even after drawing power from the generators under the 4 PSAs in question, depending upon the impact of summer rains.
- d. Discontinuing drawal of power from these 4 PSAs of 465MW will further reduce the availability of power drastically and the shortage

will increase significantly to around 1100MW. The shortage will persist throughout the year and in the coming years. It is not possible to source this huge quantum of alternate power immediately for meeting this shortage.

- e. KSEBL, in compliance with the order of MYT order dated 25.06.2022 of Ld. KSERC, directing KSEBL to purchase 465 MW power through medium term contracts, had invited tender by giving wide publicity, however, the Bid had to be cancelled as there were no eligible bidders. KSEBL is in the process of re-tendering, which may take another 6 months. It is submitted that the chance of getting power at rates cheaper than the present DBFOO generators is very little, considering the market trends.
- f. Currently, the market prices are of the order of Rs.10/unit during peak hours, from 19:00 hrs onwards till 24 hrs and the price can soar very high, adversely affecting the financials of KSEBL, which is ultimately passed on to the consumers. Availability of power in the market for such huge quantum on 24 x 7 basis - is very less. There is also a chance of scarcity in availability of power as the demand picks up in the country.
- g. KSEBL had invited short term bids through DEEP portal for meeting the peak power requirement of the State during these summer months. KSEBL could not get the tendered quantum and the rate discovered was very high (Rs. 9.26/unit.)
- h. The average tariff of the power purchase under DBFOO comes only in the range of Rs.4.50/unit. The financial implication for KSEBL and the ultimate consumers of the State for replacing DBFOO power with the high cost power shall be enormous.
- i. The consequence of the above is that the State will be drawn to power restrictions and load shedding, also affecting the Industrial consumers of the State. KSEBL will suffer huge irreparable loss with the implementation of the order.

**(b) QUESTIONS OF LAW:-**

- I. WHETHER the Ld. State Commission while exercising jurisdiction under Section 63 of the Act for adoption of tariff discovered through the bidding process – was only required to consider whether the bidding process has been carried out in a fair and transparent manner and in accordance with the guidelines laid down by the Government of India in terms of Section 63 of the 2003 Act ?
- II. WHETHER the tariff determined through the process of competitive bidding through an open tender and where the process is found to be fair, transparent and in conformity with the guidelines of the Central Government - had deserved to be adopted by passing of orders by the Ld. State Commission approving such tariff in accordance with Section 63 of the 2003 Act ?
- III. WHETHER if any situation is found to be not covered under the guidelines of the Central Government, the Ld. State Commission was required to consider and examine whether in such a situation, the process adopted by the procuring entity has met with the principles of fairness and transparency ?
- IV. WHETHER once the process is found to be in conformity with the principles of fairness and transparency, and the guidelines of the Central Government, the Ld. State Commission ought not to have permitted / entertained any contention with regards to the breakup of the tariff quoted by the Bidders in the bidding process (i.e. the components of Fixed Charge and Variable Charge separately), any submissions regarding the wisdom of the tendering authority to call for 2 Bids, or its decision to enter into long-term PSAs and also regarding comparison of the said tariff discovered through the tender process with the tariff being charge by any other entities in other state etc. ?
- V. WHETHER OP No. 05/2021 had deserved to be decided by the Ld. State Commission in accordance with the above-mentioned principles laid



down by the Hon'ble Supreme Court with regard to the exercise of jurisdiction under Section 63 of the 2003 Act ?

- VI. WHETHER the bidding process under Section 63 of the 2003 Act has been carried out by the Appellant KSEBL entirely in accordance with law, in a completely fair and transparent manner and entirely in conformity with the DBFOO Guidelines laid down by the Government of India in this behalf ?
- VII. WHETHER the process of inviting other bidders to match the L1 tariff for the balance quantum of power to be procured by the State – is entirely in conformity with the requirements of fairness and transparency ?
- VIII. WHETHER the observation of the Ld. State Commission in its order dated 30.08.2016 to the effect that the approval of the Central Government would be required for granting approval to the PSAs in question is not in conformity with the settled principles of law ?
- IX. WHETHER the facts on the record would clearly establish that not only is the process adopted by the Appellant entirely in conformity with law, the tariff discovered through the said process is entirely in public interest ?
- X. WHETHER all the data / evidence submitted on behalf of the Appellant has been completely overlooked / omitted from consideration by the Ld. State Commission and an entirely erroneous observation has been made to the effect that no factual evidence has been produced by KSEBL to support its contentions ?
- XI. WHETHER the impugned judgment passed by the Ld. KSERC is arbitrary, erroneous and premised on an incorrect application of facts and laws and hence, liable to be set aside by this Hon'ble Tribunal ?

#### **9. GROUNDS RAISED WITH LEGAL PROVISIONS:**

The impugned order is being challenged amongst others on the following grounds without prejudice to each other:

- I. BECAUSE the impugned judgment passed by the Ld. KSERC is arbitrary, erroneous and premised on an incorrect application of facts and laws and hence, liable to be set aside by this Hon'ble Tribunal.
- II. BECAUSE the Ld. Commission has failed to even mention, much less consider or appreciate the detailed submissions made on behalf of Appellant before the Ld. Commission, through its pleadings, oral submissions made on the three hearings held on 28.03.2023, 29.03.2023 and 11.04.2023, as well as the written submissions filed on behalf of KSEBL.
- III. BECAUSE the Ld. Commission has erroneously observed that the Petition OP No. 13/2015 had been disposed of by the Ld. Commission vide order dated 30.08.2016. This observation is not only erroneous but also contrary to the record. A bare perusal of the said order dated 30.08.2016 makes it abundantly clear that the petition had not been disposed of by the Ld. Commission. In fact, the subsequent orders of the Ld. Commission specifically record that the decision in the said petition had been postponed / deferred. These paragraphs from the subsequent orders of the Ld. Commission had been specifically highlighted during the hearing before the Ld. Commission, however, the same have been omitted from consideration by the Ld. Commission in its judgment dated 10.05.2023.
- IV. BECAUSE the Ld. Commission has observed that neither the Government of Kerala nor KSEBL has consulted the Ld. Commission as directed by the Central Government. It is submitted that subsequent to the order dated 30.08.2016 passed by the Ld. Commission, KSEBL has pursued the matter continuously by sending communications both to the Government of Kerala as well as to the Union of India. All responses received from the respective governments have been promptly placed before the Ld. Commission. Further, all clarifications sought, queries raised, data sought by the Ld. Commission has always been placed by KSEBL promptly before the Ld. Commission. Even in the proceedings in OP No. 5/2021, copious documents and data have been placed by KSEBL before the Ld.

Commission. However, all such data / evidence has been completely ignored by the Ld. Commission.

- V. BECAUSE the Ld. Commission has erroneously described the petition filed by KSEBL as a petition for adoption of tariff of unapproved PSAs. On the contrary, as is apparent from the prayer in the petition itself, the petition had been filed praying for passing of final orders in relation to the PSAs, the petition for approval whereof had been filed by KSEBL in 2015 and final orders were yet to be passed by the Ld. Commission on the same.
- VI. BECAUSE the Ld. Commission has erroneously observed that there is no provision in the Bidding Guidelines of 2013 for splitting up of the bids. This observation is patently erroneous. The quantum, the timing and the manner of inviting bids is in the sole discretion of the procuring entity. The guidelines only lay down the clauses for the bidding process, the Bid evaluation, and the terms of the agreement to be entered into between the generators and the procurers. The guidelines have no relevance or bearing on the decision of the procuring entity in relation to the decision to invite one Bid or more than one Bids or the timing of the Bids etc. It is submitted that the decision of the KSEBL to invite two separate Bids had been placed before the Ld. Commission at least as far back as on 18.12.2014, however, since then no objection whatsoever has been raised by the Ld. Commission in this regard.
- VII. BECAUSE the Ld. Commission has erroneously observed that the tariff quoted by the generators in the two Bids, and incorporated in the PSAs, has resulted in huge loss to the KSEBL. This observation, once again, is entirely without any basis whatsoever. The Ld. Commission has completely omitted to even mention, much less consider or appreciate the voluminous evidence submitted by KSEBL demonstrating that, even at the time when the bidding was carried out, and even in the present scenario, the alternate sources of power available to the KSEBL would have resulted in procurement of power at a higher tariff as against the tariff discovered through the bidding process under the PSAs in question.

- VIII. BECAUSE the detailed justification submitted by KSEBL regarding the decision taken to invite two separate Bids with different dates for commencement of supply of power, particularly having regard to the LTA corridor becoming available in two tranches – has been simply brushed aside by the Ld. Commission, without any discussion on the same.
- IX. BECAUSE the Ld. Commission has erroneously observed that in the guidelines, L1-matching is provided only in the event that the lowest bidder withdraws from the bidding process or is not selected. However, the Ld. Commission has failed to appreciate that Clause 1.1.4 of the RFP clearly provides for inviting bidders other than the L1 bidder to match the L1 tariff, in case the full quantum is not offered by the L1 bidder.
- X. BECAUSE in para 28.3, the Ld. Commission has erroneously observed that by inviting the L2 bidder in Bid-1 to enter into the agreement, KSEBL has caused monetary loss to the consumers. While making this observation, the Ld. Commission has once again failed to deal with the evidence submitted by KSEBL demonstrating that even this tariff was much lower than the tariff becoming available from alternate sources to KSEBL at that point in time and even in the present scenario.
- XI. BECAUSE the Ld. Commission has observed that the bidders adopted different figures for Fixed Charge and Fuel Charge in the two Bids, while supply of power was from the same generating station. The Ld. Commission observed that KSEBL ought not to have permitted the “matched” bidders to enhance their Fixed Charges. However, the Ld. Commission has failed to appreciate the contention of KSEBL that as per the provision of the guidelines, there is no permissibility for KSEBL to take into consideration into the breakup of the tariff, and the lowest “tariff” i.e. the composite of Fixed charge and Fuel charge has to be accepted by KSEBL.
- XII. BECAUSE the Ld. Commission has proceeded on a presumption that if the L1 bidder would have been asked to supply power even for the quantum of 115 MW awarded to the L2 Bidder in Bid -1 [ i.e. over and

above the quantum of 200 MW for which the Bid had been submitted by the L-1 Bidder ], at the tariff of Rs. 3.60 per unit, then KSEBL could have secured procurement of power at a much lower rate. This observation, once again, is based on surmises and is without any basis.

- XIII. BECAUSE an observation has been made by the Ld. Commission that KSEBL has not submitted any factual evidence to substantiate the contention that the process carried out by KSEBL was in public interest. Further, the Ld. Commission has made observations to the effect that additional financial liability has been created by KSEBL for the consumers. The said observation made by the Ld. Commission is patently erroneous and fallacious.
- XIV. BECAUSE it is a matter of record that voluminous data, documents and evidence had been submitted by KSEBL before the Ld. Commission. In fact, during the hearing held on the three dates before the Ld. Commission, as mentioned hereinabove, the arguments as well as deliberations before the Ld. Commission had been predominantly only in relation to the said data and evidence submitted by KSEBL. However, in a completely erroneous manner, the Ld. Commission has made the sweeping observation that no factual evidence was submitted before it. This observation is not only patently erroneous but also contrary to the record of the Ld. Commission.
- XV. BECAUSE the observation by the Ld. Commission as if the financial implication has been created by KSEBL for the consumers of the State is also entirely baseless. The Ld. Commission has failed to even deal with the contention of the KSEBL that after the approval is received from the Ld. Commission that the procurement of power has been carried out by KSEBL.
- XVI. BECAUSE the Commission has failed to consider the fact and data available in the records of the Commission (True up accounts of KSEBL for the years 2016-17, 2017-18, 2018-19, 2019-20, 2020-21 and 2021-22) and also the data submitted by the Appellant, clearly establishing that the

power purchase cost of KSEBL has been significantly curtailed with the procurement from these DBFOO contracts.

- XVII. BECAUSE the Ld. Commission has arrived at entirely baseless conclusions and has erroneously [ in an entirely arbitrary manner, and based on erroneous assumptions ], made observations regarding the purported “financial liability” created under these contracts.
- XVIII. BECAUSE the Ld. Commission has further observed that KSEBL has made a submission that the provisional approval by the Ld. Commission had constituted “deemed approval” of the PSAs. This observation is also erroneous.
- XIX. BECAUSE during the hearings before the Ld. Commission, it had been specifically submitted on behalf of KSEBL that it is not raising the contention of “deemed approval”. However, the Ld. Commission has still taken up the said contention as an argument raised by the KSEBL and rejected the same.
- XX. BECAUSE the judgement dated 10.05.2023 of the Ld. Commission suffers from patent and glaring errors. Further the Ld. Commission has made various adverse observations against KSEBL, which are entirely baseless and deserve to be set aside by this Hon’ble Tribunal.
- XXI. BECAUSE the Ld. Commission has erroneously observed that it had finally disposed of the Petition No. 13/2015, praying for approval of the PSAs in question, by its order dated 30.08.2016.
- XXII. BECAUSE the Commission has erroneously observed that there are significant deviations or that the process was not fair and transparent and had required the prior approval of the Government of India.
- XXIII. BECAUSE the aforesaid observation of the Commission is directly in the teeth of the communications of the Government of India, *inter alia*, stating that prior approval is not required in relation to the practice adopted by the procuring entity. Further, the Ld. Commission has erroneously observed as if the Appellant has violated any guidelines issued by the Government of India.

- XXIV. BECAUSE the Commission has erroneously observed that the execution of the PSAs by the Appellant without obtaining the approval of the Commission was in violation of the 2014 Tariff Regulations of the Commission. This observation is also entirely unsustainable. The provision of Regulation 78 of the 2014 Tariff Regulations makes it abundantly clear that it is only after a PSA has been executed that its approval can be sought under the said Regulations.
- XXV. BECAUSE the Ld. Commission has failed to correctly interpret clause 1.1.4 of the RFP by observing that the said clause only refers to receiving the bids and not selection of the bidders. The observation of the Ld. Commission seems to suggest that despite the provision of clause 1.1.4, it would not be open for the appellant to select more than one bidder. Such an interpretation shall render the provision of clause 1.1.4 has redundant and otiose and would deserve to be rejected on this ground alone.
- XXVI. BECAUSE the Ld. Commission has mis-interpreted the communications dated 18.11.2016 and 11.12.2019 of the Government of India which, in the humble submission of the Appellant, did not describe the bidding process carried out by the Appellant as a deviation and which had required the Ld. Commission to take an appropriate decision with regard to the approval of the PSAs. On the one hand, the Government of India is of the view that prior approval of the Government is not required and the Commission may take a decision, on the other hand the observation made by the Ld. Commission is that prior approval of the Central Government is required. In this rigmarole, prejudice has been caused to the Appellant herein and the consumers in the State of Kerala shall be deprived of the power to be procured under the said PSAs, approval whereof has now been rejected by the Commission.
- XXVII. BECAUSE the Impugned Judgment of the Ld. Commission is contrary to public interest, contrary to the record and contrary to the settled principles of law. Orders of this Hon'ble Tribunal, allowing the present appeal and reversing the Impugned Judgment – would meet the ends of justice.

XXVIII. BECAUSE the present Appeal has been filed with grave urgency and the Appellant craves liberty to add / alter / amend the contents of the present Appeal, if so necessary or directed by this Hon'ble Tribunal.

**10. MATTERS NOT PREVIOUSLY FILED OR PENDING WITH ANY OTHER COURT:**

The Appellant declares that the Appellant has not preferred any proceedings before any Court or authority against the order under challenge (order dt. 10.05.2023 passed by Ld. Kerala State Electricity Regulatory Commission in OP No. 05 / 2021).

**11. GROUNDS FOR SUCH RELIEF(S) AND THE LEGAL PROVISIONS, IF ANY, RELIED UPON:**

Reference in this regard may be had to the submissions made in paragraph 9 above, which are not repeated herein for the sake of brevity.

**12. DETAILS OF INTERIM APPLICATION, IF ANY, PREFERRED ALONG WITH APPEAL:**

- (i) Application for stay of the Impugned Order; and
- (ii) Application for Urgent Listing of the Appeal.

**13. DETAILS OF APPEALS, IF ANY PREFERRED BEFORE THIS APPELLATE TRIBUNAL AGAINST THE SAME IMPUGNED ORDER/ DIRECTION, BY RESPONDENTS AND INTERIM ORDER, IF ANY PASSED IN THAT APPEAL:**

There is no other Appeal pending before this Hon'ble Tribunal against the same Impugned Order.

**14. DETAIL OF INDEX:**

An index containing the details of the documents to be relied upon is enclosed.

**15. PARTICULARS OF FEE:**

- (i) Demand Draft dt. 23.05.2023 drawn on State Bank of India, Main Branch, New Delhi, for an amount of Rs. 1,03,775/- in favour of Pay and Accounts Officer, Ministry of Power, New Delhi.



- (ii) Transaction Receipt No. 2505230000428 dated 25.05.2023 for an amount of Rs. 1,300/- in favour of the Pay and Accounts Officer, Ministry of Power, New Delhi.
- (iii) Transaction Receipt No. 1705230001359 dated 17.05.2023 for an amount of Rs. 50/- in favour of the Pay and Accounts Officer, Ministry of Power, New Delhi.

TOTAL = Rs. 1,05,125/-

**16. LIST OF ENCLOSURES:**

As per the Index.

**17. WHETHER THE ORDER APPEALED AS COMMUNICATED IN ORIGINAL IS FILED?**

Yes.

**18. WHETHER THE APPELLANT/S IS READY TO FILE WRITTEN SUBMISSIONS/ARGUMENTS BEFORE THE FIRST HEARING AFTER SERVING THE COPY OF THE SAME ON RESPONDENTS.**

If so directed by the Hon'ble Tribunal.

**19. WHETHER THE COPY OF MEMORANDUM OF APPEAL WITH ALL ENCLOSURES HAS BEEN FORWARDED TO ALL RESPONDENTS AND ALL INTERESTED PARTIES, IF SO, ENCLOSE POSTAL RECEIPT/COURIER RECEIPT IN ADDITION TO PAYMENT OF PRESCRIBED PROCESS FEE?**

The Appellant undertakes to serve the copy of the Appeal alongwith all Annexures on the Respondents as and when directed by the Hon'ble Tribunal.

**20. ANY OTHER RELEVANT OR MATERIAL PARTICULARS / DETAILS WHICH THE APPELLANT(S) DEEMS NECESSARY TO SET OUT :**

All relevant and material particulars have been set out in the Appeal.

**21. RELIEFS SOUGHT:**


In view of the facts and grounds stated above, the Appellant prays for the following reliefs:-

- a. Allow the appeal and set aside the impugned judgment / order dated 10.05.2023 passed by the Ld. Kerala State Electricity Regulatory Commission in OP No. 05/2021;
- b. Pass such other order(s) as this Hon'ble Tribunal may deem just and necessary in the facts and circumstances of this case.

Dated at New Delhi this 24<sup>th</sup> day of May, 2023

  
COUNSEL FOR APPELLANT



  
DENNIS RAJAN  
Resident Engineer  
Liaison Office : OB-8  
KSEB Travancore House  
New Delhi-110001

#### DECLARATION BY APPELLANT

The appellant above named hereby solemnly declare(s) that nothing material has been concealed or suppressed and further declare(s) that the enclosures and typed set of material papers relied upon and filed herewith are true copies of the original.

Verified at New Delhi on this 24<sup>th</sup> day of May, 2023.  
24 MAY 2023

  
COUNSEL(S) FOR APPELLANT

  
APPELLANT



  
**ATTESTED**  
A.M. Singh, Adv.  
Notary Public  
Govt. of India, Delhi  
24 MAY 2023



DENNIS RAJAN  
Resident Engineer  
Liaison Office : OB-8  
KSEB Travancore House  
New Delhi-110001

*Palanisamy B. B.*  
I Identify the deponent as  
Signed/Put T.I. in my presence

**VERIFICATION**

I, Dennis Rajan, s/o Shri K.C. Rajan, aged about 49 years, presently working as Resident Engineer in the office of the Appellant – Kerala State Electricity Board Ltd. (KSEBL) at Travancore House, K.G. Marg, New Delhi – 110001 do hereby verify that the contents of paragraphs 1 to 7 and 11 to 21 are based on the records of the Appellant maintained in the ordinary course of business and believed by me to be true and paragraphs 8, 9, 10 and 22 are believed to be true on legal advice and that I have not suppressed any material facts.

Date: 24 MAY 2023 May 2023.

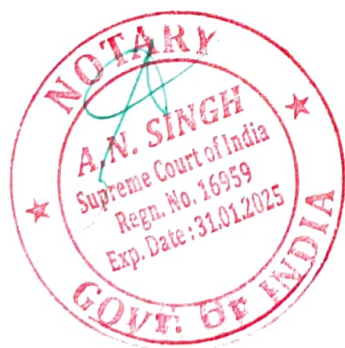
Place: New Delhi



**APPELLANT / AUTHORIZED OFFICER**

DENNIS RAJAN  
Resident Engineer  
Liaison Office : OB-8  
KSEB Travancore House  
New Delhi-110001

*Babhas Bajaj*  
I identify the deponent who has  
Signed/Put T.I. in my presence



*A.N. Singh*  
**ATTESTED**  
A.N. Singh, Adv.  
Notary Public  
Govt. of India, Delhi  
Mob.: 9718139591, 7982539115

24 MAY 2023

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI  
APPELLATE JURISDICTION**

**APPEAL NO \_\_\_\_ OF 2023**

**IN THE MATTER OF:**

Kerala State Electricity Board Ltd.

..... Appellant

Versus

Kerala State Electricity Regulatory Commission & Ors. .... Respondents

**AFFIDAVIT**

I, Dennis Rajan, s/o Shri K.C. Rajan, aged about 49 years, presently working as Resident Engineer in the office of the Appellant – Kerala State Electricity Board Ltd. (KSEBL) at Travancore House, K.G. Marg, New Delhi – 110001 do hereby solemnly affirm and state as under:-

1. That I am presently working as the Resident Engineer of the Appellant and I am well conversant with the facts of the present case. In my official capacity, I am competent and authorized to swear the present affidavit.
2. That I have read the contents of the accompanying appeal which has been prepared under my instructions, and understood the contents thereof. The contents of the present Appeal are based on the records maintained in the office of the Appellant and information received, believed by me to be true.
3. That the Annexures to the appeal are true and correct copies of their respective originals.

**VERIFICATION**

I, the deponent above-named, do hereby verify the contents of the above Affidavit to be true to the best of my knowledge, no part of it is false and nothing material has been concealed there from. Verified at New Delhi on this 24<sup>th</sup> day of May, 2023.



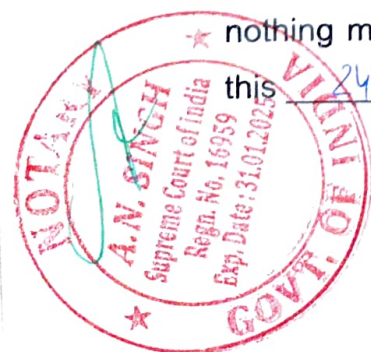
**DEPONENT**

*[Signature]*  
**DENNIS RAJAN**  
Resident Engineer  
Liaison Office: OB-8  
KSEB Travancore House  
New Delhi-110001



**DEPONENT**

*[Signature]*  
**DENNIS RAJAN**  
Resident Engineer  
Liaison Office: OB-8  
KSEB Travancore House  
New Delhi-110001



**ANNEXURE A-1****KERALA STATE ELECTRICITY REGULATORY COMMISSION****THIRUVANANTHAPURAM**

Present: **Shri. T. K. Jose, Chairman**  
**Adv. A. J. Wilson Member (Law)**

**OP No. 05/2021**

In the matter of: Petition under Section 86(1) (b) and Section 63 of the Electricity Act, 2003 seeking final orders with respect to drawal of 350 MW of contracted power under DBFOO from Bid-2 (from Jindal Power Limited – 150 MW, Jhabua Power Limited -100 MW, and Jindal India thermal Power Limited -100 MW) and final orders with respect to drawal of 115 MW of power from Jhabua Power Ltd (Bid-1) - reg

Petitioner: Kerala State Electricity Board Limited,  
 Vydhyuthi Bhavanam, Pattom, Thiruvananthapuram

Respondents: 1. Jhabua Power Limited  
 Unit No.307, Third Floor, ABW Tower, M.G Road,  
 Gurugram, Haryana- 122 002  
 2. Jindal India Thermal Power Limited  
 Plot No.2, Pocket-C, Second Floor, Nelson Mandela Road,  
 Vasanth Kunj, New Delhi-110 070  
 3. Jindal Power Limited,  
 Jindal Centre,  
 12, Bhikaji Cama Place, New Delhi 110 066.

Additional respondents impleaded during the proceedings:

1. The Kerala High Tension & Extra High Tension Industrial Electricity Consumer Association, Productivity House, HMT Road, Kalamassery, Cochin-683104  
 (Additional Respondent- No.1-IA No. 4/2021)
2. Shri. Dejo Kappen, Chairman, Democratic Human Rights & Environment Protection Forum, Kodimatha, Kottayam.  
 (Additional Respondent-No.2- IA No. 7/2021)

Date of hearing :1. 09-02-2021 at Ernakulam (Public hearing)  
 2. 28.03.2023 at Kozhikode (Public hearing)  
 3. 29.03.2023 at Ernakulam (Public hearing)  
 4. 11.04.2023 at Thiruvananthapuram (Public hearing)



**Order dated 10.05.2023**

1. The petitioner KSEB Ltd filed this petition on 12.11.2020 before this Commission for adoption of tariff of the PSAs signed by them, seeking final orders with respect to drawal of 350MW of power (Jindal Power Ltd-150MW, Jhabua Power Ltd.-100MW and Jindal India Thermal Power Ltd – 100MW) contracted by the Petitioner through the second bid invited under DBFOO Guidelines-2013, during 2014 in the light of various orders issued by this Commission. (Order dated 30-8-2016 in petition OP No. 13/2015, Order dated 8-7-2019 in OA No. 15/2018, Order dated 14-2-2020 in OA No. 29/2019, Order dated 27-4-2020 in OA No. 2/2020, Order dated.14-8-2020 in RP No. 2/2020 & RP No. 4/2020 and directions contained in the letter dated 22.12.2017).
2. The petitioner also filed an additional submission as IA No.5/2023 dated 22.03.2023 amending the prayer seeking final orders for drawal of 115 MW of contracted power under Bid-1 from Jhabua Power Ltd in view of the orders on approval of ARR, ERC and tariff of KSEB Ltd for the control period 2022-23 to 2026-27 in O.P. No.11/2022 dated 25.06.2022 of the Commission.
3. In the light of the above submissions, the petitioner KSEB Ltd requested before the Commission to issue final orders with respect to drawal of power from the following PSAs:
  1. 115 MW of power from Jhabua Power Ltd (L-2 of Bid-1)
  2. 150 MW of power from Jindal Power Ltd (Bid-2)
  3. 100 MW of power from Jindal India Thermal Power Ltd (Bid-2)
  4. 100 MW of power from Jhabua Power Ltd (Bid-2)
4. The Hon'ble Supreme Court in Civil Appeal No. 41/2021 filed by this Commission on 10.02.2023 has issued a direction to the Commission that the Commission will take a call and decide O.A. No. 5 of 2021 (OP No.5/2021) as expeditiously as possible but in no case later than three months and both the parties shall co-operate in getting expeditious disposal of the pending O.A. It was also clarified that the present interim arrangement shall continue up to the date of the disposal of O.A. No. 5 of 2021 and for a further period of two weeks thereafter. It was also directed that the parties shall appear before the Commission on 20.02.2023 at 10.30 a.m. The relevant portion of the Order issued by the Hon'ble Supreme Court is extracted hereunder:

*When the matter was taken up for hearing, a consensus has been arrived at between the parties that the interim order if decided by this Court either way is not going to ultimately decide the fate of O.A. No. 5 of 2021 pending before the Commission, which has to be independently decided on its own merits in accordance with law and interim orders always merge after the final decision is taken by the Commission.*

*In the given facts and circumstances, we consider appropriate to observe that the mechanism, which is in place after passing of the interim order of this Court dated 27.01.2021, shall continue and the electricity may be supplied by the respondents herein in terms of Power Supply Agreement on the same terms and conditions, which may be subject of the outcome of the pending O.A. No. 5 of 2021.*

*We expect that the Commission will take a call and decide O.A. No. 5 of 2021 as expeditiously as possible but in no case later than three months and both the parties shall cooperate in getting expeditious disposal of the pending O.A. We further make it clear that the present interim arrangement shall continue up to the date of the disposal of O.A. No. 5 of 2021 and for a further period of two weeks thereafter.*

*We direct the parties to appear before the Commission on 20.02.2023 at 10.30 a.m. The present appeal stands disposed of in the above terms.*

*We have not expressed any opinion on merits of the case and the Commission may decide the pending O.A. on its own merits in accordance with law.*

**5. Brief history with background of the issues involved in the OP No. 5/2021 is as follows:**

- (1) The Ministry of Power, Government of India, vide Resolution No. 23/17/2011/R&R/Vol-V dated 09.11.2013 notified the guidelines for procurement of electricity from Thermal Power Stations set up on DBFOO basis and also issued model documents comprising the Model Request for Qualification (MRFQ), the Model Request for Proposal (MRFP) and the Model Power Supply Agreement (MPSA) which are collectively known as the Standard Bidding Documents (SBD) which is to be adopted by the distribution licensee for procurement of electricity from power producers through a process of open and transparent competitive bidding under Section 63 of the Electricity Act, 2003, based on the offer of the lowest tariff. Clause 4 of the said guidelines is given below:

*4. Any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government*

- (2) According to the petitioner, considering the energy shortage anticipated from the year 2016-2017 and also considering the risk of bearing the 50% of the fixed charges in the event of non-availability of transmission system, KSEB Ltd decided to invite two separate bids for procurement of power, on DBFOO basis as detailed below:
  - (i) For procuring 450MW power from December-2016 onwards for 25 years, and,
  - (ii) For procuring 400MW power from October-2017 onwards for 25 years.
- (3) The said Bid invitations were made by the petitioner deviating from the SBD guidelines issued by the MoP dated 08.11.2013 (Clause 3.3.1 of Request for Proposal (RFP) which stipulate the selection of one bidder, and without obtaining the prior approval of the Central Government.

(4) Accordingly, the first bid was invited on 05.03.2014 and the second bid was invited on 25.04.2014. Thereafter, supposedly completing all the procedural formalities as required under the SBD guidelines of 2013 of Govt of India, the financial bids received in Bid-1 was opened on 31.10.2014. It is seen that ten bidders had submitted their bids. **(Table-1)** Further, the L1 bidder in Bid-1, offered only 200 MW. Hence, KSEB Ltd requested the bidders L2 to L4 to match their tariff to L1. But, apparently, none of the bidders were willing to match their rates with that of L1. The Bid-2 was opened on 14-11-2014. Eleven bidders participated in the bid. **(Table-2)** M/s. BALCO, the lowest bidder in Bid-2, offered to supply 100 MW only as against 400 MW by KSEB Ltd. Hence, KSEB Ltd requested the bidders L2 to L6 to match the quoted tariff with that of the L1 bidder. The bidders L2 to L5 in the Bid-2 offered their willingness to match their tariffs quoted by the L1 bidder. **(Table-3)**

**Table-1**

***Details of bids received through Bid-1 opened on 31.10.2014***

	Name of Bidder	Quantum, MW	Quoted Tariff, Rs.			Location of Power Station	Rank
		Offered	Fixed charge	Variable charge	Tariff		
1	Jindal Power Limited, New Delhi.	200	2.74	0.86	3.60	Chhattisgarh	L1
2	Jhabua Power Limited, Gurgaon.	115	2.39	1.76	4.15	Seoni, MP	L2
3	Bharat Aluminium Co. Ltd., Chhattisgarh.	115	3.25	1.04	4.29	Chhattisgarh	L3
4	Jindal India Thermal Power Limited, New Delhi.	200	3.64	0.75	4.39	Angul, Odisha	L4
5	R. K. M. Power gen Pvt. Ltd., Chennai.	150	3.24	1.96	5.20	Chhattisgarh	L5
6	Adani Power Ltd., Gujarat.	300	3.85	1.69	5.54	Kutch, Gujarat	L6
7	Lanco Power Ltd., Gurgaon.	450	3.43	2.19	5.62	Lanco Vidarbha Thermal Power Ltd	L7
8	Vandana Vidyut Ltd., Raipur.	114	4.70	1.48	6.18	Chhattisgarh	L8
9	Thermal Powertech Corporation India Ltd., Hyderabad.	120	4.93	2.07	7.00	Nellore, Andhra Pradesh	L9
10	Indiabulls Power Limited, Gurgaon.	450	5.15	2.14	7.29	Nashik Thermal Power Station	L10

**Table-2**

***Details of bids received through Bid-2 opened on 14.11.2014***

Sl.No	Name of Bidder	Quantum Offered MW	Quoted Tariff (Rs.Ps)			Rank
			Fixed charge	Fuel Charge	Tariff	
1	Bharat Aluminium Co Ltd, Chhattisgarh 495684	100	3.25	1.04	4.29	L1



2	Jindal India Thermal Power limited, New Delhi 110066.	100	3.62	0.75	4.37	L2
3	Jhabua Power Limited, Gurgaon-122001	100	2.65	1.76	4.41	L3
4	Jindal Power Limited, New Delhi	150	3.57	0.86	4.43	L4
5	East Coast Energy Private Limited, Andhra Pradesh	100	2.95	1.5	4.45	L5
6	Monnet Power Company Limited, New Delhi	100	3.61	0.88	4.49	L6
7	SKS Power Generation (Chhattisgarh)Ltd.	122	3.96	0.87	4.83	L7
8	Lanco Power Limited, Gurgaon, 122016	400	3.67	1.52	5.19	L8
9	Adani Power Limited; Gujarat 380009	300	3.95	1.69	5.64	L9
10	M B Power (Madhya Pradesh) Limited; New Delhi 110020	374.15	3.50	2.43	5.93	L10
11	NCC Power Projects Limited, Andhra Pradesh 500082.	100	3.88	2.07	5.95	L11

**Table-3****Details of the tariff matched by L2 to L5 in the Bid-2 with that of L1**

Rank	Name of Bidder	Quantum Offered MW	Quoted Tariff (Rs.Ps)/kwh			Matched tariff (Rs.Ps)/kwh		
			Fixed charge	Fuel Charge	Tariff	Fixed charge	Fuel Charge	Tariff
L1	BALCO Ltd, Chhattisgarh	100	3.25	1.04	4.29			
L2	Jindal India Thermal Power limited, New Delhi 110066.	100	3.62	0.75	4.37	3.54	0.75	4.29
L3	Jhabua Power Limited, Gurgaon-122001	100	2.65	1.76	4.41	2.97	1.32	4.29
L4	Jindal Power Limited, New Delhi	150	3.57	0.86	4.43	3.43	0.86	4.29
L5	East Coast Energy Private Limited, Andhra Pradesh	100	2.95	1.5	4.45	3.14	1.15	4.29
	Total	550						4.29

(5) Considering both the Bids, KSEB Ltd had in principle decided as follows.

- (a) The tariff offered by the L1 bidder in the Bid-1 is @ Rs 3.60 per unit for supplying 200 MW from December-2016 onwards for 25 years. Since the tariff appeared to be very competitive, KSEB Ltd issued LoA with the 'L1' bidder, M/s Jindal Power Limited, New Delhi for procuring 200 MW from December-2016 onwards for '25' years.
- (b) The tariff offered by L2 bidder in the Bid-1 is @ Rs 4.15 per unit for supplying 115 MW from December-2016 onwards for 25 years. However, though L2 bidder of Bid-1 had refused to match the L1 bidder's tariff, KSEB Ltd in deviation to its own offer, accepted the quoted tariff of 4.15 per unit. KSEB Ltd tried to justify this exception on the grounds that the tariff offered by L2 bidder of Bid-1 is less than the tariff quoted by L1 bidder in the Bid-2 and the tariff "seems to be competitive when compared to the cost-plus tariff of recently commissioned NTPC projects,". Though it was contrary to KSEB Ltd.'s offer to match the tariff of the L1 bidder in Bid-1, KSEB Ltd based on this justification issued LoA to the 'L2' bidder of the Bid-1, M/s Jhabua Power Limited Gurgaon for procuring 115 MW from December-2016 onwards for '25' years @ Rs 4.15 per unit.
- (c) Since the tariff quoted by the remaining bidders (Other than L1 and L2) in the Bid-1 is equal to or more than the tariff derived in the Bid-2, KSEB Ltd did not consider the remaining offers from the Bid-1. Thus, in Bid-1, out of the tendered quantity of 450 MW, KSEB Ltd issued LoA for 315 MW (200 MW +115 MW) to the L1 and L2 bidders.
- (d) In so far as the Bid-2 is concerned, against a tendered quantity of 400 MW, KSEB Ltd in violation of the tendered quantity issued LOA for 550 MW from the L2, L3, L4 and L5 bidders @ Rs 4.29 per unit for 25 years from October-2017. KSEB Ltd thereafter tried to justify this on the ground that the tariff offered 'appeared to be competitive' when compared to the present cost-plus tariff of the recently commissioned stations of NTPC Ltd and considering the competitive tariff of Rs 4.29 per unit derived through the Bid-2, and also duly considering the likely power shortages in the forthcoming years. Hence, KSEB Ltd decided to procure 550MW through Bid-2, @4.29 per unit for twenty-five years from October-2017 onwards.
- (6) Government of Kerala has accorded sanction for procuring 865 MW on DBFOO basis vide G.O(MS) No.45/2014/PD dated 20.12.2014.
- (7) Subsequently, KSEBL entered into Power Supply Agreements for the long-term procurement of 865 MW electricity for a period of 25 years from 1<sup>st</sup> December 2016 and 1<sup>st</sup> October 2017 with the L-1 and L-2 bidders of Bid-1 and L-1 to L-5 bidders of bid-2 respectively as given below:

**Table-4**

Sl No.	Power Supplier	Region	Power MW	Tariff (Rs. /kWh)	PSA Date	To be supplied from
1	Jindal Power Limited	WR	200	3.60	29-12-2014	Dec-16
2	Jhabua Power Limited	WR	115	4.15	31-12-2014	Dec-16
3	Bharat Aluminium Co. Ltd	WR	100	4.29	26-12-2014	Oct-17
4	Jindal India Thermal Power Ltd	ER	100	4.29	29-12-2014	Oct-17
5	Jhabua Power Limited	WR	100	4.29	26-12-2014	Oct-17
6	Jindal Power Limited	WR	150	4.29	29-12-2014	Oct-17
7	East Coast Energy Private Ltd	SR	100	4.29	02-02-2015	Oct-17
	<b>Total</b>		<b>865</b>			

- (8) Hence, KSEB Ltd. has filed a petition before the Commission on 21.04.2015, requesting to adopt the tariff as per Section 63 of the Electricity Act, 2003 for the 865 MW of power tied with various generators as per the tariff as detailed in the petition.
- (9) The Commission examined the petition and the report furnished by the KSEB Ltd in detail and found out certain irregularities/ deviations in the bidding guidelines and also found out that the petitioner has not obtained prior approval of the Commission and Central Government in the matter of PSAs and the deviations from the guidelines. In response to the clarification sought by the Commission vide letter dated 07.12.2015, the petitioner submitted a reply dated 27.01.2016. However, no request has been made by the petitioner before the Commission for a hearing/ public hearing. The important deviations noted by the Commission at Para 32 of the Order dated 30.08.2016 in OP No.13/2015 is extracted below:

*“32. KSEB Ltd has stated that it has not deviated from the guidelines issued by Government of India. But it is found that KSEB Ltd has deviated from the procedures prescribed by the guidelines issued by Government of India, when the bids were processed by it. The Commission has also noted that KSEB Ltd has deviated from the procedure specified in Tariff Regulations, 2014. The Commission has noted the following deviations from the standard bidding documents and guidelines issued by Government of India on 08.11.2013 and 09.11.2013 and from the provisions in the Tariff Regulations, 2014 issued by the Commission,-*

- (i) *KSEB Ltd has awarded power purchase contract to the second lower bidder at its quoted rate of Rs.4.15 / kWh which is higher than the lowest rate of Rs.3.60 / kWh in Bid-1, whereas the guidelines issued by the Government of India are only for the selection of the lowest bidder.*
- (ii) *KSEB Ltd has not invited all the remaining bidders other than L1 to revalidate or extend their respective bid security and to match their rates with that of L1.*
- (iii) *KSEB Ltd has purchased 550 MW of power in Bid-2 as against the tendered quantity of 400 MW.*

- (iv) *KSEB Ltd has obtained only 200 MW from the lowest bidder in Bid-1 at a rate of Rs.3.60 / kWh. Thereafter 115 MW power from L2 has also been purchased at a higher rate of Rs.4.15 / kWh. Thus a total quantity of 315 MW was purchased as against the tendered quantity of 450 MW leaving a balance of 135 MW. KSEB Ltd has purchased more quantity of power than the tendered quantity in Bid-2 stating the reason that it could not get the full tendered quantity in Bid-1. Such purchase of more than the tendered quantity is not in accordance with the general principles of tender process.*
  - (v) *Even if the above 135 MW is considered for procurement from Bid-2, the total quantity that can be purchased is only 535 MW (400 MW + 135 MW). However, KSEB Ltd has purchased 550 MW deviating from the conditions prescribed by Government of India in the para 3.3.3 in the guidelines notified by Government of India on 5<sup>th</sup> May 2015, which has been relied upon by KSEB Ltd to justify award of power purchase contracts to bidders other than the lowest bidder in Bid-2.*
  - (vi) *KSEB Ltd has not obtained prior approval from Government of India for the deviations from the standard bidding documents and the guidelines.*
  - (vii) *KSEB Ltd has not obtained approval from the Commission before executing the power purchase agreements.*
  - (viii) *KSEB Ltd has not included any clause in the impugned PPAs to the effect that the PPA shall have the effect only with the approval by the Commission as specified in sub-regulation (1) of regulation 78 of the Tariff Regulations, 2014”.*
- (10) Hence the Commission considering the facts, documents and legal position has disposed of the Petition OP No.13/2015 vide Order dated 30-08-2016. The relevant portion of the said Order dated 30.08.2016 is extracted hereunder:

**“Order of the Commission**

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

- (1) *The purchase of 200 MW of power by KSEB Ltd from M/s Jindal Power Ltd, New Delhi at the rate of Rs.3.60 / kWh as per the Bid -1 dated 05.03.2014 which was opened on 31.10.2014, is approved.*
- (2) *The purchase of 100 MW of power by KSEB Ltd from M/s Bharat Aluminium Company Ltd, Chhattisgarh at the rate of Rs.4.29/ kWh as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014, is approved.*
- (3) *The approval of the following purchases of power by KSEB Ltd from the bidders other than the lowest bidder (L1) will be considered on getting the approval from Government of India for the deviations from the guidelines and on getting the views from Government of Kerala on the issues raised in paragraphs 34 and 38 of this order.*

(a)	The purchase of 115 MW of power by KSEB Ltd from M/s Jhabua Power Ltd, Gurgaon at the rate of Rs.4.15/ kWh as per the Bid -1 dated 05.03.2014 which was opened on 31.10.2014.
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(b)	<i>The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jindal India Thermal Power Ltd, New Delhi (L2) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.</i>
(C)	<i>The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jhabua Power Limited, Gurgaon (L3) as per the Bid -2dated 25.05.2014 which was opened on 14.11.2014</i>
(d)	<i>The purchase of 150 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jindal Power Limited, New Delhi (L4) as per the Bid -2dated 25.05.2014 which was opened on 14.11.2014.</i>
(e)	<i>The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s East Coast Energy Private Limited, Andhra Pradesh (L5) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.</i>

- (4) *A copy of this order will be submitted to Government of Kerala with request to communicate their views after duly considering the relevant facts and legal provisions in view of the Government Order GO (MS) No. 45/2014/PD dated 20.12.2014 sanctioning the purchase of 865 MW of power by KSEB Ltd on DBFOO basis*
- (5) *KSEB Ltd is directed to follow up the matter in Government of India and in Government of Kerala and to submit the results to the Commission as early as possible, considering the fact that the power purchases as per Bid-1 will have to commence with effect from December, 2016.*
- (6) *All the orders above are subject to the final decisions of the Hon'ble High Court in Writ Petition No. WP (C) 33100/2014."*

- (11) The Government of Kerala vide letter No. CA-DBFOO/KSERC/2016/PD dated 15-09-2016 addressed to the Govt. of India, sought for clarification/decision on the matter of long-term procurement for 865 MW power, in view of the observation made by the Commission in the Order dated 30-8-2016 in OP No.13/2015. In response to the above letter, Govt of India furnished their views vide letter dated 18.11.2016. The relevant portions of the said Govt of India letter dated 18-11-2016 is extracted below:

*"4. The deviations as pointed out by KSERC would have been got vetted and approved by the Central Government before issuance of RFQ, RFP&PSA & not at this stage". As per the guidelines, deviation on the provision of the bidding documents is approved, if necessary, and not the action taken by utility as per the practice or precedent.*

*5, In view of the above, Government of Kerala / KSEBL may take action as appropriate in consultation with KSERC".*

- (12) The petitioner vide letter No. KSEB/TRAC/Power Purchase/2016-17/3384 dated 15.11.2016, has submitted to the Commission as follows:

*14. In view of the above it is submitted that the purchase of 115 MW power from M/s Jhabua Power Ltd, is inevitable and it is humbly requested the Hon'ble Commission may kindly accord approval for scheduling the power from M/s Jhabua Power Ltd from December, 2016 It is also submitted that KSEBL shall approach the Commission with the approval from Ministry of Power once the same is received.*

But the Commission, as per letter No. 1893/DD (T)/Jhabua/2016/ KSERC dated 28.11.2016 directed the KSEB Ltd to submit approval from both Government of India and Government of Kerala. But no reply was received from the petitioner, instead the petitioner submitted a copy of GO (Rt) No.238/2016/PD dated 30.11.2016 issued by the Government of Kerala which granted permission to the KSEB Ltd to procure 115 MW from M/s Jhabua Power Ltd from 01.12.2016. The petitioner has further submitted that no formal communication has been received in respect of approval of Government of India.

- (13) In the circumstances and urgency explained by KSEB Ltd and in view of the decision of Government of Kerala vide GO dated 30.11.2016, the Commission vide Order No.1893/DD/(T)/Jhabua /2016/KSERC in OP No.13/2015 dated 22.12.2016 has provisionally approved the purchase of 115 MW of power by KSEB Ltd from M/s Jhabua Power Ltd at the rate of Rs.4.15 / kWh as per the power purchase agreement dated 31.12.2014, subject to the clearance from Government of India. Relevant portion of the said Order is extracted hereunder:

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

- (14) Thereafter, the petitioner vide letter No.KSEB/TRAC/POWER PURCHASE/2018 dated 25/10/2017 informed that KSEBL was forced to schedule the 350MW power under Bid-2 from 1-10-2017 and could not defer scheduling this power because of the precarious power scenario and in anticipation of getting approval from the Commission upon clarification/direction from the Govt. of Kerala. The petitioner also produced G.O.(Ms) No.22/2017/PD dated 21/10/2017 and also requested to the Commission for approval. As per the above G.O, the Govt has permitted the KSEBL to draw the contracted power from 1/10/2017. In the said Order, the Government of Kerala has clarified that final orders in the matter shall be issued in due course and hence the Govt order dated 21.10.2017 is not a final order.
- (15) In the circumstances mentioned above, the Commission vide its letter dated 22.12.2017 allowed KSEB Ltd to schedule 100 MW power from Jindal India Thermal Power Ltd, 100 MW from M/s Jhabua power limited and 150 MW from M/s Jindal Power Limited in view of the G.O (M.S) No. 22/2017/PD dated 21.10.2017. In the said letter, the Commission pointed out that *the G.O. dated 21/10/2017 is only an interim measure and final orders are yet to be issued. Since the Government is yet to give its final decision, it is informed that, the Commission may approve the power purchase proposal including the rate for the pending approvals only after the State Government accords the final approval for the entire power purchase under DBFOO.*

- (16) The petitioner vide letters dated 20/7/2019 and 2/8/2019, has requested the Commission that in order to avoid the denial of purchase of power from exchanges and the stoppage of supply of 350 MW power by RLDCS and the consequent adverse impact on the state power system, due to the non-establishment of LC as PSM for the DBFOO contracts under Bid-2, the final approval of PSA's may be granted. The Commission declined the petitioner's requests vide letter No.1146/D(T)/2019/KSERC dated 26/9/2019 as extracted here under:

*KSERC is a statutory quasi-judicial body constituted under the Electricity Act, 2003. Section 94 of the Electricity Act, 2003 confers on the Commission the same power as are listed in a Civil court under the Code of civil procedure, 1908 in respect of directions, orders, reviews etc.*

*The Commission had vide its Order dated 30/8/2016 directed KSEB Ltd. to get the approval of the Govt. of India for the deviations in the standard bidding guidelines and in view of the G.O (Ms)No.45/2014/PD dated 20/12/2014 to obtain the views of Govt of Kerala, after duly considering the relevant facts and legal provisions. Since the above approvals are yet to be submitted before the Commission by the KSEB Ltd. the Commission cannot consider the request of KSEB Ltd to grant approvals for the PSA's entered into with L2, L3 and L4 in Bid-2 under DBFOO.*

- (17) The Government of Kerala vide letter dated 20.01.2018 has requested the Ministry of Power to render the advice as to whether it will be irregular to confirm the said purchase of power under PSAs executed with the bidders other than L 1 bidder under Bid 1 and Bid 2. In reply to the clarification sought by State Government, Central Government vide letter No.23/12/2018-R&R dated 11.12.2019 has clarified as follows:

*"4. The matter has been further examined. The view of Ministry of Power as communicated earlier vide letter dated 18.11.2016 are read. Deviations are pointed out by KSERC would have been got better and approved by Central Government before the issuance of RFQ, RFP and PSA and not at this stage. Government of Kerala / KSEBL may take action as appropriate in consultation with KSERC".*

- (18) But neither the Government of Kerala nor KSEB Ltd has consulted the Commission as directed by the Central Government.

- (19) While approving the ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22, the Commission stated as follows.

*"Hence the Commission has considered scheduling power from the three projects of Bid-2, ie., 100 MW of power from M/s Jindal India Thermal Power Ltd, New Delhi, 100 MW of power from M/s Jhabua Power Limited and 150 MW of power from M/s Jindal Power Limited for the limited purpose of estimating the ARR&ERC for the control period. Since the required approvals from Gol and State Government is still awaited, the Commission is constrained to use the rate equivalent to the cost of power from BALCO, which is the L1 of Bid 2. The Commission emphasizes that this consideration is only for the purposes of estimating the cost of power provisionally in the ARR and shall not be construed as an approval of the power purchase, rate or of the PPA itself as per Section 63 of the Act which can be considered only after the fulfilment of conditions specified by the Commission in its order dated 30-8-2016"*

- (20) Similarly, while approving the ARR & ERC and tariff for the MYT period 2018-19 to 2021-22, the Commission had considered the rate equivalent to the cost of power from BALCO for estimating the cost of power provisionally from these three generators. The Commission reiterate that, during the truing up of accounts for the respective financial years, excess amount, if any, incurred for procuring power from these three generators shall not be considered, unless KSEB Ltd gets the approval of power purchase from Government of India for the deviations from the guidelines and on getting the approval of the Government of Kerala on the entire power purchase under DBFOO. With the above observation, the Commission decided the Fuel surcharge petitions OA No. 29/2019 and OA No. 02/2020 filed by the KSEB Ltd, limiting the additional cost claimed by the generators.
- (21) On 06.04.2020, KSEB Ltd wrote to Jindal India Thermal Power Ltd stating that in the absence of regulatory approval to pass the entire power procurement cost against the unapproved PSAs, KSEB Ltd would have to limit payment to the generators in accordance with the orders of the Commission.
- (22) KSEB Ltd. in the petition O.A.No.29/2019 dated 14.2.2020 filed for the approval of fuel surcharge for the period from April 2019 to June 2019, and also in petition O.A.No.02/2020 dated 27.4.2020 for the approval of fuel surcharge for the period from July 2019 to September 2019 has claimed fuel surcharge for the electricity purchased from the three unapproved DBFOO contracts in bid-2 namely (1) 100 MW power from M/s Jindal India Thermal Power Ltd ,New Delhi, (2) 100 MW from M/s Jhabua Power Ltd and (3) 150 MW from M/s Jindal Power Ltd. The Commission vide the Orders dated 14.2.2020 and 27.4.2020 has not approved the fuel surcharge claimed from the above three unapproved DBFOO contracts citing the reason that the Commission has not specifically approved the fixed charge and variable cost of these stations. Instead, the Commission directed KSEB Ltd. to limit the payment of these stations at the rate of BALCO, i.e, the L1 rate of Bid-2. KSEB Ltd filed review petition Nos. 2 of 2020 and 4 of 2020 against the orders of the Commission dated 14.02.2020 and 27.04.2020 respectively. The Commission, vide its common order dated 14.08.2020 dismissed the review petitions.
- (23) The petitioner KSEB Ltd on 08.09.2020 wrote to Jindal India Thermal Power Ltd stating that a petition for approval or otherwise of the PSAs was being filed by them before the State Commission. Relevant portion is extracted hereunder:
- .....Now KSERC had rejected these review petitions in the common order issued on 14.08.2020. In this order, KSERC has reiterated that the contracts do not have approval of KSERC and any amount paid above the rate applicable to L1 bidder will not be passed on. Apparently, with this order of KSERC , the conditions precedence mandated under the PSA remains unfulfilled . In these circumstances KSEBL is filing a separate petition before KSERC seeking specific order on the approval or otherwise of the respective PSA's. Meanwhile, KSEBL is constrained to limit the payment against monthly bills with respect of the power*



*scheduled from your station to that of the tariff rate of BALCO, in the respective monthly bills, in compliance with the orders of the Commission....”*

- (24) Aggrieved by the above, communication of KSEB Ltd M/s Jindal India Thermal Power Ltd on 07.10.2020 filed an appeal under Section 111 of the Electricity Act, 2003 before the Hon'ble Appellate Tribunal for Electricity being DFR No. 369/2020 titled *Jindal India Thermal Power Ltd. Vs. Kerala State Electricity Regulatory Commission & Ors.* In that petition, Jindal India Thermal Power Ltd prayed that the orders of the Commission passed in OA No. 29/2019 and OA No. 2 of 2020 dated 14.02.2020 and 27.04.2020 respectively are to be set aside. Additionally, it was also prayed that the procurement of power to be approved as per the tariff in the PSA signed with KSEB Ltd. The APTEL issued an interim direction to this Commission to file affidavit and posted the case to 20.11.2020.
- (25) In the meanwhile, **on 12.11.2020, KSEB Ltd filed this OP No.5/2021 as fresh petition under Section 63 of the Act, for adoption of tariff of the unapproved PSAs signed by them before the Commission.**
- (26) In due compliance of the interim Order dated 06.11.2020, issued by the Hon'ble APTEL, the Commission filed an affidavit stating the entire facts. But the Hon'ble APTEL issued an interim stay Order on 20.11. 2020. Relevant portion is extracted hereunder:
- ..... During the hearing today, we were informed that the second Respondent i.e. Kerala State Electricity Board Ltd. (KSEBL) has approached the State Commission (first Respondent) by a fresh petition seeking approval for procurement of power from the Appellant and the PSA as also adoption of tariff discovered in bid process. The State Commission, we are further informed, has issued notice to the Appellant as well.*
- .....In the facts and circumstances and bearing in mind also the fact that the approval of the State Commission for the PSA and the prayer for tariff adoption is still awaited, we feel it just and proper to direct stay against the operation of the impugned orders dated 14.02.2020 and 27.04.2020 on subject of fuel surcharge and, in the consequence, restoring status quo ante to the dispensation prevailing immediately anterior thereto, as an ad-interim arrangement, such ad-interim order to continue till the application for stay and appeal are adjudicated upon after final hearing. ...**We clarify that the appeal and application filed therewith will be taken up for final hearing after the decision on the fresh petition for approval/adoption has been rendered by the State Commission. Ordered accordingly. ....***
- (27) The Commission, challenging the interim Order of the APTEL dated 20.11.2020 filed Civil Appeal No. 41/2021 before the Hon'ble Supreme Court on 04.01.2021. The bench of the Hon'ble Chief Justice of India, vide the Order dated 27.01.2021 in Civil Appeal No. 41/2021 was pleased to award stay to further proceedings in this matter in the Appellate Tribunal. However, in compliance of the Order issued by the Hon'ble APTEL dated 20.11.2020, the Commission scheduled public hearings on 09.02.2021 at Ernakulam and on 19.02.2021 at Thiruvananthapuram in OP No. 5/2021. Accordingly, a public hearing was conducted on 09.02.2021 at Ernakulam. During the hearing, the KSEB Ltd presented the case and reiterated their contentions narrated in the Original Petition. But objections were raised by the participants on the ground that the Order dated 20.11.2020 of the APTEL has been stayed by the Hon'ble Supreme Court. Since the matter is sub judice, the Commission shall not hear

the case. The Kerala High Tension & Extra High Tension Industrial Electricity Consumer Association and Shri. Dejo Kappen, Chairman, Democratic Human Rights & Environment Protection Forum raised strong objections and filed IAs and sought three weeks' time. Based on the objections raised by the participants in the public hearings and in view of the Interim Stay Order issued by the Hon'ble Supreme Court in Civil Appeal No. 41/2021 dated 27.01.2021, the Commission decided to wait for the final disposal of the Civil Appeal No. 41/2021.

- (28) The Petitioner vide letter No. KSEB/TRAC/CG/DBFOO/2021-22/49 dated 28/4/2022 informed the Commission that Govt. of Kerala "on 27/10/2021 vide G.O (Rt) No.163/2021/POWER dated 27/10/2021 had constituted a Committee with Additional Chief Secretary (Finance) as Chairman, Principal Secretary (Power) as Convenor and Law Secretary and CMD KSEBL as members to examine the bidding process and purchase agreements entered into by KSEBL based on the comments of the statutory agencies and the possibility of terminating/re-negotiating the power purchase agreements in the best interest of the State. It was mentioned in the said letter that the said Committee in the meeting held on 19/1/2022 recommended that the prudent course of action would be that deviations in the standard bidding process are not agreed by the Government of Kerala in respect of the following PSA's.
  - i. Jhabua Power Ltd-Bid1-115 MW
  - ii. Jhabua Power Ltd-Bid2-100 MW
  - iii. Jindal India Thermal Power Ltd-Bid-2-100 MW
  - iv. Jindal Power Ltd-Bid2-150 MW
6. The Hon'ble Supreme Court disposed the Civil Appeal No.41/2021 vide Order dated 10.02.2023 as stated at pre-Para-4. In compliance of the Order dated 10.02.2023 of the Hon'ble Supreme Court, a meeting was convened at the Office of the Commission by e-hearing mode on 20.02.2023 at 10.30 a.m. During the meeting, the Commission considered and agreed to the suggestions of the parties and allowed 'Thirty days' time to all the parties to file objections and suggestions and directed to communicate the same to other parties also.
7. The Commission also considered the IA filed by the petitioner dated 22.03.2023 and allowed the application as IA No.05/2023 on 24.03.2023 seeking approval for amending the relief portion of the petition OP No. 05/2021 for final orders for drawal of power from the PSAs for 115 MW of contracted power under Bid-1 from Jhabua Power Ltd in view of the Order dated 25.06.2022 in OP No.11/2022 of the Commission.
8. Thereafter, Public hearings were conducted on 28.03.2023 at Kozhikode, 29.03.2023 at Ernakulam and on 11.04.2023 at Head Quarters, Thiruvananthapuram. Adv. Prabhas Bajaj appeared on behalf of the petitioner KSEB Ltd. Adv. Pranav Sood represented for M/s Jindal Power Ltd. Adv. Matrugupta Mishra, Shri. Pulak Srivastava, General Manager, and Shri. Sanjay Mittal, Director, JITPL represented on behalf of M/s Jindal India Thermal Power Ltd. Shri. Vinod Kumar Jain, AGM, NTPC represented for Jhabua power Ltd. Shri Nandakumar, Shri. Saji Mathew and Shri. Prabhakaran. K. V. represented on behalf of HT&EHT Association and presented the averments on behalf of HT&EHT

Association. Shri Dejo Kappen, Chairman, Democratic Human Rights & Environment Protection Forum and Shri. C.P. George, Dy. Chief Engineer, KSEB Ltd (Rtd), were also presented their arguments. Shri. M.G. Suresh Kumar, Gen Secretary, KSEB Officer's Association and Shri. Saju. A.H, KSEBWA, (CITU) were also presented their arguments and submitted their written documents.

9. During the final public hearing held on 11.04.2023, the petitioner presented the case in detail seeking final approval of the four PSAs based on the IA No.05/ 23 filed by the petitioner. The respondents (M/s jhabua Power Ltd, M/s Jindal India Thermal Power Ltd and M/s Jindal Power Ltd) have supported the petitioner and presented their arguments for final approval of the PSAs pending for approval. The additional respondents raised objections. On conclusion of the hearing, the Commission vide Daily Order dated 12.04.2023 directed the Petitioner to present their final submission with their sworn affidavit within seven days, ie, on or before 17<sup>th</sup> April, 2023, with direction to serve copies of the same to the respondents and additional respondents. The Commission also directed other respondents and stake holders who participated and presented the arguments, to submit their argument notes, objections and suggestions with duly authenticated data along with their sworn affidavit on or before 17<sup>th</sup> April, 2023 in view of the time limit fixed by the Hon'ble Supreme Court.

**10. Summary of the petition filed by Petitioner (KSEB Ltd) is given below:**

- (1) From 2011-12 year onwards, the petitioner had been facing huge power and energy shortage in the State. Considering this the petitioner decided to procure 850 MW of power to meet the peak demand and the energy requirement of the State, took a decision for procurement of long-term power by the petitioner on 21-2-2014 and entered into long-term Power Sale Agreements for 865 MW through two tariff based competitive bids during December, 2014 as per the tariff based competitive bidding Guidelines for procurement of electricity from Thermal Power Stations set up on DBFOO basis, notified vide Resolution No. 23/17/2011-R&R (Vol-V) dated 08-11-2013 by MoP under Section 63 of the Electricity Act, 2003.
- (2) As per the DBFOO guidelines, after entering into Power Purchase contracts, if the power could not be evacuated, the buying entity is bound to pay 50% of the fixed charges to the supplier. Since DBFOO guidelines provides for only one delivery date (CoD) to be prescribed in a bid and since two delivery dates are found to be necessary based on assessment of transmission corridor availability, it became imperative to invite two separate bids with two separate start dates. Further, it was assessed that the tender procedures would be completed before December, 2014 and LTA applications for the same could be submitted by December, 2014 so that availability of corridor can be ensured for the start dates specified in the bids. Accordingly, KSEB Ltd. decided to invite two separate bids as per DBFOO guidelines, for the procurement of RTC power from thermal power stations set up on DBFOO basis for a period of 25 years – Bid-1 for 450 MW on 5-3-2014 and Bid-2 for 400 MW on 25-4-2014.
- (3) As part of seeking guidance from MoP, the bid documents were forwarded to MoP on 30-7-2014 and had sought clarifications from MoP on 23-8-2014, on

handling a situation wherein L1 bidder did not offer entire bid quantum. MoP after vetting the entire bid documents clarified on 6-8-2014 that different sources of fuel cannot be specified in one bid. Apart from this no other deviations were pointed out by MoP. Bid documents were vetted by MoP and no deviations other than on fuel option was pointed out, which was set right subsequently while issuing RFP to qualified bidders. Thus, the impression that KSEBL has deviated from guidelines and SBDs while issuing bids is misplaced.

- (4) Immediately, on completion of bid process, the petitioner communicated the bid outcome including discovered price to Govt of India. The petitioner vide letter No. 18-12-2014 had intimated the Commission about the outcome of the entire competitive bidding process. Government of Kerala vide order G. O. (Ms.) No. 45/2014/PD dated 20-12-2014 accorded sanction for the long-term power procurement. Considering the above and the approval from Govt of Kerala, petitioner entered into Power Supply Agreements as shown in Table4.
- (5) On 26-2-2015, the petitioner filed copy of PSAs executed, before the Commission. On 16-3-2015, the Commission directed the petitioner to file petition for the adoption of tariff under Section 63 of the Electricity Act, 2003. Accordingly, on 20-4-2015, the petitioner filed the petition as OP 13/2015.
- (6) In view of failure of monsoon in 2016-17 and the power shortage estimated, KSEBL sought the approval of Govt of Kerala and the Commission for scheduling 115 MW power from M/s. Jhabua Power Ltd. from December 2016. Govt of Kerala approved the procurement vide G.O (Rt) No.238/2016/PD dated 30.11.2016. Thereafter, the Commission vide Order dated 22-12-2016 gave provisional approval. Thus, DBFOO PSAs of 415 MW are approved (315 MW under Bid-1 and 100MW under Bid-2). Therefore, the balance PSAs for 350 MW in Bid-2 still awaiting approval from the Commission.
- (7) The matter of approval of the balance PSAs under Bid 2 was again taken up by the petitioner with GoK vide letters dated 10-05-2017, 03-07-2017 and 22-09-2017. Govt. of Kerala vide order dated 21-10-2017 permitted the petitioner to draw power from the entire DBFOO contracts, pending detailed consideration of the matter. Thereafter the Commission, vide the letter dated 22.12.2017 allowed the petitioner to draw the contracted power under DBFOO, in view of the order of the State Government vide GO (Ms) No. 22/2017/PD dated 21.10.2017, clarifying that Commission may approve the power purchase proposal including the rate for the pending approvals under DBFOO only after the State Government accords the final approval for the entire power purchase under DBFOO. Based on the above, the petitioner has been scheduling power from these suppliers.
- (8) The petitioner has further submitted that the alleged deviation from the standard bidding guidelines issued by are not factually correct as submitted below.
  - (i) No deviation was made by KSEBL in the standard bid documents used for both bid processes, warranting prior approval of MoP. The entire bid documents were forwarded to MoP on 30-7-2014. MoP

after vetting the entire bid documents clarified on 6-8-2014 that different sources of fuel cannot be used in one bid. Apart from this no other deviations were pointed out by MoP.

- (ii) The petitioner had approached MoP to issue clarifications regarding procedural gap in the bidding documents viz-a-viz lowest bidder not offering entire bid quantum and the process to be followed in that scenario, for tying up the required quantum of power by the Utility. MoP could come with the clarification by way of modification in guidelines only on 5-5-2015, which is substantially similar to the procedure followed by KSEBL in the second bid.
- (iii) MoP vide letter dated 11-12-2019 had clarified that no deviations were noticed by the Commission in the RFQ, RFP and PSA issued by the Petitioner while inviting offers and the deviation pointed out by the Commission were only in respect of the evaluation process that followed. Therefore, MoP advised that Govt. of Kerala/KSEB Ltd. may take action as appropriate in consultation with KSERC.
- (iv) The petitioner also submitted that the Commission may seek the views of GoK and if views are not obtained, may take appropriate action in the matter. No appeal or review was filed against the order as the order was not conclusive on the approval of the PSAs. The order never disallowed the PSAs entered by KSEBL, rather it only directed that the approval of pending PSAs shall be considered on getting approval from Government of India for the deviations from the guidelines and on getting views from Government of Kerala on the issues raised in the order.

(9) The petitioner has also submitted the following matters for the consideration of this Commission:

- 1) The approval of PPA by the Commission is a condition precedent which is to be satisfied by the Petitioner, prior to the commencement of supply.
- 2) GoK had already given in principle approval for availing the power from the above contracts and the Commission has also permitted the same.
- 3) By approving to draw power and allowing passing of bulk portion of the cost of power, the Commission has granted deemed approval for the PSAs.
- 4) The reason for slight changes in the monthly tariff payable to each generator is dependent on number of internal and external factors and is bound to change from month to month. The Commission has allowed scheduling of power. The Commission has considered the procurement of power from these sources while approving ARR&ERC for the control period 2018-22.
- 5) While procuring power as authorized by GoK and the Commission, petitioner is bound to comply with the terms and conditions specified in the executed PSAs having statutory force under Section 63 of the Electricity Act, 2003 and make monthly payments as envisaged in the PSAs. L-1 rate is already adopted by the Commission vide order dated 30-8-2016 as per Section 63 of the Electricity Act, 2003.
- 6) The quantum contracted is not in excess of the requirement of the State as is evident from the subsequent approval of the Commission to purchase another 150 MW on long term basis from 1-6-2016 onwards

from M/s Maithon Power Ltd. The fixed charge and variable charge in each PSA are linked with several external parameters. The source of fuel for the generators are different. The grade of coal linkage through CIL for the generators also differ. Further, to the above, the escalation quoted by each bidder in respect of the landed cost of and the escalation quoted against railway freight are also different. The distance from mine for each generator is different.

- 7) The standard PSA notified by MoP, GoI as per Section 63 of the Electricity Act, 2003 prescribes regulating FC based on pre-determined parameters and allow pass through of fuel cost based on actuals subject to certain parameters. As per the provisions of the Electricity Act, 2003 and the judgment of Hon'ble Supreme Court dated 11.04.2017 in CA 5399-5400 of 2016 and also as per the various orders of the Commission, the State Commission do not have jurisdiction in respect of determination or re-determination of tariff of interstate generating stations.
- 8) The Commission in OP No.12/2018 filed by M/s.Jhabua has already decided that this Commission does not hold jurisdiction to go into the provisions in the PSA for the inter-State sale of power contracted therein. The rate of power from all the DBFOO contracts are lower than most of the PPAs whose tariff is determined by CERC having similar CoD.
- 9) KSEB Ltd has not taken any deviation from the SBDs and the deviations pointed out by Commission is related to the process of selection of successful bidders. If these concluded PSAs are terminated, the Petitioner will be liable to bear the cost involved in contractual termination, litigations and relinquishment charges of LTA. The amount payable towards this cannot be estimated now, but the amount could be huge.

**11. The petitioner submitted their arguments, objections and suggestions during the hearings as follows:**

- (1) Under Section 63, the Commission shall only consider whether the bidding process has been carried out in a fair and transparent manner and in accordance with the guidelines laid down by the Government of India in terms of Section 63 of the Electricity Act, 2003. If any situation is found to be not covered under the guidelines of the Central Government, the Commission shall consider and examine whether in such a situation, the process adopted by the procuring entity has met with the principles of fairness and transparency, the Central Government has no role to play in this regard.
- (2) The scope and ambit of the jurisdiction exercised by the Commission under Section 63 of the 2003 Act has also been interpreted, expounded and explained by the Hon'ble Supreme Courts in a number of judgments as explained.
  1. Judgment of the Hon'ble Supreme Court in Energy Watchdog v. CERC, (2017) 14 SCC
  2. Judgment of Hon'ble Supreme Court in Tata Power Company Ltd. Transmission Vs. Maharashtra Electricity Regulatory Commission & Ors., (2022 SCC Online SC 1615)

- (3) There may be instances and / or situations which may not get covered by any provision of the tender document or the guidelines as such a situation may not have been envisaged in the said tender document or guidelines. It is the settled position of law that if the tendering authority is faced with any such situation, it shall be opened to the tendering authority to adopt any fair or transparent method to deal with such situation for proceeding further with the tender process as laid down by the Hon'ble Supreme Court in *Bharat Coking Coal Ltd. v. AMR Dev Prabha*, (2020) 16 SCC 759.
- (4) Clause 1.1.4 of Model Request for Proposal (RFP) is specifically permitting the Petitioner to adopt process of inviting other Bidders to match the L1 Bid. The process of inviting other bidders to match the L1 tariff for the balance quantum of power to be procured by the State is entirely in conformity with the requirements of fairness and transparency. Such a situation is also envisaged by the guidelines. It would be open for the concerned tendering authority to invite the other bidders to match the tariff quoted by the L1 bidder and such a process can never be termed as "negotiation" (Circular dated. 15.03.1999 and Circular dt. 03.03.2007).
- (5) With respect to the L2 Bidder in the Bid-1 process (Bid of Jhabua Power Ltd. for supplying 115 MW at the tariff of Rs. 4.15 / unit), after the tariff of Rs.4.29 per unit had been discovered in the Bid-2 process as being the lowest tariff quoted by the L1 bidder in the Bid-2 process, it was seen that the tariff quoted by the L2 bidder in the Bid1 process was even lower than this tariff of the L1 bidder discovered in Bid-2 process. In response to the clarification sought by the Commission regarding the willingness to increase the quantum in Bid-1, the Petitioner clarified the situation with relevant date as 15-11-2014, after opening of Bid-2.
- (6) On the opening of Bid-2, when it was seen that there is a possibility for the Petitioner to secure procurement of power to the extent of 115 MW from the L2 Bidder in Bid-1, at the rate lesser than the lowest tariff discovered in the Bid-2 process, the Petitioner found to be in the interest of the State to procure this cheaper power and therefore, entered into the PSA with the L2 bidder in the Bid-1 process due to the reasons stated.
- (7) The petition filed by the KSEB Ltd had been kept pending and the final orders were to be passed by the Commission. The Petitioner had addressed communications to the State Government as well as Central Government, and the replies received from time to time had also been placed before the Commission, as directed by the Commission in the Order dated 30.08.2016. The issue of grant of approval has remained pending before the Commission till date.
- (8) Even the Government of India in its communication dt. 18.11.2016 has not described the process conducted by KSEBL as a "deviation", rather it has described the same as "action taken by the Utility as per practice or precedent".

(9) In the meanwhile, Government of Kerala approved the procurement under the PSA of the L2 bidder under Bid-1 i.e. 115 MW from Jhabua Power Ltd. vide GO (Rt) No.238/2016/PD dated 30.11.2016. The Commission, vide order dated 22.12.2016 also gave its provisional approval for the PSA of the L2 bidder under Bid-1 i.e. 115 MW from Jhabua Power Ltd. The matter of approval of the balance PSAs under Bid 2 was again taken up by the Petitioner with the Government of Kerala vide letters dated 10.05.2017, 03.07.2017 and 22.09.2017. Government of Kerala, vide order dated 21.10.2017 permitted the petitioner to draw power and the Commission vide Order dated 22.12.2017 also allowed to draw the contracted power. The Ministry of Power (MoP), Government of India, vide its letter dated 11.12.2019, reiterated its observations earlier communicated vide its communication dated 18.11.2016.

(10) There is no “deviation” from the guidelines of the Central Government, in the process adopted by the Petitioner. Any situation not covered by a specific provision of the guidelines, it falls squarely within the jurisdiction of the Commission to approve such a decision of the Petitioner, the same being entirely in conformity with the principles of fairness, transparency and public interest.

(11) The tariff discovered through the said bidding process has been entirely in public interest and in the interest of the consumers of the State of Kerala due to the reasons stated in the petition and statements. The petitioner has taken steps for medium-term procurement under the SHAKTI Policy based on the observations made by the Commission it is order dated 25.06.2022 in O.P.No.11/2022. Accordingly, the tender was invited on November 21, 2022 for a supply for a period of 5 years. But subsequently, the Ministry of Power (MoP) has cancelled the tender.

**12. The respondents (M/s jhabua Power Ltd, M/s Jindal India Thermal Power Ltd and M/s Jindal Power Ltd) attended the hearings and supported the arguments of the petitioner and filed their reply/submissions. The contentions raised by the Respondent No.1 Jhabua power Limited are summarized below:**

1. M/s Jhabua Power Ltd operates a 600 MW coal -based power plant at Barela-Gorakhpur, Dist.Seoni, Madhya Pradesh. Power is supplying from this 600MW generating unit., M/s Jhabua Power Ltd had entered into the following power purchase agreements with the KSEB Ltd:
  1. Bid 1-for drawal of 115 MW of contracted power as per the PSA signed on 31.12.2014 for 25 years supplying power since 22.12.2016 onwards;
  2. Bid 2-for drawal of 100 MW of contracted power as per the PSA signed on 26.12.2014 for 25 years supplying power since 01.10.2017 onwards;
2. M/s Jhabua Power Ltd has a limited role to play in so far as the present proceedings are concerned. There is no requirement of a public hearing in a Section 63 proceedings. The Commission is bound to adopt the tariff if such tariff has been discovered through a transparent process of bidding. M/s Jhabua Power Ltd supports the Petitioner and requests Hon'ble Commission to adopt the tariff in an expeditious manner.



**13. M/s Jindal India Thermal Power Ltd (R-2) also supported the arguments of the petitioner and filed their reply/submissions in the following lines:**

1. This 2<sup>nd</sup> respondent reduced the fixed rate by 8 paise (fixed charges from Rs.3.62/kWh to Rs.3.54/kWh) without asking for any variations in other aspects. The petitioner is continuously purchasing power 100 MW since October, 2017. Pursuant to Execution of the PSA, the answering respondent applied to Power Grid Corporation of India Limited for grant of long-term access (LTA) of 95 MW for the purposes of evacuation of power from its project to beneficiary in the State of Kerala. Thereafter, on 01.10.2015, PGCIL granted LTA of 95 MW for evacuation of power from its project to KSEB Ltd.
2. This 2<sup>nd</sup> Respondent has made a commitment to supply power at Rs.4.29/ Unit for a period of 25 years. Denying approval of the PPA at this point of time would infuse distrust and illegality amongst the generators and the same would amount to an outrageous violation of the provisions of the Electricity Act, 2003. It will be against the sanctity of the agreement reached in pursuance to a competitive bid process and sanctity of procuring power from the Respondent. Based on the permission of the State Government and the Commission's letter dated 22.12.2017 the supply has been initiated in October, 2017 and is continuing till date.
3. It is a settled principle of law that the issues in a suit shall have to be adjudicated as it stood on the day of institution of the suit. Hence, while considering the petition, situation at that time shall also be taken into consideration. JITPL is continuously supplying power to the State of Kerala since 01.10.2017. The letter dated 06.05.2021 issued by KSEBL clearly demonstrates as to how JITPL was asked to extend its complete co-operation to its fullest during the PANDEMIC Covid-19 period of 2020-2021-2022 and kept on generating and supplying power to the petitioner/KSEBL in such toughest time ever.
4. The tendered quantum under Bid-1 was 450 MW. The petitioner requested the bidders L-2 to L-4 to match their bid tariff to L-1, however, none of the bidders agreed to match their rate with L-1. But M/s JITPL could not match the L-1 bid as there was a huge rate difference of Rs.0.79 per kWh which is actually 18% of the bid price quoted. Further, M/s JITPL reduced its fixed cost by Rs.0.08 per unit to match L-1 rate duly following the terms of the bid documents.

**14. M/s Jindal Power Ltd (R-3) furnished their reply submission and pleaded as follows:**

- (1) The Respondent/JPL is supporting the petitioner's prayer for grant of approval for procurement of power from JPL. The Respondent participated in both the bids and offered the quantum of 200 MW and 150 MW of power for Bid-I and Bid-II respectively.
- (2) KSEB Ltd vide letter dated 19.11.2014 asked the Respondent/JPL's willingness (L-4) to match the quoted tariff by L-1 to which JPL vide letter dated 21.11.2014,

gave its concurrence and offered 150 MW power at INR 4.29/kWh (fixed charge of INR 3.43/kWh and a fuel charge of INR 0.86/kWh). On 04.12.2014, KSEB Ltd issued a Letter of Award for supply of 150 MW at a tariff of INR 4.29/kWh comprising of a fixed charge of INR 3.43/kWh and a fuel charge of INR 0.86/kWh.

- (3) The Government of Kerala issued GO(MS)No.45/2014/PD dated 20/12/2014 sanctioning the purchase of 865 MW (315 MW and 550 MW of Bid-I&II) by KSEB Ltd including the 550 MW of power from L-1 to L-4 bidders of Bid-II at INR 4.29/kWh. This Order which was akin to a Section 108 of Electricity Act, 2003 direction, as the same was in the public interest.
- (4) The Commission vide the MYT Order dated 08.07.2019 permitted scheduling of power from the said PSAs for control period of FY 2018-19 to 2021-22, at the rate to be paid to L-1 bidder of Bid-II (BALCO). On 25.06.2022, this Commission passed the Order in the afore said MYT petition vide the said order, this Commission held as follows:

*“6.112 In view of the foregoing facts and developments the Commission cannot permit KSEB Ltd to continue scheduling of power from the following four provisionally approved/unapproved contracts (i) Purchase of 115 MW of Power from Jhabua Power Ltd of L2 of Bid-1 (ii) 150MW from Jindal Power Ltd of Bid-2 (iii) 100MW from Jindal India Power Ltd and (iv) 100 MW of power from Jhabua Power Ltd of Bid-2 KSEB Ltd to make necessary arrangements for procuring 465 MW of equivalent power on medium term basis through competitive bidding as per Section 63 of the Electricity Act, 2003. Alternatively, KSEB Ltd may make necessary arrangements for procuring 465 MW from power plants through competitive bidding route who have assigned coal linkage as per the SHAKTI policy of the Central Government.*

- (5) The Commission vide the Order dated 25.06.2022 also estimated the single rate of power procurement from L2 to L4 bidders as INR 4.00/kWh for the year 2022-23 with an escalation of 2% for the subsequent years of the MYT period. Being aggrieved by the Order dated 25.06.2022 JPL has approached the Hon'ble APTEL by way of filing an appeal being DFR No.56 of 2023 interalia seeking directions upon KSEB to continue the procurement of power from JPL. The respondent added that the present petition filed by the Petitioner/KSEB Ltd be allowed taking into account the following salient aspects which invariably establish that the PSAs of L-2 to L-4 including the Respondent, are already deemed to be approved by the State Government as well as by this Commission in the public interest, from time to time since 01.10.2017 when the procurement of power was commenced. The Respondent has also cited following decisions to substantiate their arguments:

- a. *Energy Watchdog v. CERC, reported in (2017)*
- b. *Judgment dated 16.12.2011 passed by the Hon'ble APTEL in Appeal No.82 of 2011.*
- c. *In Appeal No.106 of 2011, the Hon'ble APTEL vide judgment dated 17.02.2012.*
- d. *Judgment Dated 03.02.2020 passed by the Hon'ble APTEL in Appeal No.224 of 2019.*

- (6) JPL has changed its position to its detriment by obtaining coal linkage vide FSA dated 28.08.2013 and 29.08.2013 and by obtaining LTA dated 01.10.2015 for

a quantum of 142.5 MW from CTUIL and that huge penalties are likely to be imposed upon JPL in the event the said agreements are surrendered. In view of the above facts and circumstances the Commission ought to allow the present petition.

**15. The 1<sup>st</sup> Addl Respondent, HT & EHT INDUSTRIAL ELECTRICITY CONSUMERS' ASSOCIATION attended the hearings and raised objections against the petition in the following lines:**

- (1) The Orders of the Commission dated 30.08.2016 in OP No. 13/2015 is binding on KSEB Ltd. The KSEB Ltd filed the petition before the Commission for getting approval of PPAs belatedly by 7 months from the date of tendering and by four months from the date of execution of the tender. PPA signed with adherence to Section 63 of Electricity Act, 2003 cannot be a claim for deemed approval. Prior approval from Govt. of India is required as per the Resolution dated 9.11.2013 of Ministry of Power, Govt. of India. As this condition was not adhered to, Commission had not approved the PPA. It is relevant that the Hon'ble Supreme Court has directed the KSERC to take a decision on the issue but not directed KSERC to accord approval to PPA.
- (2) The Commission had vide Order dated 22/12/2016, granted provisional approval only subject to submission of approval of Govt. of India. The KSEB Ltd. has again approached KSERC vide petition 05/ 2021 on same issue of approval of PPA. This is legally not valid or tenable. It is also submitted that the growth projections of demand and availability of energy during 2016-2021 by KSEB Ltd is a gross over estimation and need correction. The unrealistic over estimate by KSEB Ltd has led to unnecessary investment in high-cost LT Power sourcing agreement and this will result in passing on this unjustified heavy cost burden to the consumers.
- (3) The DBFOO Guidelines, even after amendment does not permit post regularization of a deviation in the tendering and bidding process. It only confers powers to the State Commission for according approval of deviation from MoP's DBFOO guidelines. But KSEBL did not approach the Commission for any prior approval for deviation before execution of the PPA with L2 to L5 bidders. Hence, the grounds for approval based on revised MoP guidelines are not applicable. It is also submitted that the Commission has already heard and disposed of the petition for PPA approvals as per Order dated 30.08.2016. Hence, only a Review Petition is admissible. However, since there is no fresh evidence or matter has been submitted as required for a Revision Petition, the admissibility of this petition even as a Review Petition also does not arise. Hence, the Commission shall reject the petition.

**16. The 2<sup>nd</sup> Addl Respondent Shri. Dejo Kappan, Chairman, Democratic Human Rights & Environment Protection Forum attended the hearings and filed statements and submitted his objections in the following lines:**

- (1) The reason stated by KSEB Ltd for calling two tenders is non availability of 'Transmission Corridor' for drawing of 850 MW. This argument is completely wrong because the Central Transmission Utility (PowerGrid) is responsible for

obtaining the necessary 'Transmission Corridor' for entities entering into long-term contracts to purchase power. KSEBL has not submitted any document to prove that the corridor will be available only if two tenders are made for 450MW & 400MW. If L1 bidder is unable to supply electricity as required, the remaining power can be purchased from the L2 bidder only at the same amount quoted by L1. According to this condition, the decision taken to purchase electricity from M/s. Jhabua Power Limited at the rate of Rs 4.15/- is considered as illegal.

- (2) M/s.Jhabua Power Limited has signed the first bid agreement on 31-12-2014 @ Rs 4.15/-. The same company has come as L3 bidder in the second bid also. A supply contract of 100MW was signed on 29-12-2014 @ Rs.4.29/- per unit. It is to be examined as to how can there be a difference of 58 paise in the price of power from Madhya Pradesh plant in FC within two days. In the Bid-1 (450MW) L2 was not brought to the lower amount of L1 rate. M/s. Jindal Power Limited which participated in bid-2 has quoted Fixed Charge in Bid-1 as Rs. 2.74/- but in Bid-2, F. C has been quoted as Rs. 3.43/-. How does FC come up with a difference of 69 paisa for electricity generated from the Chhattisgarh Plant and supplied to Kerala in an agreement signed on the same day? If the bid was invited and awarded to a bidder in a single tender, this same company would have provided 150 MW of power quote the tender at the same rate of 200 MW of electricity quoted at in bid 1 @ Rs. 3.60/-per unit.
- (3) There are guidelines for peak power purchase issued by the Central Government. The KSEB Ltd has taken the decision to sign the PPA during 2014 without conducting detailed study but only with the intention of helping the generators. There are instances like even in peak time, electricity from central pool was surrendered or sold at a huge loss. If the agreement continues for 25 years, customers will have to bear a heavy monetary liability of Rs. 66,250 crores. The government have appointed a committee consisting of 'Addl. Chief Secretary' as Chairman, 'Power principal secretary' as convener and 'Law secretary & KSEBL Chairman' as members to look into the steps taken by KSEBL to purchase 850 MW of power, without the prior permission of the Regulatory Commission. (G.O.(Rt) No 163/2021/POWER Tvm dated 27-10-2021). Hence it is requested that The Commission should examine this report also before taking a decision.

**17. Shri. C. P GEORGE, Deputy Chief Engineer (Retd), KSEB LTD and other stake holders made their submissions in the following lines:**

The quantum of electricity to be purchased per annum by KSEB Ltd. as per the impugned power purchase agreements is about 6440MU which costs approximately Rs.2650 crore at a weighted average of Rs.4.11 per unit. The amount needed for 25 years contract would be to the tune of Rs.66225 crore and the amounts projected above are likely to increase further over the contract period. Though DBFOO Power purchase was based on the 18th Electric Power Survey by Central Electricity Authority, the data used by CEA is supplied by KSEBL only. It is only a macro & generic report to spread awareness about the Indian power scenario and not to be taken as a recommendation for procurement of RTC power through DBFOO mode. He added that when comparing the Long Term RTC (LTA) & Short-Term purchases (STOA) for 100 MW for 100 hrs. in a year, it can be seen

that Long Term RTC Purchase would fetch Rs.233.52 while the Short-Term Purchase would fetch Rs.20 crore only. The decision to procure RTC power through LTA at a high rate was taken in a hurry without conducting enough study and discussion and without complying rules, regulations & procedures when the power market is getting stabilized. And the motive behind such a decision is under cloud due to lack of transparency, non-compliance of procedures and excess payment made without proper scrutiny of PSA provisions and KSERC directions.

18. The procurement of excess power through LTA without real time demand shall end up in the surrender of procured power with financial liability of at least the specified fixed charge and also less operation of hydro machines which leads to excess storage in the reservoir at the end of the water year and results in spillage during next monsoon. When evaluating the DBFOO bids and PSAs, it can be seen that the difference in rate quoted by M/s Jindal Power Limited in Bid-1 & bid -2 is against the basic principles DBFOO tariff and is without any logic. As far as Jindal Power Ltd is concerned, both the bids were offered from the same plant and same generating machines with same heat rate and infrastructure investment requirement. KSEB Ltd is seen to have admitted this manipulation without evaluating its long-term financial implications and consequences. In view of the above the PSA may be rejected and the licensee may be directed to cancel the PSA and may be directed to take steps to recover the excess payment made to the generators.
19. The KSEB Officer's Association has submitted that from 2011-12 year onwards, Kerala had been facing huge power and energy shortage in the State and hence imposed load shedding during peak and off-peak hours. At that time liquid fuel sources cost high and short-term transaction were very costly ie. up to Rs.7.45 per unit. Transmission Congestion was experienced early in 2014. As per CERC Regulation, transmission corridor priority is for LTA followed by MTOA and less priority is for STOA. The Commission in its various orders on ARR&ERC for the year 2012-2015 insisted that the KSEB Ltd shall immediately assess the long-term deficit in availability of power and contract for long term power purchase through case -1 bidding process. The PSAs executed by KSEBL under Bid-1 & Bid-2 of DBFOO contracts, KSEB Ltd was with the object to avoid costlier plants such as Judger (231 MW), BSES, KDPP, BDPP, Kayamkulam and reduce the dependence on the expensive short term power purchases. With the relinquishment of DBFOO contracts, the Load Generation balance during 2023-24, 2024-25 and 2025-26 will be expectedly affected by a deficit of 890 MW, 1064 MW and 1497 MW respectively. Another important aspect is that DBFOO contracted power is cheaper when compared to the other available similar sources. The present market rate is also higher than that of the DBFOO contracted power. A decision may be taken considering the fact that the power obtained through the said contract is highly necessary for the State and electricity obtained under this agreement helped Kerala to avoid loadshedding and to provide electricity at a cheaper cost to the people of Kerala.
20. The KSEB Worker's Association also has submitted that since the KSEB Ltd. had decided to invite tender for procuring power under the Long-Term Power Purchase Agreements during the period 2014-15, the Commission has to decide the matter whether to give approval or not to the PPAs only after considering the then

prevailing circumstances. The Association reiterated the arguments of the petitioner.

### **Analysis and Decision of the Commission**

21. The Commission examined the Petition (OP No. 5/2021) filed by the KSEB Ltd, Order dated 30.08.2016 issued by this Commission in OP No.13/2015 along with the documents furnished by the petitioner and the respondents in the present petition, their arguments, documents, rival contentions, objections and suggestions in detail, and decided as follows;
22. The OP No. 05/2021 is filed by KSEB Ltd under sections 86(1)(b) and 63 of the Electricity Act, 2003 for final approval of the following PSAs in OP No.13/2015 dated 30.08.2016, which was not approved for want of final approval of the deviations from the State Government and Central Government.
  - i) 115 MW of power from Jhabua Power Ltd (L-2 of Bid-1)
  - ii) 150 MW of power from Jindal Power Ltd (Bid-2)
  - iii) 100 MW of power from Jindal India Thermal Power Ltd (Bid-2)
  - iv) 100 MW of power from Jhabua Power Ltd (Bid-2).
23. In view of directions issued to this Commission by the Hon'ble Supreme Court in Civil Appeal No. 41/2021 dated 10.02.2023, the Commission has examined the issues involved in the present petition in detail in the light of the rival contentions and documentary evidences furnished by the petitioner, respondents, additional respondents, stake holders and general public. Based on the deliberations of the subject matter, the Commission has to mainly examine the following issues:
  1. **Whether the tariff has been determined as per the guidelines issued by the Central Government through competitive bidding in a fair and transparent and equitable process under Section 63 of the Electricity Act, 2003 or not?**
  2. **Whether any deviations were made in the bidding process from the guidelines dated 09.11.2013 and if so, whether the deviations are fair and transparent and to protect the public interest? What are the deviations and its long-term financial implications?**
  3. **Whether provisional approval given by the Commission for drawing power from the un approved PSAs amounts to deemed approval?**
24. Since the issues referred as 1<sup>st</sup> and 2<sup>nd</sup> above being interconnected and inter related it can be considered together. For this purpose, the Commission has to examine the relevant Bidding guidelines, statutory provisions and settled legal position in detail and also whether tariff adopted by the petitioner is strictly in a fair and transparent and equitable process of bidding under Section 63 of the Electricity Act, 2003.
  - (1) This petition is filed for final approval of the PSAs due to the reasons stated in the petition. Hence the Commission has to verify as to whether the tariff has been determined strictly in a transparent and objective process of bidding in accordance with the guidelines dated 9.11.2013 issued by the Central Government under DBFOO Scheme. Section 63 of the Act is extracted herewith:

### **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.*

### **Section 86 (1) (b): Functions of State Commission**

*(1) The State Commission shall discharge the following functions, namely:*

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*(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;*

*(2) The KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 came into force with effect from 14.11.2014. Regulation 78 of the said regulations is extracted hereunder, -*

***“78. Approval of power purchase agreement /arrangement – (1) Every agreement for procurement of power by the distribution business / licensee from the generating business/company or licensee or from other source of supply entered into after the date of coming into effect of these regulations shall come into effect only with the approval of the Commission:***

*Provided that the approval of the Commission shall be required in accordance with this regulation in respect of any agreement or arrangement for power procurement by the distribution licensee from the generating business / company or licensee or from any other source of supply on a standby basis:*

*Provided further that the approval of the Commission shall also be required in accordance with this regulation for any change to an existing agreement or arrangement for power procurement, whether or not such existing agreement or arrangement was approved by the Commission.*

*(2) The Commission shall examine an application for approval of power purchase agreement/arrangement having regard to the approved power procurement plan of the distribution business/licensee and the following factors:-*

*(a) requirement of power under the approved power procurement plan;*

*(b) adherence to a transparent process of bidding in accordance with guidelines issued by the Central Government under Section 63 of the Act;*

*(c) adherence to the terms and conditions for determination of tariff specified under chapter VI of these Regulations where the process specified in clause (b) above has not been adopted;*

*(d) availability (or expected availability) of capacity in the intra-State transmission system for evacuation and supply of power procured under the agreement/arrangement; and*

*(e) need to promote co-generation and generation of electricity from renewable sources of energy.*

*(3) Where the terms and conditions specified under chapter VI of these Regulations are proposed to be adopted, the approval of the power purchase agreement/arrangement between the generating business/company and the distribution business/licensee for supply of electricity from a new generating station may comprise of the following two steps, at the discretion of the applicant:*

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(a) approval of a provisional tariff, on the basis of an application made to the Commission at any time prior to the application made under clause (b) below; and

(b) approval of the final tariff, on the basis of an application made not later than three months from the cut-off date.”

- (3) The Hon’ble Supreme Court in *Energy Watchdog and Ors. vs. Central Electricity Regulatory Commission and Ors.* (11.04.2017 - SC) and in various judgments observed that ...” **the appropriate Commission does not act as a mere post office Under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government”.**
- (4) The Hon’ble Supreme Court in its judgment in ***The TATA Power Company Limited Transmission vs. Maharashtra Electricity Regulatory Commission and Ors.* (23.11.2022 - SC): MANU/SC/1536/2022)** clarified that the tariff determined through the bidding process **may not be adopted by the Appropriate Commission if the bidding process was not transparent (undertaking a substantive review) or the procedure prescribed by the Central Government guidelines Under Section 63 was not followed.**
- (5) As observed by the Hon’ble APTEL, ***Competitive bidding process under Section 63 must be consistent with the Government of India guidelines.*** (*Essar Power Limited vs. Uttar Pradesh Electricity Regulatory Commission and Ors.* (16.12.2011 - APTEL): MANU/ET/0177/2011).
- (6) Government of India had, vide Resolution No. 23/17/2011 – R&R (Vol V) dated 09.11.2013 published in the Gazette of India dated 09.11.2013, notified the guidelines for procurement of electricity from thermal power stations set up on design, build, financed, own and operate (DBFOO) basis (hereinafter referred to as the Guidelines, 2013). The said guidelines are quoted hereunder, -

**No. 23/17/2011-R&R(Vol-V).** -Whereas the Central Government is engaged in creating an enabling policy and regulatory environment for the orderly growth of generation of electricity in accordance with the provisions of the Electricity Act, 2003 (the “Act”);

Whereas it is incumbent upon the Central Government, State Governments, Electricity Regulatory Commissions and the distribution licensees to promote competition in the procurement of electricity through competitive and transparent processes;

Whereas the Central Government has, after extensive consultations with various stakeholders and experts, evolved a model contractual framework for procurement of electricity by the distribution licensees from power producers who agree to construct and operate thermal power generating stations on a ‘Design, Build, Finance, Own and Operate (“DBFOO”)’ basis; Whereas, the Central Government has, vide its letter No. 23/17/2011R&R(Vol-V) dated 8th November, 2013, issued the model documents comprising the Model Request for Qualification



(the “**MRFQ**”), the Model Request for Proposals (the “**MRFP**”) and the Model Power Supply Agreement (the “**MPSA**”) (collectively, the “**Standard Bidding Documents**”) to be adopted by distribution licensees for procurement of electricity from the aforesaid power producers through a process of open and transparent competitive bidding based on offer of the lowest tariff from thermal power generating stations constructed and operated on DBFOO basis;

Now, therefore, in exercise of the powers conferred under section 63 of the Electricity Act, 2003, the Central Government notifies these guidelines to be known as the ‘Guidelines for Procurement of Electricity from Thermal Power Stations set up on DBFOO Basis’ (the “**Guidelines**”).

These Guidelines shall come into effect from the date hereof subject to the following terms and conditions:

1. The terms and conditions specified in the Standard Bidding Documents referred to hereinabove shall, by reference, form part of these Guidelines and shall be treated as such.
2. The application of these Guidelines shall be restricted to projects constructed and operated in accordance with a Power Supply Agreement signed for a period of about 25 years including construction period with provision of extension of 5 years at the option of either party.
3. The tariff determined through the bidding process based on these Guidelines comprising the Standard Bidding Documents shall be adopted by the Appropriate Commission in pursuance of the provisions of section 63 of the Act.
4. **Any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government.**

Provided, however, that any project specific modifications expressly permitted in the Standard Bidding Documents shall not be construed as deviations from the Standard Bidding Documents.

5. The ‘Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees’ issued on 19th January, 2005, as amended from time to time, including the standard bidding documents issued in 2009 and amended from time to time thereunder, are hereby repealed insofar as they relate to long-term procurement of electricity where the location, technology, or fuel is not specified by the procurer referred to therein as Case 1 projects. Provided, however, that any agreements signed or actions taken prior to the date hereof shall not be affected by such repeal of the said guidelines of 2005 and shall continue to be governed by the guidelines repealed hereunder.

- (7) As stipulated in the above Resolution dated 9.11.2013, the Central Government had issued the bidding guidelines for long term power procurement under DBFOO Scheme. The procedure for adoption of tariff

has been well explained in the SBD guidelines published on 8.11.2013. The General terms of bidding and Procedure for selection of Bidder is well explained in RFP in Clause 2.1 and Clause 3.3. respectively. Relevant portion is extracted hereunder:

## **21. General terms of bidding**

**2.1.1 No bidder shall submit more than one Bid Project.** A Bidder bidding individually or as a member of a consortium shall not be entitled to submit another bid either individually or as a member of consortium, as the case may be.

### **“3.3 Selection of Bidder**

**3.3.1** Subject to the provisions of Clause 2.16.1, the Bidder whose Bid is adjudged as responsive in terms of Clause 3.2.1 and who quotes the lowest Tariff offered to the Utility in conformity with the provisions of Clause 3.5 shall be declared as the selected Bidder (the “Selected Bidder”). In the event that the Utility rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.

**3.3.2** In the event that two or more Bidders quote the same amount of Tariff (the “**Tie Bidders**”), the Utility shall identify the Selected Bidder by draw of lots, which shall be conducted, with prior notice, in the presence of the Tie Bidders who choose to attend.

**3.3.3** In the event that the Lowest Bidder withdraws or is not selected for any reason in the first instance (the “**first round of bidding**”), the Utility may invite all the remaining Bidders to revalidate or extend their respective Bid Security, as necessary, and match the Bid of the aforesaid Lowest Bidder (the “**second round of bidding**”). If in the second round of bidding, only one Bidder matches the Lowest Bidder, it shall be the Selected Bidder. If two or more Bidders match the said Lowest Bidder in the second round of bidding, then the Bidder whose Bid was lower as compared to other Bidder(s) in the first round of bidding shall be the Selected Bidder. For example, if the third and fifth lowest Bidders in the first round of bidding offer to match the said Lowest Bidder in the second round of bidding, the said third lowest Bidder shall be the Selected Bidder.

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

**3.3.5** After selection, a Letter of Award (the “**LOA**”) shall be issued, in duplicate, by the Utility to the Selected Bidder and the Selected Bidder shall, within 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgement thereof. In the event the duplicate copy of the LOA duly signed by the Selected Bidder is not received by the stipulated date, the Utility may, unless it consents to extension of time for submission thereof, appropriate the Bid Security of such Bidder as Damages on account of failure of the Selected Bidder to acknowledge the LOA, and the next eligible Bidder may be considered.

**3.3.6** After acknowledgement of the LOA as aforesaid by the Selected Bidder, it shall cause the Supplier to execute the PSA within the period prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation, modification or amendment in the PSA.

**25.** The Commission vide Order dated 30/8/2016 in petition O.P No.13/2015 had observed the following deviations in the DBFOO bidding process done by KSEB Ltd.

- (1) KSEB Ltd had followed the procedures stipulated in the repealed RFP guidelines notified by Ministry of Power Govt. of India dated 22/7/2010 while selecting the bidders other than L1.
- (2) KSEB Ltd. has selected L2 bidder in Bid-1 namely M/s Jhabua Power Ltd for supply of 115 MW of power @4.15/kWh which is higher than the L1 tariff rate @Rs.3.60/unit. The selection of bidders at a tariff higher than the L1 rate is not stipulated in the SBD dated 8/11/2013.
- (3) In the bidding process KSEB Ltd has accepted bid capacity higher than the bid quantum in bid-2. In the bid-2 the quantity of power requirement of KSEB Ltd was 400 MW only. However, KSEB Ltd. has accepted the bid quantity of 550 MW. Accepting the quantum higher than the bid quantum was not stipulated in the bidding guidelines.
- (4) While matching the rate with lower tariff in bid-2, KSEB Ltd. has allowed the bidders other than L1 to enhance the fixed charges. In bid-2, the bidder L3 has enhanced the fixed charges from Rs.2.65/kWh to Rs.2.97/kWh. Similarly, the bidder L5 in bid-2 has enhanced the fixed charges from Rs.2.95/kWh to Rs.3.14/kWh while matching with L1 tariff of bid-2.
- (5) In the bidding process KSEB Ltd has not invited all the remaining bidders other than L1 to revalidate or extent their respective bid security and to match their rate with that of L1. KSEB Ltd. not obtained prior approval from the Govt. of India for the deviations from the SBD as stipulated in the guidelines dated 8/11/2013.
- (6) As per the Regulation 78 of the Tariff Regulation 2014, prior approval of the commission is mandatory for entering into PPA with generators by the distribution licensee including KSEB Ltd under Section 86(1)(b) of the Electricity Act, 2003. However prior approval of the commission was not obtained before entering into PPA with generators in the DBFOO contract.

**26.** In view of the above stated statutory provisions, this Commission has examined the documents and the evidences produced by the petitioner and the rival contentions raised by the parties in detail and analyzed as to whether the petitioner has deviated from the guidelines/procedure stipulated in the Standard Bidding Guidelines, 2013.

**27.** Based on the demand forecast and power shortage estimated by KSEB Ltd, the petitioner, decided to procure 850 MW of power for a period of 25 years through open tender, as per the DBFOO Guidelines issued by the Ministry of Power on 08-11-2013 and notified by Government of India on 9-11-2013 in two bids. The 1<sup>st</sup> tender was floated on 5.3.2014 and the 2<sup>nd</sup> tender was floated on 25.04.2014. The first delivery of 450 MW was to commence in December, 2016 and the balance

400 MW in October, 2017. Instead of inviting single tender, the petitioner decided to split the procurement tenders and floated 2 separate tenders within a span of 50 days. The reason stated by the petitioner for the splitting of bids are that DBFOO guidelines provides for only one delivery date and two delivery dates are necessary.

**28.** The Commission noted the following important deviations in tendering process, selection process, L1 matching, enhancement in fixed charges etc. from the bidding guidelines in the present power purchase under DBFOO Scheme:

(1) Deviation in tendering process:

There is no provision in bidding guidelines, 2013 issued by the Ministry of Power for splitting up of the bids. Without prior approval of the Central Government and without obtaining the prior permission from the Commission, the petitioner decided to invite two bids for the procurement of 850 MW. The petitioner has intimated this decision to the Commission only on 18.12.2014, after the completion of bidding process. It was also informed to the Commission that the petitioner shall file formal petition for adoption of tariff under Section 63 of the Electricity Act, 2003 once KSEB Ltd entered into Power Supply Agreement. The splitting up of tenders enabled the same bidders to participate and to submit two separate bids quoting two different tariff rates in two tenders for power generated from the same plant to the procurer. Thus, the generators could quote different tariff in the two tenders and to attain additional financial benefit which ultimately resulted huge loss to the petitioner.

The reasons stated by the petitioner for these deviations are transmission corridor availability, anticipated variations in electricity demand etc. are not convincing and acceptable. Further, the petitioner could not produce sufficient and convincing documents to prove their arguments. If the petitioner floated one tender instead of splitting in to two, the bidders should lose their chance to submit two separate bids quoting two different tariffs from the same plant. Further, the petitioner may not lose the chance to get 850 MW of power @ Rs. 3.60 per kWh for the entire period of 25 years. Hence this significant deviation made by the petitioner to bypass the Bidding guidelines created huge financial implications on the State and the general public.

(2) Deviations in selection process (Selection of lowest bidder):

Clause 3.3 of Request for Proposal (RFP), stipulates the provision for selection of Bidder. As per the said clause, the bidder, who quotes the lowest Tariff offered to the Utility in conformity with the provisions of Clause 3.5 shall be the "Selected Bidder". Further, as per the guidelines, if two or more bidders quote the same tariff, the bidder is to be selected through draw of lots. Thus, only one bidder can be selected in this process. But the petitioner selected L1 bidder in Bid -1 and also selected L2 bidder in addition to L1 and also five bidders in Bid-2 thereby violated the guidelines issued by the MoP and entered into PSAs, without the approval of the State Commission.

(3) Deviations in L1 matching

As per Clause 3.3.3. of RFP guidelines, L1 matching is provided only in the event that the Lowest Bidder withdraws or is not selected. For this purpose, Utility may invite all the remaining bidders to revalidate or extend their respective bid Security, as necessary, and match the Bid of the aforesaid Lowest Bidder. If in the second round of bidding, only one Bidder matches the Lowest Bidder, it shall be the Selected Bidder. But the petitioner, in addition to selecting the L1 bidder in Bid-1, also selected the L2 bidder and entered into Power Sale Agreement (PSA) with the L2 Bidder and that too without matching the L1 tariff. The petitioner agreed to pay a higher tariff of Rs. 4.15 for kWh in Bid-1 which is higher than the L1 rate of Rs. 3.60/ kWh by for Rs.0.55/unit in this bid. This irregular decision was taken by the petitioner stating that the L2 tariff of Bid-1 at Rs. 4.15/kWh was lower than L1 tariff of Bid-2 (Rs.4.29/kWh). The monetary loss sustained to the consumers for the purchase of 115 MW is estimated at Rs 59.08 crore per annum and Rs 1477 crore for 25 years.

In addition to the above, in Bid-1, the petitioner instead of inviting all the remaining bidders to revalidate or extend their bid security as specified in paragraph 3.3.3 of the RFP document for fresh bids, selectively invited L2 to L4 bidders only. In Bid -2 also, after selecting the L1 bidder (Rs.4.29/kWh), the petitioner instead of inviting all the bidders, selectively invited bidders L2 to L5 to match the L1bid tariff. This was in violation of para 3.3.3 of RFP.

(4) Changes made in purchase of bid quantity:

As stated in the preceding paragraphs, mentioned above, the petitioner invited two bids for the purchase of 450 MW and 400 MW respectively. Instead of contracting the bid quantity as mentioned in the bid, the petitioner contracted 315 MW in Bid-1 and 550 MW in the tendered quantity of Bid-2. This deviation was made by the petitioner on the reasoning that the petitioner could procure 315 MW only in Bid-1. The petitioner contracted for the purchase of additional tendered quantity of 150 MW at higher rate of Rs. 4.29 per kWh instead of exploring the possibility to get power @ Rs. 3.60 per kWh in Bid-1. This deviation also created additional liability of about Rs 77.06 crore per annum and Rs 1926.5 crore for 25 years on the consumers.

(5) Enhancement in fixed charge:

i. In Bid-1, M/s Jhabua Power Ltd, Gurgaon has quoted Rs.2.39/kWh as fixed charge and Rs. 1.76/kWh as variable charge, whereas, in Bid-2 M/s Jhabua Power Ltd increased the fixed charge from the quoted fixed charge of Rs.2.65/kWh to Rs.2.97/kWh during the L1 matching i.e., increased the fixed charge by Rs 0.32/unit in Bid-2. This deviation/irregular action created huge monetary loss to the KSEB Ltd and consumers of the State, estimated at Rs 23.83 crore per annum and Rs 595.75 crore for 25 years. The petitioner or the generator could not

explain satisfactorily the reason for such an increase in the tariff during the L1 matching.

ii. Like so, M/s Jindal power Ltd who is the L-1 bidder in Bid -1 has quoted the tariff @Rs.3.60/kWh comprising of fixed charge @Rs.2.74/kWh and variable charge @ Rs.0.86 per unit. The same M/s Jindal Power Ltd has also offered to supply 150 MW @ Rs.4.29/kWh comprising fixed charge @ Rs.3.43/kWh and variable charge @ Rs.0.86/kWh. The Commission also noted that in both bids M/s. Jindal Power Ltd. offered to supply power from the same plant but quoted different fixed charges i.e., Rs.2.74/kWh in bid-1 whereas fixed charges quoted in bid-2 was @Rs.3.43/unit. The Commission could not understand what is the reason for quoting the higher fixed charge of Rs.3.43/kWh per unit in bid-2, ie. Rs. 0.69/kWh than the quoted amount of Rs.2.74/kWh in Bid-1. The bidder offered to supply power from the same plant, same location and using same machinery. If the bidder M/s Jindal Power Ltd. offered to supply power from bid-2 also at the same fixed charge of Rs.2.74/unit quoted in bid-1, KSEB Ltd. could have annual savings of Rs.77.1 crore and the savings for the entire period of 25 years would be Rs.1927.5 crores.

The petitioner being well aware of the fact that since the fuel charge is determined by the coal price determined by Ministry of Coal and coal transportation cost through rail fixed by Ministry of Railways and have to be paid at these rates depending upon various factors, the petitioner should not have permitted the “matched bidders” to enhance their fixed charge.

(6) Additional quantity of power procurement:

The petitioner proceeded to purchase additional quantity (865 MW) of power in excess of the tendered quantity (850). There is no provision in the MoP guidelines, 2013 for the purchase of additional quantity of power in excess of the tendered quantity. This is also a deviation from the MoP guidelines.

- (7) KSEB had followed the procedures stipulated in the repealed RFP guidelines notified by Ministry of Power, Govt. of India dated 22/7/2010 while selecting the bidders other than L1.
- (8) In the bidding process KSEB Ltd has not invited all the remaining bidders other than L1 to revalidate or extent their respective bid security and to match their rate with that of L1.
- (9) As per the Regulation 78 of the Tariff Regulation 2014, prior approval of the commission is mandatory for entering into PPA with generators by the distribution licensee including KSEBL under Section 86(1)(b) of the EA 2003. However prior approval of the commission was not obtained before entering into PPA with generators in the DBFOO contract.

- 29. During the hearing, in response to the clarification sought for by the Commission regarding the date of willingness sought by the petitioner from the L1 bidder in Bid-1 for the supply of additional quantity of power, petitioner clarified that the date is 15.11,2014. The petitioner further clarified that Bid-1

was opened on **31.10.2014** and Bid-2 was opened on **14.11.2014**. But after opening the Bid-2, on **15.11.2014**, **the very next day of opening Bid-2, and after realizing the higher rates in Bid-2**, the petitioner asked L1 Bidder (Jindal Power Ltd.) to convey its willingness to increase the quantum offered by it in Bid -1, on the same tariff. But the generator not expressed their willingness to match with L1 tariff @ Rs.3.60/unit quoted by M/s Jindal Power Ltd who quoted L1 bid in Bid-1. The Commission observed that, if, the petitioner sought willingness to match L1 rate with other bidders in Bid-1 prior to the opening of Bid-2, the petitioner could get sufficient power in L1 rate. The Commission further observed that the petitioner lost their chance to secure procurement of power to the extent of 115 MW from the L2 Bidder in Bid-1, at the L1 rate of Bid-1, by disclosing the bid amount in Bid-2 in advance.

30. The Commission has also examined as to whether the reasons stated by the petitioner to justify their action are in public interest and for averting any power crisis for the consumers in the State of Kerala. But the petitioner or the respondents have not submitted any factual evidences in the OP or raised any conclusive arguments during the hearings to substantiate their contentions. In this respect, the Commission observed that the above reasons stated by the petitioner are not convincing and without any substantive evidence and is liable to be rejected. In fact, public interest is violated when the petitioner selected the bidders other than L1 in bid-1 and bid-2, deviating the SBD guidelines. The deviation noted by the Commission at Paras 28 (3), (4) and (5) alone would create an additional liability of Rs.237.07 crore per annum and Rs. 5926.75 crore for 25 years.
31. The Commission observed that the above-mentioned deviations are significant, the process was not fair and transparent, which require prior approval of the Central Government. It is settled legal position that under Section 63 of Electricity Act, 2003, the Commission could adopt tariff, if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. The petitioner has not submitted any evidence to substantiate that the deviations noted by the Commission would come within the purview of project specific modifications expressly permitted in the SBD. But in this case, the petitioner has significantly deviated and blatantly violated the guidelines issued by the MoP, which require prior approval of the Central Government. Further, as per Section 86 (1) (b) of the Electricity Act, 2003, the State Commission is competent to regulate electricity purchase and procurement process.
32. In addition to the above, the petitioner had executed the PSAs without obtaining the approval of this Commission as stipulated in Regulation 78 of the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 which came into force with effect from 14.11.2014. The petitioner executed the PSAs within the period from 26.12.2014 to 02.02.2015, blatantly violating the said Regulations issued by this Commission.
33. The Commission has examined the judgments referred by the petitioner in support of their arguments. The settled position is that the Commission can adopt the tariff under Section 63 of the Electricity Act, 2003, only if the tariff is

adopted through a fair and transparent process of bidding in accordance with the guidelines notified by the Central Government. The observations made by the Hon'ble Supreme Court in Energy Watchdog's case, is in a different situation and factual position, which laid down that "change in law is applicable to change in domestic law, not change in foreign law. It is not applicable to imported coal/change in foreign law. (MANU/SC/0661/2020)". The deviations noted by the Commission from the bidding guidelines would clarify the lack of transparency which require prior approval of the Central Government.

34. During the hearing the petitioner attempted to justify that as per Clause 1.1.4 of the RFP, in the event the L1 Bidder does not bid for the entire quantum, it would be open to the tendering authority to invite other bidders to match the tariff quoted by the L1 Bidder. Clause 1.1.4 which is reproduced hereunder for ready reference: –

*"1.1.4 Applicants may bid for the capacity specified in Clause 1.1.1, or a part thereof, not being less than 25% (twenty-five per cent) of such capacity. Provided, however, that the Utility may, in its sole discretion, accept only those Bids which match the lowest Bid."*

The Commission examined the bidding guidelines in detail. Clause 1.1.4 of RFP is part of the bidding documents, which confer discretion to the bidders to bid up to 25 percent of capacity. But utility can accept only those bids which match the lowest Bid. As per this clause, the utility has the discretion to accept only those bids which match the L1 bid. Here the word accept means to receive the bids and not selection of bidder. Evaluation of bids and selection of Bidder etc. are clearly specified in Clause 3.1 and Clause 3.3 of RFP. In this regard, the Commission observed that the whole process seems to lack of transparency and objectivity and fail at the touch stone of public interest. Hence the argument of the petitioner is not legally sustainable and liable to be rejected.

35. The Commission also examined the contentions raised by the petitioner that the Central Government has ratified the deviations pointed out by the Commission considering it as petitioner's practice and precedent. Further the petitioner also contended that the deviations noted are only procedural deviations which do not require prior approval of the Central Government. The Commission examined in detail the above contentions in view of the communications received from the Central Government in this matter.

The Ministry of Power, vide its letter No.23/39/2016- dated 18.11.2016 clarified that, ***"the deviations as pointed out by the KSERC would have been got vetted and approved by Central Government, before the issuance of RFQ, RFP and PSA and not at this stage. As per the Guidelines, deviations on the provisions of the bidding documents are approved, if necessary and not the actions taken by the utility as per practice or precedent. In view of the above Government of Kerala/ KSEB Ltd may take action as appropriate in consultation with KSERC."***

In addition to the above, the Central Government vide the letter No.23/12/2018-R&R dated 11<sup>th</sup> December 2019, reiterated the same position and clarified that ***"the views of Ministry of Power as communicated earlier vide letter dated 18.11.2016 are reiterated. The deviations as pointed out by KSERC***



***would have been got vetted and approved by the Central Government before issuance of RFQ, RFP and PSA and not at this stage. Government of Kerala/ KSEB Ltd may take actions as appropriate in consultation with KSERC."***

The above-mentioned replies would show that the Central Government rejected the request for approval of the deviations in the DBFOO guidelines made by KSEB Ltd. The State Government also has neither approved the deviations pointed out by the Commission nor accorded final approval to purchase of the unapproved DBFOO contracts. As per Clause 4 of the Resolution dated 9.11.2013 issued by the Central Government under Section 63, ***any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government.*** Hence the Central Government alone is competent to approve the deviations from the SBD guidelines. Further, the law laid by the Hon'ble Supreme Court in *Bajaj Hindustan Ltd. vs. State of U.P. and Ors. (14.03.2016 - SC) : MANU/SC/0476/2016* would clarify that if the words used were "with the prior approval" for getting validity of any such action taken ....prior approval shall be obtained and subsequent ratification is not possible.

36. ***In view of the above observations, the Commission has come to the conclusion that in this case, the tariff determined by the petitioner KSEB Ltd in these unapproved PSAs is not in a fair, transparent and equitable process and the petitioner has grossly deviated from the guidelines issued by the MoP, Government of India vide Resolution dated 9.11.2013 issued under Section 63 of the Electricity Act, 2003. Further, the deviations made by the petitioner are against the public interest and created long term financial implications to the consumers and the State. Hence the petition filed by the KSEB Ltd for final approval of the four un approved PSAs are liable to be rejected.***

### **Issue No.3**

**Whether provisional approval given by the Commission for drawing power from the un approved PSAs amounts to deemed approval?**

37. The petitioner and the respondents raised their contentions that the petitioner is drawing power from these unapproved DBFOO contracts, uninterruptedly for more than last six years which amounts to deemed approval. The petitioner and the respondents have submitted that the Commission has approved to draw contracted power from these four generators and has been allowing to pass through portion of the cost of power. Through this action, the Commission has granted deemed approval for the PSAs and all the pre-requisites for conclusion of a binding contract as per the Indian Contract Act, 1972 are satisfied.
38. This Commission vide Order dated 22-12-2016, had provisionally approved the purchase of 115 MW of power from M/s Jabhua Power Ltd, L2 bidder of Bid 1, in view of the facts, circumstances and urgency explained by KSEB Ltd vide their letter dated 15.11.2016 and in view of the decision of Government of Kerala in GO (Rt) No.238/2016/PD dated 31.11.2016. In the said Order the Commission has specifically mentioned therein that the approval is provisional only and stated "that the Commission hereby approves provisionally the purchase of 115 MW of power by KSEB Ltd. from M/s.Jhabua Power Limited @ Rs.4.15/kWh as per the power purchase agreement dated 31.12.2014, subject to the clearance from the Government of India and subject to the final

decision of the Hon'ble High Court in WP (C) 33100/2014" and final approval is subject to the clearance from Government of India. Further the Commission vide its letter dated 22.12.2017 allowed the petitioner to draw power provisionally from three un approved PSAs of the generators namely, M/s Jindal India Thermal Power Ltd, M/s Jhabua Power Ltd and M/s Jindal Power Ltd, clarifying that, the Commission may approve the power purchase proposal including the rate for the pending approvals only after the Government accords the final approval for the entire power purchase under DBFOO.

39. Further, the Commission in response to the request of the KSEB Ltd. sought vide Letters No.KSEB/TRAC/DBFOO/2019-20/251 dated 20.07.2019 and 02.08.2019 to grant approval for the unapproved PSA's, the Commission vide letter No.1146/D(T)/2019/KSERC dated 26/08/2019 clarified as follows.

"KSERC is a statutory quasi-judicial body constituted under the Electricity Act, 2003. Section 94 of the Electricity Act, 2003 confers on the Commission the same power as are listed in a Civil Court under the Code of Civil Procedure, 1908 in respect of directions, orders, reviews etc".

*"The Commission had vide its Order dated 30/8/2016 directed KSEB Ltd. to get the approval of the Govt. of India for the deviations in the standard bidding guidelines and in view of the G.O (Ms)No.45/2014/PD dated 20/12/2014 to obtain the views of Govt of Kerala, after duly considering the relevant facts and legal provisions. Since the above approvals are yet to be submitted before the Commission by the KSEB Ltd. the Commission cannot consider the request of KSEB Ltd to grant approvals for the PSA's entered into with L2, L3 and L4 in Bid-2 under DBFOO".*

40. While approving the ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22, the Commission stated that "*...since the required approvals from Gol and State Government is still awaited, the Commission is constrained to use the rate equivalent to the cost of power from BALCO, which is the L1 of Bid 2. The Commission emphasizes that this consideration is only for the purposes of estimating the cost of power provisionally in the ARR and shall not be construed as an approval of the power purchase, rate or of the PPA itself as per Section 63 of the Act which can be considered only after the fulfilment of conditions specified by the Commission in its order dated 30-8-2016.*" Similarly, while approving the ARR & ERC and tariff for the MYT period 2018-19 to 2021-22, the Commission reiterate that, during the truing up of accounts for the respective financial years, excess amount, if any, incurred for procuring power from these three generators shall not be considered, unless KSEB Ltd gets the approval of power purchase from Government of India for the deviations from the guidelines and on getting the approval of the Government of Kerala on the entire power purchase under DBFOO. Hence the arguments raised by the petitioner regarding the deemed approval are not acceptable.
41. The concept of deemed approval was explained by the Hon'ble Supreme Court in various decisions. (*Sushila Mafatlal Shah MANU/SC/0482/1988: (1988) 4*

SCC 490. *Ankit Ashok Jalan vs. Union of India (UOI) and Ors. (04.03.2020 - SC): MANU/SC/0276/2020.*) The settled position is that the principle “deemed approval” is applicable only if there is specific provision in the Act/Rules or Regulations. The petitioner has not pointed out any provision either in the Electricity Act, 2003, Rules or Regulations framed thereunder by the Commission to substantiate their contentions to that effect.

42. ***As clarified above, the Central Government has not approved the deviations made by the petitioner in the Standard Bidding Documents and guidelines issued by the MoP dated 9.11.2013, and the Commission has not yet issued final approval and also in view of the legal and statutory provisions, the contention raised by the petitioner regarding “deemed approval” is not legally sustainable and is liable to be rejected. The 3<sup>rd</sup> referred issue is answered accordingly***

### **Orders of the Commission**

43. This Commission after examining all the averments in the petition filed by KSEB Ltd, the relief sought for, statements filed by the petitioner and respondents and rival contentions, expert opinion, and objections and suggestions of the stakeholders during the public hearings held on 28.03.2023, 29.03.2023 and 11.04.2023, the provisions of the Electricity Act, 2003, Standard bidding documents and Notifications issued by the Central Government, Regulations in force; hereby reject petition OP No.5/2021 filed by the petitioner KSEB Ltd before this Commission seeking to issue final orders with respect to drawal of power from generators of the following un approved PSAs:

1. 115 MW of power from Jhabua Power Ltd (L-2 of Bid-1)
2. 150 MW of power from Jindal Power Ltd (Bid-2)
3. 100 MW of power from Jindal India Thermal Power Ltd (Bid-2)
4. 100 MW of power from Jhabua Power Ltd (Bid-2)

**Petition disposed of.      Ordered Accordingly.**

Sd/-  
**Adv. A. J. Wilson**  
**Member (Law)**

Sd/-  
**T. K. Jose**  
**Chairman**

Approved for issue  
Sd/-  
**C.R. Satheesh Chandran**  
**Secretary**



रजिस्ट्री सं. डी. एल.-33004/99

REGD. NO. D. L.-33004/99



# भारत का राजपत्र The Gazette of India

असाधारण

EXTRAORDINARY

भाग I—खण्ड 1

PART I—Section 1

प्राधिकार से प्रकाशित

PUBLISHED BY AUTHORITY

सं. 257]

नई दिल्ली, शनिवार, नवम्बर 9, 2013/कार्तिक 18, 1935

No. 257]

NEW DELHI, SATURDAY, NOVEMBER 9, 2013/KARTIKA 18, 1935

विद्युत मंत्रालय

संकल्प

नई दिल्ली, 9 नवंबर, 2013

डिजाइन, निर्माण, वित्त, प्रचालन और स्थानांतरण (डीबीएफओओ) आधार पर स्थापित ताप विद्युत स्टेशनों से विद्युत की अधिप्राप्ति के लिए दिशा-निर्देश

सं. 23/17/2011-आर एंड आर (खंड-V).—जबकि केंद्र सरकार विद्युत अधिनियम, 2003 ("अधिनियम") के प्रावधानों के अनुसार विद्युत उत्पादन के सुव्यवस्थित विकास के लिए एक सक्षम नीति और विनियामक वातावरण तैयार करने के लिए प्रतिबद्ध है;

जबकि प्रतिस्पर्धात्मक और पारदर्शी प्रक्रियाओं के माध्यम से विद्युत के अधिप्राप्ति में प्रतिस्पर्धा को बढ़ावा देना केंद्र सरकार, राज्य सरकारों, विद्युत विनियामक आयोगों और वितरण लाइसेंसियों के लिए आवश्यक है;

जबकि केंद्र सरकार ने विभिन्न पणधारकों और विशेषज्ञों के साथ विस्तृत परामर्श के बाद, विद्युत उत्पादकों से, वितरण लाइसेंसधारकों द्वारा विद्युत की अधिप्राप्ति के लिए एक आदर्श संविदात्मक ढांचा तैयार किया है जो 'डिजाइन, निर्माण, वित्त, प्रचालन और स्थानांतरण' ('डीबीएफओओ') आधार पर ताप विद्युत उत्पादन स्टेशनों का निर्माण और प्रचालन करने के लिए सहमत हों,

जबकि, केंद्र सरकार ने, 08 नवंबर, 2013 के अपने पत्र सं. 23/17/2011-आर एंड आर (खंड-V) के माध्यम से दस्तावेज जारी किया है जिसमें मॉडल पात्रता अनुरोध ('एमआरएफव्यू'), मॉडल प्रस्ताव अनुरोध ('एमआरएफपी'), मॉडल विद्युत आपूर्ति करार ('एमपीएसए') (संयुक्त रूप से, 'मानक बोली दस्तावेज') शामिल हैं जिसे डीबीएफओओ आधार पर निर्माण किए गए और प्रचालित किए गए ताप विद्युत उत्पादन स्टेशनों से न्यूनतम प्रशुल्क के प्रस्ताव पर आधारित खुली और पारदर्शी प्रतिस्पर्धात्मक बोली प्रक्रिया के माध्यम से उपर्युक्त विद्युत उत्पादकों से बिजली के अधिप्राप्ति के लिए वितरण लाइसेंसधारकों द्वारा अपनाया जाना है;

इसलिए अब विद्युत अधिनियम, 2003 की धारा 63 के अंतर्गत प्रदत्त शक्तियों का प्रयोग करते हुए केंद्र सरकार इन दिशानिर्देशों को अधिसूचित करती है जिन्हें 'डीबीएफओओ आधार पर स्थापित ताप विद्युत स्टेशनों से विद्युत की अधिप्राप्ति हेतु दिशा-निर्देश' ('दिशा-निर्देश') के रूप में जाना जाएगा। ये दिशा-निर्देश निम्नलिखित निबंधन एवं शर्तों के अधीन रहते हुए इसकी तारीख से प्रभावी होंगे:

1. उपरोक्त मानक बोली दस्तावेजों में निर्दिष्ट निबंधन एवं शर्तें, संदर्भ द्वारा, इन दिशा-निर्देशों का भाग होगी और इन्हें इसी रूप में माना जाएगा।

2. इन दिशा-निर्देशों का लागू किया जाना लगभग 25 वर्ष की अवधि जिसमें किसी भी पक्ष के विकल्प पर 5 वर्ष की अवधि बढ़ाने के प्रावधान सहित निर्माण अवधि शामिल है, के लिए हस्ताक्षर किए गए विद्युत आपूर्ति करारों के अनुसार निर्मित एवं प्रचालित परियोजनाओं तक ही सीमित होगा।

3. मानक बोली दस्तावेजों को शामिल करते हुए इन दिशा-निर्देशों के आधार पर बोली प्रक्रिया के माध्यम से निर्धारित प्रशुल्क अधिनियम की धारा 63 के प्रावधानों के अनुसरण में उपयुक्त आयोग द्वारा अपनाया जाएगा।

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TRUE COPY





4. मानक बोली दस्तावेजों से कोई विचलन केंद्र सरकार के पूर्व अनुमोदन से ही किया जाएगा। बशर्ते यह कि मानक बोली दस्तावेजों में अभिव्यक्त रूप से अनुमति दिए गए किसी परियोजना विशेष संशोधनों का अर्थ मानक बोली दस्तावेजों से विचलन के रूप में नहीं लगाया जाएगा।

5. इसके अंतर्गत 2009 में जारी तथा समय-समय पर यथा संशोधित मानक बोली दस्तावेजों सहित समय-समय पर यथा संशोधित, 19 जनवरी 2005 को जारी वितरण लाइसेंसियों द्वारा विद्युत की अधिप्राप्ति हेतु बोली प्रक्रिया द्वारा प्रशुल्क के निर्धारण के लिए दिशा-निर्देश को एतद्वारा निरसित किया जाता है जहाँ तक कि वे मामला 1 परियोजनाओं के रूप में इसमें संदर्भित प्रापक द्वारा स्थान, प्रौद्योगिकी, अथवा ईंधन विनिर्दिष्ट नहीं है, विद्युत की दीर्घावधि अधिप्राप्ति से संबंधित हों। बशर्ते यह कि इस तारीख से पूर्व हस्ताक्षर किया गया कोई भी करार या की गई कोई भी कार्यवाई 2005 के उक्त दिशा-निर्देशों के ऐसे निरसन द्वारा प्रभावित नहीं होगी और इसके अंतर्गत निरसित दिशा-निर्देशों द्वारा शासित होती रहेंगी।

ज्योति अरोरा, संयुक्त सचिव

## MINISTRY OF POWER

### RESOLUTION

New Delhi, the 9th November, 2013

#### Guidelines for Procurement of Electricity from Thermal Power Stations set up on Design, Build, Finance, Own and Operate (DBFOO) basis

**No. 23/17/2011-R&R(Vol-V).**—Whereas the Central Government is engaged in creating an enabling policy and regulatory environment for the orderly growth of generation of electricity in accordance with the provisions of the Electricity Act, 2003 (the “Act”);

Whereas it is incumbent upon the Central Government, State Governments, Electricity Regulatory Commissions and the distribution licensees to promote competition in the procurement of electricity through competitive and transparent processes;

Whereas the Central Government has, after extensive consultations with various stakeholders and experts, evolved a model contractual framework for procurement of electricity by the distribution licensees from power producers who agree to construct and operate thermal power generating stations on a ‘Design, Build, Finance, Own and Operate (DBFOO)’ basis;

Whereas, the Central Government has, vide its letter No. 23/17/2011-R&R(Vol-V) dated 8th November, 2013, issued the model documents comprising the Model Request for Qualification (the “MRFQ”), the Model Request for Proposals (the “MRFP”) and the Model Power Supply Agreement (the “MPSA”) (collectively, the “Standard Bidding Documents”) to be adopted by distribution licensees for procurement of electricity from the aforesaid power producers through a process of open and transparent competitive bidding based on offer of the lowest tariff from thermal power generating stations constructed and operated on DBFOO basis;

Now, therefore, in exercise of the powers conferred under section 63 of the Electricity Act, 2003, the Central Government notifies these guidelines to be known as the ‘Guidelines for Procurement of Electricity from Thermal Power Stations set up on DBFOO Basis’ (the “Guidelines”). These Guidelines shall come into effect from the date hereof subject to the following terms and conditions:

1. The terms and conditions specified in the Standard Bidding Documents referred to hereinabove shall, by reference, form part of these Guidelines and shall be treated as such.
2. The application of these Guidelines shall be restricted to projects constructed and operated in accordance with a Power Supply Agreement signed for a period of about 25 years including construction period with provision of extension of 5 years at the option of either party.
3. The tariff determined through the bidding process based on these Guidelines comprising the Standard Bidding Documents shall be adopted by the Appropriate Commission in pursuance of the provisions of section 63 of the Act.
4. Any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government. Provided, however, that any project specific modifications expressly permitted in the Standard Bidding Documents shall not be construed as deviations from the Standard Bidding Documents.
5. The ‘Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees’ issued on 19th January, 2005, as amended from time to time, including the standard bidding documents issued in 2009 and amended from time to time thereunder, are hereby repealed insofar as they relate to long-term procurement of electricity where the location, technology, or fuel is not specified by the procurer referred to therein as Case 1 projects. Provided, however, that any agreements signed or actions taken prior to the date hereof shall not be affected by such repeal of the said guidelines of 2005 and shall continue to be governed by the guidelines repealed hereunder.

JYOTI ARORA, Jt. Secy.

**Model**

**Request For Proposal**

**for**

**Power Supply Agreement**

**Government of India**





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# Model Request for Proposal (RFP)



[NAME AND ADDRESS OF THE UTILITY]

**LETTER OF INVITATION**

Dated .....

To,

.....

.....

.....

Sub: RFP for \*\*\*\*\* Project

Dear Sir,

Pursuant to your application in response to our Request for Qualification for the above said project (the "RFQ "), you were short listed as a Bidder, and asked vide our letter dated ..... to remit the fee for RFP document (the "RFP") within a week. We acknowledge your remittance of [Rs. 100,000 (Rs. one lakh only)]<sup>1</sup> as the cost of procuring the RFP documents, which are enclosed.

You are requested to participate in the Bid Stage and submit your financial proposal (the "Bid") for the aforesaid project in accordance with the RFP.

Please note that the [Utility] reserves the right to accept or reject all or any of the bids without assigning any reason whatsoever.

Thanking you,

Yours faithfully,

(Signature, name and designation of the Signatory)

---

<sup>1</sup> To be fixed at the rate of Rs 50,000 (Rupees fifty thousand) for every 100 MW of capacity to be procured. The Utility may, in its discretion, increase this amount by upto 50% thereof.



## **DISCLAIMER**

The information contained in this Request for Proposal document (the “**RFP**”) or subsequently provided to Bidder(s), whether verbally or in documentary or any other form by or on behalf of the Utility or any of its employees or advisors, is provided to Bidder(s) on the terms and conditions set out in this RFP and such other terms and conditions subject to which such information is provided.

This RFP is not an agreement and is neither an offer nor invitation by the Utility to the prospective Bidders or any other person. The purpose of this RFP is to provide interested parties with information that may be useful to them in making their financial offers (Bids) pursuant to this RFP. This RFP includes statements, which reflect various assumptions and assessments arrived at by the Utility in relation to the Project. Such assumptions, assessments and statements do not purport to contain all the information that each Bidder may require. This RFP may not be appropriate for all persons, and it is not possible for the Utility, its employees or advisors to consider the investment objectives, financial situation and particular needs of each party who reads or uses this RFP. The assumptions, assessments, statements and information contained in the Bidding Documents, may not be complete, accurate, adequate or correct. Each Bidder should, therefore, conduct its own investigations and analysis and should check the accuracy, adequacy, correctness, reliability and completeness of the assumptions, assessments, statements and information contained in this RFP and obtain independent advice from appropriate sources.

Information provided in this RFP to the Bidder(s) is on a wide range of matters, some of which may depend upon interpretation of law. The information given is not intended to be an exhaustive account of statutory requirements and should not be regarded as a complete or authoritative statement of law. The Utility accepts no responsibility for the accuracy or otherwise for any interpretation or opinion on law expressed herein.

The Utility, its employees and advisors make no representation or warranty and shall have no liability to any person, including any Applicant or Bidder under any law, statute, rules or regulations or tort, principles of restitution or unjust enrichment or otherwise for any loss, damages, cost or expense which may arise from or be incurred or suffered on account of anything contained in this RFP or otherwise, including the accuracy, adequacy, correctness, completeness or reliability of the RFP and any assessment, assumption, statement or information contained therein or deemed to form part of this RFP or arising in any way for participation in this Bid Stage.

The Utility also accepts no liability of any nature whether resulting from negligence or otherwise howsoever caused arising from reliance of any Bidder upon the statements contained in this RFP.

The Utility may in its absolute discretion, but without being under any obligation to do so, update, amend or supplement the information, assessment or assumptions contained in this RFP.

The issue of this RFP does not imply that the Utility is bound to select a Bidder or to appoint the Selected Bidder or Supplier, as the case may be, for the Project and the Utility reserves the right to reject all or any of the Bidders or Bids without assigning any reason whatsoever.

The Bidder shall bear all its costs associated with or relating to the preparation and submission of its Bid including but not limited to preparation, copying, postage, delivery

fees, expenses associated with any demonstrations or presentations which may be required by the Utility or any other costs incurred in connection with or relating to its Bid. All such costs and expenses will remain with the Bidder and the Utility shall not be liable in any manner whatsoever for the same or for any other costs or other expenses incurred by a Bidder in preparation or submission of the Bid, regardless of the conduct or outcome of the Bidding Process.



## GLOSSARY

<b>Associate</b>	As defined in Clause 2.1.14
<b>Bank Guarantee</b>	As defined in Clause 2.20.1
<b>Bid(s)</b>	As defined in Clause 1.2.2
<b>Bidders</b>	As defined in Clause 1.2.2
<b>Bidding Documents</b>	As defined in Clause 1.1.7
<b>Bid Due Date</b>	As defined in Clause 1.1.7
<b>Bidding Process</b>	As defined in Clause 1.2.1
<b>Bid Security</b>	As defined in Clause 1.2.4
<b>Bid Stage</b>	As defined in Clause 1.2.1
<b>[CIL</b>	As defined in Clause 3.5.2]
<b>Conflict of Interest</b>	As defined in Clause 2.1.14
<b>Contract</b>	As defined in Clause 1.1.5
<b>Damages</b>	As defined in Clause 2.1. 14
<b>BOO</b>	As defined in Clause 1.1.1
<b>Demand Draft</b>	As defined in Clause 2.20.1
<b>Government</b>	Government of *****
<b>Lowest Bidder</b>	As defined in Clause 1.2.6
<b>LOA</b>	As defined in Clause 3.3.5
<b>Member</b>	Member of a Consortium
<b>PSA</b>	As defined in Clause 1.1.2
<b>PPP</b>	Public Private Partnership
<b>Project</b>	As defined in Clause 1.1.1
<b>Re. or Rs. or INR</b>	Indian Rupee
<b>RFP or Request for Proposals</b>	As defined in the Disclaimer
<b>RFQ</b>	As defined in Clause 2.1.2
<b>Selected Bidder</b>	As defined in Clause 3.3.1
<b>Supplier</b>	As defined in Clause 1.1.2
<b>Tariff</b>	As defined in Clause 1.2.6
<b>Utility</b>	As defined in Clause 1.1.1

The words and expressions beginning with capital letters and defined in this document shall, unless repugnant to the context, have the meaning ascribed thereto herein. The words and expressions beginning with capital letters and not defined herein, but defined in the RFQ, shall, unless repugnant to the context, have the meaning ascribed thereto therein.



## **Invitation for Proposal**



[Name of Utility]

## 1. INTRODUCTION

### 1.1 Background<sup>2</sup>

- 1.1.1 The [\*\*\*<sup>3</sup> Distribution Company]<sup>4</sup> (the “**Utility**”) is engaged in the distribution of electricity and as part of this endeavour, the Utility has decided to procure electricity on a long term basis from a power station (the “**Project**”) through Public Private Partnership (the “**PPP**”) on Build, Own and Operate (the “**BOO**”) basis, and has decided to carry out the bidding process for selection of a corporate entity as the Bidder to whom the contract may be awarded for production of electricity and supply thereof as per the terms and conditions specified in the Bidding Documents.

Brief particulars of the Project are as follows:

**Capacity Required**  
(in MW)

**Period when supply must  
commence**

\*\*\*

[\*\*\* months from date of  
RFQ]

- 1.1.2 The Selected Bidder, who is either a company incorporated under the Companies Act, 1956 or undertakes to incorporate as such prior to execution of the Power Supply Agreement (the “**Supplier**”), shall be responsible for designing, engineering, financing, procurement, construction, operation and maintenance of the Power Station for production of electricity and supply thereof under and in accordance with the provisions of a long-term agreement for supply of Power (the “**Power Supply Agreement**” or the “**PSA**”) to be entered into between the Selected Bidder and the Utility in the form provided by the Utility as part of the Bidding Documents pursuant hereto.
- 1.1.3 The scope of work will broadly include designing, financing, operation and maintenance of the Power Station and supply of power in accordance with the terms in the PSA.
- 1.1.4 Applicants may bid for the [the capacity specified in Clause 1.1.1, or a part thereof, not being less than 25% (twenty five per cent) of such capacity.

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<sup>2</sup> Serially numbered footnotes are for guidance of the Utility and should be omitted prior to issue of RFP. Footnotes marked in non-numerical characters shall be retained in the RFP.

<sup>3</sup> Wherever asterisk is used, it should be substituted by project-specific details prior to issue of RFP.

<sup>4</sup> All project-specific provisions in this document have been enclosed in square parenthesis and may be modified, as necessary. The square parenthesis should be removed after carrying out the required modifications. The curly parenthesis including the provisions contained therein, and all blank spaces shall be retained in the RFP document to be issued to the Bidders. They should be suitably modified/filled up by the respective Bidders to reflect the particulars relating to such Bidders.

Provided, however, that the Utility may, in its sole discretion, accept only those Bids which match the lowest Bid]<sup>5</sup>.

- 1.1.5 The PSA sets forth the detailed terms and conditions for grant of the contract to the Supplier, including the scope of the Supplier's services and obligations (the "**Contract**").
- 1.1.6 The statements and explanations contained in this RFP are intended to provide a better understanding to the Bidders about the subject matter of this RFP and should not be construed or interpreted as limiting in any way or manner the scope of services and obligations of the Supplier set forth in the PSA or the Utility's rights to amend, alter, change, supplement or clarify the scope of work, the Contract to be awarded pursuant to this RFP or the terms thereof or herein contained. Consequently, any omissions, conflicts or contradictions in the Bidding Documents including this RFP are to be noted, interpreted and applied appropriately to give effect to this intent, and no claims on that account shall be entertained by the Utility.
- 1.1.7 The Utility shall receive Bids pursuant to this RFP in accordance with the terms set forth in this RFP and other documents to be provided by the Utility pursuant to this RFP, as modified, altered, amended and clarified from time to time by the Utility (collectively the "**Bidding Documents**"), and all Bids shall be prepared and submitted in accordance with such terms on or before the date specified in Clause 1.3 for submission of Bids (the "**Bid Due Date**").

## **1.2 Brief description of Bidding Process**

- 1.2.1 The Utility has adopted a two-stage process (collectively referred to as the "**Bidding Process**") for selection of the Bidder for award of the Project. The first stage (the "**Qualification Stage**") of the process involved pre-qualification of interested parties/ Consortia in accordance with the provisions of the RFQ. At the end of the Qualification Stage, the Utility short-listed Applicants who are eligible for participation in this second stage of the Bidding Process (the "**Bid Stage**") comprising Request for Proposals.

[GOI has issued guidelines (see Appendix-V of RFP) for qualification of bidders seeking to acquire stakes in any public sector enterprise through the process of disinvestment. These guidelines shall apply *mutatis mutandis* to this Bidding Process. The Utility shall be entitled to disqualify an Applicant in accordance with the aforesaid guidelines at any stage of the Bidding Process. Applicants must satisfy themselves that they are qualified to bid, and should give an undertaking to this effect in the form at Appendix-I]

- 1.2.2 In the Bid Stage, the aforesaid short-listed Applicants, including their successors, (the "**Bidders**", which expression shall, unless repugnant to the context, include the Members of the Consortium) are being called upon to submit their financial offers (the "**Bids**") in accordance with the terms specified in the Bidding Documents. The Bid shall be valid for a period of not less than 120 days from the date specified in Clause 1.3 for submission of bids (the "**Bid Due Date**").

---

<sup>5</sup> The Utility may suitably modify this Clause depending on its own requirements.

- 1.2.3 The Bidding Documents include the draft PSA for the Project [which is enclosed/ which will be provided to the Bidders on or near about \*\*\*]<sup>6</sup>. Subject to the provisions of Clause 2.1.3, the aforesaid documents and any addenda issued subsequent to this RFP Document, will be deemed to form part of the Bidding Documents.
- 1.2.4 A Bidder is required to deposit, along with its Bid, a bid security of [Rs 5 lakh (Rupees five lakh) per MW of capacity offered by the Bidder]<sup>7</sup> (the "**Bid Security**"), refundable not later than 60 (sixty) days from the Bid Due Date, except in the case of the Selected Bidder whose Bid Security shall be retained till it has provided a Performance Security under the PSA. The Bidders will have an option to provide Bid Security in the form of a demand draft or a bank guarantee acceptable to the Utility, and in such event, the validity period of the demand draft or bank guarantee, as the case may be, shall not be less than 180 (one hundred and eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Utility and the Bidder from time to time. The Bid shall be summarily rejected if it is not accompanied by the Bid Security.
- 1.2.5 During the Bid Stage, Bidders are invited to examine the Bidding Documents in greater detail, and to carry out, at their cost, such studies as may be required for submitting their respective Bids for award of the Contract including implementation of the Project.
- 1.2.6 Bids are invited for the Project on the basis of a tariff to be offered by a Bidder for and in respect of the Project. For the purposes of evaluation hereunder, the Fixed Charge [and Fuel Charge] will constitute the tariff for the Power Station (the "**Tariff**"). The contract period shall be pre-determined and specified in the Bidding Documents.
- In this RFP, the term "**Lowest Bidder**" shall mean the Bidder who is offering the lowest Tariff.
- 1.2.7 Generally, the Lowest Bidder shall be the Selected Bidder. The remaining Bidders shall be kept in reserve and may, in accordance with the process specified in Clause 3 of this RFP, be invited to match the Bid submitted by the Lowest Bidder in case such Lowest Bidder withdraws or is not selected for any reason. In the event that none of the other Bidders match the Bid of the Lowest Bidder, the Utility may, in its discretion, either invite fresh Bids from the remaining Bidders or annul the Bidding Process.
- 1.2.8 Further and other details of the process to be followed at the Bid Stage and the terms thereof are spelt out in this RFP.
- 1.2.9 Any queries or request for additional information concerning this RFP shall be submitted in writing or by fax and e-mail to the officer designated in Clause

<sup>6</sup> The PSA should either be provided along with the RFP or at least 45 days before the Bid Due Date and 21 days before the Pre-Bid Conference.

<sup>7</sup> The Utility may, if deemed necessary, prescribe a higher bid security not exceeding Rs. 7.5 lakh per MW. It may also reduce the bid security, but not less than Rs 3 lakh per MW, in any case.

2.11.5 below. The envelopes/ communication shall clearly bear the following identification/ title:

"Queries/Request for Additional Information: RFP for \*\*\*\*\* Project".

### **1.3 Schedule of Bidding Process**

The Utility shall endeavour to adhere to the following schedule:

<b>Event Description</b>	<b>Date</b>
1. Last date for receiving queries	[25 days from the date of RFP]
2. Pre-Bid meeting-1	[To be specified]
3. Utility response to queries latest by	[35 days from the date of RFP]
4. [Pre-Bid meeting-2] <sup>8</sup>	[To be specified]
5. Bid Due Date	[To be specified]
	On Bid Due Date [at least 45 days
6. Opening of Bids	from the date of RFP]
7. Letter of Award (LOA)	Within 30 days of Bid Due Date
8. Validity of Bids	120 days of Bid Due Date
9. Signing of PSA	Within 30 days of award of LOA

---

<sup>8</sup> In case of complex projects, the number of pre-bid meetings could be more than two. For repetitive projects, one Pre-bid meeting would suffice.



## **2. INSTRUCTIONS TO BIDDERS**

### **A. GENERAL**

#### **2.1. General terms of Bidding**

- 2.1.1 No Bidder shall submit more than one Bid for the Project. A Bidder bidding individually or as a member of a Consortium shall not be entitled to submit another bid either individually or as a member of any Consortium, as the case may be.
- 2.1.2 Unless the context otherwise requires, the terms not defined in this RFP, but defined in the Request for Qualification document for the Project (the “**RFQ**”) shall have the meaning assigned thereto in the RFQ.
- 2.1.3 The Bidders are expected to carry out their own surveys, investigations and other detailed examination of the Project before submitting their Bids. Any variations or deviations found subsequently shall not confer any right on the Bidders, and the Utility shall have no liability whatsoever in relation to or arising out of any variations or deviations detected subsequently.
- 2.1.4 Notwithstanding anything to the contrary contained in this RFP, the detailed terms specified in the draft PSA shall have overriding effect; provided, however, that any conditions or obligations imposed on the Bidder hereunder shall continue to have effect in addition to its obligations under the PSA.
- 2.1.5 The Bid should be furnished in the format at Appendix–I, clearly indicating the bid amount in both figures and words, in Indian Rupees, and signed by the Bidder’s authorised signatory. In the event of any difference between figures and words, the amount indicated in words shall be taken into account.
- 2.1.6 The Bid shall consist of a Tariff to be quoted by the Bidder, as per the terms and conditions of this RFP and the provisions of the PSA.
- 2.1.7 The Bidder shall deposit a Bid Security of Rs. \*\*\*\*\* (Rupees \*\*\*\*\* ) in accordance with the provisions of this RFP. The Bidder has the option to provide the Bid Security either as a Demand Draft or in the form of a Bank Guarantee acceptable to the Utility, as per format at Appendix–II.
- 2.1.8 The validity period of the Bank Guarantee or Demand Draft, as the case may be, shall not be less than 180 (one hundred and eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Utility and the Bidder. The Bid shall be summarily rejected if it is not accompanied by the Bid Security. The Bid Security shall be refundable no later than 60 (sixty) days from the Bid Due Date except in the case of the Selected Bidder whose Bid Security shall be retained till it has provided a Performance Security under the PSA.
- 2.1.9 The Bidder should submit a Power of Attorney as per the format at Appendix–III, authorising the signatory of the Bid to commit the Bidder.

- 2.1.10 In case the Bidder is a Consortium, the Members thereof should furnish a Power of Attorney in favour of the Lead Member in the format at Appendix–IV.
- 2.1.11 Any condition or qualification or any other stipulation contained in the Bid shall render the Bid liable to rejection as a non-responsive Bid.
- 2.1.12 The Bid and all communications in relation to or concerning the Bidding Documents and the Bid shall be in English language.
- 2.1.13 The documents including this RFP and all attached documents, provided by the Utility are and shall remain or become the property of the Utility and are transmitted to the Bidders solely for the purpose of preparation and the submission of a Bid in accordance herewith. Bidders are to treat all information as strictly confidential and shall not use it for any purpose other than for preparation and submission of their Bid. The provisions of this Clause 2.1.13 shall also apply *mutatis mutandis* to Bids and all other documents submitted by the Bidders, and the Utility will not return to the Bidders any Bid, document or any information provided along therewith.
- 2.1.14 A Bidder shall not have a conflict of interest (the “**Conflict of Interest**”) that affects the Bidding Process. Any Bidder found to have a Conflict of Interest shall be disqualified. In the event of disqualification, the Utility shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Utility and not by way of penalty for, *inter alia*, the time, cost and effort of the Utility, including consideration of such Bidder’s proposal (the “**Damages**”), without prejudice to any other right or remedy that may be available to the Utility under the Bidding Documents and/ or the PSA or otherwise. Without limiting the generality of the above, a Bidder shall be deemed to have a Conflict of Interest affecting the Bidding Process, if:
- (i) the Bidder, its Member or Associate (or any constituent thereof) and any other Bidder, its Member or any Associate thereof (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this disqualification shall not apply in cases where the direct or indirect shareholding of a Bidder, its Member or an Associate thereof (or any shareholder thereof having a shareholding of more than 5% (five per cent) of the paid up and subscribed share capital of such Bidder, Member or Associate, as the case may be) in the other Bidder, its Member or Associate, is less than 5% (five per cent) of the subscribed and paid up equity share capital thereof; provided further that this disqualification shall not apply to any ownership by a bank, insurance company, pension fund or a public financial institution referred to in section 4A of the Companies Act 1956. For the purposes of this Clause 2.1.14, indirect shareholding held through one or more intermediate persons shall be computed as follows: (aa) where any intermediary is controlled by a person through management control or otherwise, the entire shareholding held by such controlled intermediary in any other person (the “**Subject Person**”)

shall be taken into account for computing the shareholding of such controlling person in the Subject Person; and (bb) subject always to sub-clause (aa) above, where a person does not exercise control over an intermediary, which has shareholding in the Subject Person, the computation of indirect shareholding of such person in the Subject Person shall be undertaken on a proportionate basis; provided, however, that no such shareholding shall be reckoned under this sub-clause (bb) if the shareholding of such person in the intermediary is less than 26% of the subscribed and paid up equity shareholding of such intermediary; or

- (ii) a constituent of such Bidder is also a constituent of another Bidder; or
- (iii) such Bidder, its Member or any Associate thereof receives or has received any direct or indirect subsidy, grant, concessional loan or subordinated debt from any other Bidder, its Member or Associate, or has provided any such subsidy, grant, concessional loan or subordinated debt to any other Bidder, its Member or any Associate thereof; or
- (iv) such Bidder has the same legal representative for purposes of this Bid as any other Bidder; or
- (v) such Bidder, or any Associate thereof, has a relationship with another Bidder, or any Associate thereof, directly or through common third party/ parties, that puts either or both of them in a position to have access to each others' information about, or to influence the Bid of either or each other; or
- (vi) such Bidder or any Associate thereof has participated as a consultant to the Utility in the preparation of any documents, design or technical specifications of the Project.

*Explanation:*

In case a Bidder is a Consortium, then the term Bidder as used in this Clause 2.1.14, shall include each Member of such Consortium.

For purposes of this RFP, Associate means, in relation to the Bidder/ Consortium Member, a person who controls, is controlled by, or is under the common control with such Bidder/ Consortium Member (the “**Associate**”). As used in this definition, the expression “control” means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person by operation of law.

- 2.1.15 A Bidder shall be liable for disqualification and forfeiture of Bid Security if any legal, financial or technical adviser of the Utility in relation to the Project is engaged by the Bidder, its Members or any Associate thereof, as the case may be, in any manner for matters related to or incidental to such Project

during the Bidding Process or subsequent to the (i) issue of the LOA or (ii) execution of the PSA. In the event any such adviser is engaged by the Selected Bidder or Supplier, as the case may be, after issue of the LOA or execution of the PSA for matters related or incidental to the Project, then notwithstanding anything to the contrary contained herein or in the LOA or the PSA and without prejudice to any other right or remedy of the Utility, including the forfeiture and appropriation of the Bid Security or Performance Security, as the case may be, which the Utility may have thereunder or otherwise, the LOA or the PSA, as the case may be, shall be liable to be terminated without the Utility being liable in any manner whatsoever to the Selected Bidder or Supplier for the same. For the avoidance of doubt, this disqualification shall not apply where such adviser was engaged by the Bidder, its Member or Associate in the past but its assignment expired or was terminated 6 (six) months prior to the date of issue of RFQ for the Project. Nor will this disqualification apply where such adviser is engaged after a period of 3 (three) years from the date of commercial operation of this Project.

2.1.16 This RFP is not transferable.

2.1.17 Any award of Contract pursuant to this RFP shall be subject to the terms of Bidding Documents.

2.1.18 [Other Bid conditions shall include:\*\*\*]<sup>9</sup>

[(a) The Bidder, in case it does not have the O&M experience specified in Clause 2.2.3 of the RFQ, by submitting its Bid, shall be deemed to acknowledge and agree that for a period of at least 5 (five) years from the date of commercial operation of the Project, it shall enter into an operation & maintenance (O&M) agreement with an entity having the specified experience, failing which the PSA shall be liable to termination].

## **2.2 Change in composition of the Consortium**

2.2.1 Where the Bidder is a Consortium, change in composition of the Consortium may be permitted by the Utility during the Bid Stage, only where:

- (a) the Lead Member continues to be the Lead Member of the Consortium;
- (b) the substitute is at least equal, in terms of Technical Capacity or Financial Capacity, to the Consortium Member who is sought to be substituted and the modified Consortium shall continue to meet the pre-qualification and short-listing criteria for Applicants; and
- (c) the new Member(s) expressly adopt(s) the Application already made on behalf of the Consortium as if it were a party to it originally, and is not an Applicant/Member/ Associate of any other Consortium bidding for this Project.

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<sup>9</sup> Other Project specific conditions of bidding or restrictions, if any, may be stated here, such as a limit on the number of projects which may awarded to a Bidder.

- 2.2.2 Approval for change in the composition of a Consortium shall be at the sole discretion of the Utility and must be approved by the Utility in writing. The Bidder must submit its application for change in composition of the Consortium no later than 15 (fifteen) days prior to the Bid Due Date.
- 2.2.3 The modified/ reconstituted Consortium shall submit a revised Jt. Bidding Agreement and a Power of Attorney, substantially in the form at Appendix-IV, prior to the Bid Due Date.

### **2.3 Change in Ownership**

- 2.3.1 By submitting the Bid, the Bidder acknowledges that it was pre-qualified and short-listed on the basis of Technical Capacity and Financial Capacity of those of its Consortium Members who shall, until the 2<sup>nd</sup> (second) anniversary of the date of commercial operation of the Project, hold equity share capital representing not less than: (i) 26% (twenty six per cent) of the subscribed and paid-up equity of the Supplier; and (ii) 5% (five per cent) of the Total Project Cost specified in the PSA. The Bidder further acknowledges and agrees that the aforesaid obligation shall be the minimum, and shall be in addition to such other obligations as may be contained in the PSA, and a breach hereof shall, notwithstanding anything to the contrary contained in the PSA, be deemed to be a breach of the PSA and dealt with as such thereunder. For the avoidance of doubt, the provisions of this Clause 2.3.1 shall apply only when the Bidder is a Consortium.
- 2.3.2 By submitting the Bid, the Bidder shall also be deemed to have acknowledged and agreed that in the event of a change in control of a Consortium Member or an Associate whose Technical Capacity and/ or Financial Capacity was taken into consideration for the purposes of short-listing and pre-qualification under and in accordance with the RFQ, the Bidder shall be deemed to have knowledge of the same and shall be required to inform the Utility forthwith along with all relevant particulars about the same and the Utility may, in its sole discretion, disqualify the Bidder or withdraw the LOA from the Selected Bidder, as the case may be. In the event such change in control occurs after signing of the PSA but prior to Financial Close of the Project, it would, notwithstanding anything to the contrary contained in the PSA, be deemed to be a breach of the PSA, and the same shall be liable to be terminated without the Utility being liable in any manner whatsoever to the Supplier. In such an event, notwithstanding anything to the contrary contained in the PSA, the Utility shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Utility under the Bidding Documents and/ or the PSA or otherwise.

### **2.4 Cost of Bidding**

The Bidders shall be responsible for all of the costs associated with the preparation of their Bids and their participation in the Bidding Process. The Utility will not be responsible or in any way liable for such costs, regardless of the conduct or outcome of the Bidding Process.

## **2.5 Verification of information**

2.5.1 Bidders are encouraged to submit their respective Bids after familiarising themselves with the information and physical conditions relevant to the Project, including the transmission capacity, the site conditions, location, surroundings, climate, availability of power, water and other utilities for construction, access to site, handling and storage of materials, weather data, applicable laws and regulations, and any other matter considered relevant by them.

2.5.2 It shall be deemed that by submitting a Bid, the Bidder has:

- (a) made a complete and careful examination of the Bidding Documents;
- (b) received all relevant information requested from the Utility;
- (c) accepted the risk of inadequacy, error or mistake in the information provided in the Bidding Documents or furnished by or on behalf of the Utility relating to any of the matters referred to in Clause 2.5.1 above;
- (d) satisfied itself about all matters, things and information including matters referred to in Clause 2.5.1 hereinabove necessary and required for submitting an informed Bid, execution of the Project in accordance with the Bidding Documents and performance of all of its obligations thereunder;
- (e) acknowledged and agreed that inadequacy, lack of completeness or incorrectness of information provided in the Bidding Documents or ignorance of any of the matters referred to in Clause 2.5.1 hereinabove shall not be a basis for any claim for compensation, damages, extension of time for performance of its obligations, loss of profits etc. from the Utility, or a ground for termination of the PSA by the Supplier;
- (f) acknowledged that it does not have a Conflict of Interest; and
- (g) agreed to be bound by the undertakings provided by it under and in terms hereof.

2.5.3 The Utility shall not be liable for any omission, mistake or error in respect of any of the above or on account of any matter or thing arising out of or concerning or relating to RFP, RFQ, the Bidding Documents or the Bidding Process, including any error or mistake therein or in any information or data given by the Utility.

## **2.6 Verification and Disqualification**

2.6.1 The Utility reserves the right to verify all statements, information and documents submitted by the Bidder in response to the RFQ, the RFP or the Bidding Documents and the Bidder shall, when so required by the Utility, make available all such information, evidence and documents as may be necessary for such verification. Any such verification, or lack of such

verification, by the Utility shall not relieve the Bidder of its obligations or liabilities hereunder nor will it affect any rights of the Utility thereunder.

**2.6.2** The Utility reserves the right to reject any Bid and appropriate the Bid Security if:

- (a) at any time, a material misrepresentation is made or uncovered, or
- (b) the Bidder does not provide, within the time specified by the Utility, the supplemental information sought by the Utility for evaluation of the Bid.

Such misrepresentation/ improper response shall lead to the disqualification of the Bidder. If the Bidder is a Consortium, then the entire Consortium and each Member may be disqualified / rejected. If such disqualification / rejection occurs after the Bids have been opened and the Lowest Bidder gets disqualified / rejected, then the Utility reserves the right to:

- (i) invite the remaining Bidders to submit their Bids in accordance with Clauses 3.3.3 and 3.3.4; or
- (ii) take any such measure as may be deemed fit in the sole discretion of the Utility, including annulment of the Bidding Process.

**2.6.3** In case it is found during the evaluation or at any time before signing of the PSA or after its execution and during the period of subsistence thereof, including the Contract thereby granted by the Utility, that one or more of the pre-qualification conditions have not been met by the Bidder, or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith if not yet appointed as the Supplier either by issue of the LOA or entering into of the PSA, and if the Selected Bidder has already been issued the LOA or has entered into the PSA, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by the Utility to the Selected Bidder or the Supplier, as the case may be, without the Utility being liable in any manner whatsoever to the Selected Bidder or Supplier. In such an event, the Utility shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Utility under the Bidding Documents and/ or the PSA, or otherwise.

## **B. DOCUMENTS**

### **2.7 Contents of the RFP**

**2.7.1** This RFP comprises the Disclaimer set forth hereinabove, the contents as listed below, and will additionally include any Addenda issued in accordance with Clause 2.9.

#### **Invitation for Bids**

##### **Section 1. Introduction**

- Section 2. Instructions to Bidders
- Section 3. Evaluation of Bids
- Section 4. Fraud and Corrupt Practices
- Section 5. Pre-Bid Conference
- Section 6. Miscellaneous

### **Appendices**

- I. Letter comprising the Bid
- II. Bank Guarantee for Bid Security
- III. Power of Attorney for signing of Bid
- IV. Power of Attorney for Lead Member of Consortium
- V. Guidelines of the Department of Disinvestment

- 2.7.2 The draft PSA provided by the Utility as part of the Bidding Documents shall be deemed to be part of this RFP.

## **2.8 Clarifications**

- 2.8.1 Bidders requiring any clarification on the RFP may notify the Utility in writing or by fax and e-mail in accordance with Clause 1.2.10. They should send in their queries on or before the date mentioned in the Schedule of Bidding Process specified in Clause 1.3. The Utility shall endeavour to respond to the queries within the period specified therein, but no later than 15 (fifteen) days prior to the Bid Due Date. The responses will be sent by fax or e-mail. The Utility will forward all the queries and its responses thereto, to all Bidders without identifying the source of queries.
- 2.8.2 The Utility shall endeavour to respond to the questions raised or clarifications sought by the Bidders. However, the Utility reserves the right not to respond to any question or provide any clarification, in its sole discretion, and nothing in this Clause shall be taken or read as compelling or requiring the Utility to respond to any question or to provide any clarification.
- 2.8.3 The Utility may also on its own motion, if deemed necessary, issue interpretations and clarifications to all Bidders. All clarifications and interpretations issued by the Utility shall be deemed to be part of the Bidding Documents. Verbal clarifications and information given by Utility or its employees or representatives shall not in any way or manner be binding on the Utility.

## **2.9 Amendment of RFP**

- 2.9.1 At any time prior to the Bid Due Date, the Utility may, for any reason, whether at its own initiative or in response to clarifications requested by a Bidder, modify the RFP by the issuance of Addenda.



- 2.9.2 Any Addendum issued hereunder will be in writing and shall be sent to all the Bidders.
- 2.9.3 In order to afford the Bidders a reasonable time for taking an Addendum into account, or for any other reason, the Utility may, in its sole discretion, extend the Bid Due Date<sup>\$</sup>.

## **C. PREPARATION AND SUBMISSION OF BIDS**

### **2.10 Format and Signing of Bid**

- 2.10.1 The Bidder shall provide all the information sought under this RFP. The Utility will evaluate only those Bids that are received in the required formats and complete in all respects.
- 2.10.2 The Bid and its copy shall be typed or written in indelible ink and signed by the authorised signatory of the Bidder who shall also initial each page, in blue ink. In case of printed and published documents, only the cover shall be initialled. All the alterations, omissions, additions or any other amendments made to the Bid shall be initialled by the person(s) signing the Bid.

### **2.11 Sealing and Marking of Bids**

- 2.11.1 The Bidder shall submit the Bid in the format specified at Appendix-I, and seal it in an envelope and mark the envelope as “BID”.
- 2.11.2 The documents accompanying the Bid shall be placed in a separate envelope and marked as “Enclosures of the Bid”. The documents shall include:
- (a) Bid Security in the format at Appendix–II;
  - (b) Power of Attorney for signing of Bid in the format at Appendix–III;
  - (c) If applicable, the Power of Attorney for Lead Member of Consortium in the format at Appendix–IV; and
  - (d) A copy of the PSA with each page initialled by the person signing the Bid in pursuance of the Power of Attorney referred to in Clause (b) hereinabove.
- 2.11.3 A true copy of the documents accompanying the Bid, as specified in Clause 2.11.2 (a), (b) and (c) above, shall be bound together in one hard cover and a copy of the PSA as specified in Clause 2.11.2 (d) shall be bound in another hard cover. The pages in each hard cover shall be numbered serially and every page shall be initialled in blue ink by the authorised signatory of the Bidder. This copy of the documents shall be placed in a separate envelope and marked “Copy of Documents”.

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<sup>\$</sup> While extending the Bid Due Date on account of an addendum, the Utility shall have due regard for the time required by Bidders to address the amendments specified therein. In the case of significant amendments, at least 15 (fifteen) days shall be provided between the date of amendment and the Bid Due Date, and in the case of minor amendments, at least 7 (seven) days shall be provided.

- 2.11.4 The three envelopes specified in Clauses 2.11.1, 2.11.2 and 2.11.3 shall be placed in an outer envelope, which shall be sealed. Each of the four envelopes shall clearly bear the following identification:

“Bid for the \*\*\*\*\* Project”

and shall clearly indicate the name and address of the Bidder. In addition, the Bid Due Date should be indicated on the right hand top corner of each of the envelopes.

- 2.11.5 Each of the envelopes shall be addressed to:

ATTN. OF:	Mr. *****
DESIGNATION	*****
ADDRESS:	*****
FAX NO:	*****
E-MAIL ADDRESS	*****

- 2.11.6 If the envelopes are not sealed and marked as instructed above, the Utility assumes no responsibility for the misplacement or premature opening of the contents of the Bid submitted and consequent losses, if any, suffered by the Bidder.

- 2.11.7 Bids submitted by fax, telex, telegram or e-mail shall not be entertained and shall be rejected.

## **2.12 Bid Due Date**

- 2.12.1 Bids should be submitted before 1100 hours IST on the Bid Due Date at the address provided in Clause 2.11.5 in the manner and form as detailed in this RFP. A receipt thereof should be obtained from the person specified at Clause 2.11.5.

- 2.12.2 The Utility may, in its sole discretion, extend the Bid Due Date by issuing an Addendum in accordance with Clause 2.9 uniformly for all Bidders.

## **2.13 Late Bids**

Bids received by the Utility after the specified time on the Bid Due Date shall not be eligible for consideration and shall be summarily rejected.

## **2.14 Contents of the Bid**

- 2.14.1 The Bid shall be furnished in the format at Appendix–I and shall consist of a Tariff to be quoted by the Bidder. The Bidder shall specify (in Indian Rupees) the Tariff to undertake the Project in accordance with this RFP and the provisions of the PSA.

- 2.14.2 Generally, the Project will be awarded to the Lowest Bidder.
- 2.14.3 The opening of Bids and acceptance thereof shall be substantially in accordance with this RFP.
- 2.14.4 The proposed PSA shall be deemed to be part of the Bid.

## **2.15 Modifications/ Substitution/ Withdrawal of Bids**

- 2.15.1 The Bidder may modify, substitute or withdraw its Bid after submission, provided that written notice of the modification, substitution or withdrawal is received by the Utility prior to the Bid Due Date. No Bid shall be modified, substituted or withdrawn by the Bidder on or after the Bid Due Date.
- 2.15.2 The modification, substitution or withdrawal notice shall be prepared, sealed, marked, and delivered in accordance with Clause 2.11, with the envelopes being additionally marked “MODIFICATION”, “SUBSTITUTION” or “WITHDRAWAL”, as appropriate.
- 2.15.3 Any alteration/ modification in the Bid or additional information supplied subsequent to the Bid Due Date, unless the same has been expressly sought for by the Utility, shall be disregarded.

## **2.16 Rejection of Bids**

- 2.16.1 Notwithstanding anything contained in this RFP, the Utility reserves the right to reject any Bid and to annul the Bidding Process and reject all Bids at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons therefor. In the event that the Utility rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.
- 2.16.2 The Utility reserves the right not to proceed with the Bidding Process at any time, without notice or liability, and to reject any Bid without assigning any reasons.

## **2.17 Validity of Bids**

The Bids shall be valid for a period of not less than 120 (one hundred and twenty) days from the Bid Due Date. The validity of Bids may be extended by mutual consent of the respective Bidders and the Utility.

## **2.18 Confidentiality**

Information relating to the examination, clarification, evaluation and recommendation for the Bidders shall not be disclosed to any person who is not officially concerned with the process or is not a retained professional advisor advising the Utility in relation to, or matters arising out of, or concerning the Bidding Process. The Utility will treat all information, submitted as part of the Bid, in confidence and will require all those who have access to such material to treat the same in confidence. The Utility may not divulge any such information unless it is directed to do so by any statutory

entity that has the power under law to require its disclosure or is to enforce or assert any right or privilege of the statutory entity and/ or the Utility or as may be required by law or in connection with any legal process.

## **2.19 Correspondence with the Bidder**

Save and except as provided in this RFP, the Utility shall not entertain any correspondence with any Bidder in relation to acceptance or rejection of any Bid.

## **D. BID SECURITY**

### **2.20 Bid Security**

- 2.20.1 The Bidder shall furnish as part of its Bid, a Bid Security referred to in Clauses 2.1.7 and 2.1.8 hereinabove in the form of a bank guarantee issued by a nationalised bank, or a Scheduled Bank in India having a net worth of at least Rs. 1,000 crore (Rs. one thousand crore), in favour of the Utility in the format at Appendix–II (the “**Bank Guarantee**”) and having a validity period of not less than 180 (one hundred eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Utility and the Bidder from time to time. In case the Bank Guarantee is issued by a foreign bank outside India, confirmation of the same by any nationalised bank in India is required. For the avoidance of doubt, Scheduled Bank shall mean a bank as defined under Section 2(e) of the Reserve Bank of India Act, 1934.
- 2.20.2 Bid Security can also be in the form of a demand draft issued by a Scheduled Bank in India, drawn in favour of the Utility and payable at [Delhi] (the “**Demand Draft**”). The Utility shall not be liable to pay any interest on the Bid Security deposit so made and the same shall be interest free.
- 2.20.3 Any Bid not accompanied by the Bid Security shall be summarily rejected by the Utility as non-responsive.
- 2.20.4 Save and except as provided in Clauses 1.2.4 and 1.2.5 above, the Bid Security of unsuccessful Bidders will be returned by the Utility, without any interest, as promptly as possible on acceptance of the Bid of the Selected Bidder or when the Bidding process is cancelled by the Utility, and in any case within 60 (sixty) days from the Bid Due Date. Where Bid Security has been paid by deposit, the refund thereof shall be in the form of an account payee demand draft in favour of the unsuccessful Bidder(s). Bidders may by specific instructions in writing to the Utility give the name and address of the person in whose favour the said demand draft shall be drawn by the Utility for refund, failing which it shall be drawn in the name of the Bidder and shall be mailed to the address given on the Bid.
- 2.20.5 The Selected Bidder’s Bid Security will be returned, without any interest, upon the Supplier signing the PSA and furnishing the Performance Security in accordance with the provisions thereof. The Utility may, at the Selected Bidder’s option, adjust the amount of Bid Security in the amount of

Performance Security to be provided by him in accordance with the provisions of the PSA.

2.20.6 The Utility shall be entitled to forfeit and appropriate the Bid Security as Damages *inter alia* in any of the events specified in Clause 2.20.7 herein below. The Bidder, by submitting its Bid pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the Utility will suffer loss and damage on account of withdrawal of its Bid or for any other default by the Bidder during the period of Bid validity as specified in this RFP. No relaxation of any kind on Bid Security shall be given to any Bidder.

2.20.7 The Bid Security shall be forfeited as Damages without prejudice to any other right or remedy that may be available to the Utility under the Bidding Documents and/ or under the PSA, or otherwise, under the following conditions:

- (a) If a Bidder submits a non-responsive Bid;
- (b) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Clause 4 of this RFP;
- (c) If a Bidder withdraws its Bid during the period of Bid validity as specified in this RFP and as extended by mutual consent of the respective Bidder(s) and the Utility;
- (d) In the case of Selected Bidder, if it fails within the specified time limit-
  - (i) to sign and return the duplicate copy of LOA;
  - (ii) to sign the PSA; or
  - (iii) to furnish the Performance Security within the period prescribed therefor in the PSA; or
- (e) In case the Selected Bidder, having signed the PSA, commits any breach thereof prior to furnishing the Performance Security.

### **3. EVALUATION OF BIDS**

#### **3.1 Opening and Evaluation of Bids**

- 3.1.1 The Utility shall open the Bids at 1130 hours on the Bid Due Date, at the place specified in Clause 2.11.5 and in the presence of the Bidders who choose to attend.
- 3.1.2 The Utility will subsequently examine and evaluate the Bids in accordance with the provisions set out in this Section 3.
- 3.1.3 To facilitate evaluation of Bids, the Utility may, at its sole discretion, seek clarifications in writing from any Bidder regarding its Bid.

#### **3.2 Tests of responsiveness**

- 3.2.1 Prior to evaluation of Bids, the Utility shall determine whether each Bid is responsive to the requirements of this RFP. A Bid shall be considered responsive only if:
  - (a) it is received as per the format at Appendix-I;
  - (b) it is received by the Bid Due Date including any extension thereof pursuant to Clause 2.12.2;
  - (c) it is signed, sealed, bound together in hard cover and marked as stipulated in Clauses 2.10 and 2.11;
  - (d) it is accompanied by the Bid Security as specified in Clause 2.1.7;
  - (e) it is accompanied by the Power(s) of Attorney as specified in Clauses 2.1.9 and 2.1.10, as the case may be;
  - (f) it contains all the information (complete in all respects) as requested in this RFP and/or Bidding Documents (in formats same as those specified);
  - (g) it does not contain any condition or qualification; and
  - (h) it is not non-responsive in terms hereof.
- 3.2.2 The Utility reserves the right to reject any Bid which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by the Utility in respect of such Bid.

#### **3.3 Selection of Bidder**

- 3.3.1 Subject to the provisions of Clause 2.16.1, the Bidder whose Bid is adjudged as responsive in terms of Clause 3.2.1 and who quotes the lowest Tariff offered to the Utility in conformity with the provisions of Clause 3.5 shall be declared as the selected Bidder (the “**Selected Bidder**”). In the event that the

Utility rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.

- 3.3.2 In the event that two or more Bidders quote the same amount of Tariff (the "**Tie Bidders**"), the Utility shall identify the Selected Bidder by draw of lots, which shall be conducted, with prior notice, in the presence of the Tie Bidders who choose to attend.
- 3.3.3 In the event that the Lowest Bidder withdraws or is not selected for any reason in the first instance (the "**first round of bidding**"), the Utility may invite all the remaining Bidders to revalidate or extend their respective Bid Security, as necessary, and match the Bid of the aforesaid Lowest Bidder (the "**second round of bidding**"). If in the second round of bidding, only one Bidder matches the Lowest Bidder, it shall be the Selected Bidder. If two or more Bidders match the said Lowest Bidder in the second round of bidding, then the Bidder whose Bid was lower as compared to other Bidder(s) in the first round of bidding shall be the Selected Bidder. For example, if the third and fifth lowest Bidders in the first round of bidding offer to match the said Lowest Bidder in the second round of bidding, the said third lowest Bidder shall be the Selected Bidder.
- 3.3.4 In the event that no Bidder offers to match the Lowest Bidder in the second round of bidding as specified in Clause 3.3.3, the Utility may, in its discretion, invite fresh Bids (the "**third round of bidding**") from all Bidders except the Lowest Bidder of the first round of bidding, or annul the Bidding Process, as the case may be. In case the Bidders are invited in the third round of bidding to revalidate or extend their Bid Security, as necessary, and offer fresh Bids, they shall be eligible for submission of fresh Bids provided, however, that in such third round of bidding only such Bids shall be eligible for consideration which are lower than the Bid of the second lowest Bidder in the first round of bidding.
- 3.3.5 After selection, a Letter of Award (the "**LOA**") shall be issued, in duplicate, by the Utility to the Selected Bidder and the Selected Bidder shall, within 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgement thereof. In the event the duplicate copy of the LOA duly signed by the Selected Bidder is not received by the stipulated date, the Utility may, unless it consents to extension of time for submission thereof, appropriate the Bid Security of such Bidder as Damages on account of failure of the Selected Bidder to acknowledge the LOA, and the next eligible Bidder may be considered.
- 3.3.6 After acknowledgement of the LOA as aforesaid by the Selected Bidder, it shall cause the Supplier to execute the PSA within the period prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation, modification or amendment in the PSA.

#### **3.4 Contacts during Bid Evaluation**

Bids shall be deemed to be under consideration immediately after they are opened and until such time the Utility makes official intimation of award/rejection to the Bidders. While the Bids are under consideration, Bidders and/

or their representatives or other interested parties are advised to refrain, save and except as required under the Bidding Documents, from contacting by any means, the Utility and/ or their employees/ representatives on matters related to the Bids under consideration.

### **3.5 Bid Parameter**

3.5.1 The Bid shall comprise the Tariff offered by the Bidder for production and supply of electricity to the Utility in accordance with the provisions of the PSA. The Tariff comprising the Bid shall be offered in accordance with the provisions of Clause 3.5.2.<sup>10</sup>

3.5.2 [(a) Since the Bidder is expected to source concessional fuel from Coal India Limited or a subsidiary thereof (the “**CIL**”), the cost of Fuel which shall be included in the Fuel Charge shall be a ‘pass through’ in accordance with the terms of the PSA. However, the element of coal transportation and transmission losses may vary from case to case and shall affect the Fuel Charge offered by each Bidder. The Bid for the Project shall, therefore, comprise the Fixed Charge and Fuel Charge, which shall be specified separately, and the Bidder seeking the lowest Tariff shall be the Selected Bidder.]

[(b) Since the Bidder is expected to source fuel from captive mines separately allotted to it by a Governmental Instrumentality, the Bid for the Project shall be the Tariff comprising the Fixed Charge and Fuel Charge which shall be specified separately. As a condition of bidding, the Fuel Charge to be offered by the Bidder shall not exceed Rs.\*\*\* per kWh and shall not be lower than Rs.\*\*\* per kWh<sup>11</sup>. The Bidder seeking the lowest Tariff shall be the Selected Bidder.]

[(c) Since the Bidder is expected to source Fuel through imports, the Fuel Charge shall be a ‘pass through’. For the purposes of submission of Bids, the Bidders may assume a Fuel cost equal to Rs. \*\*\* per<sup>12</sup> KWh on the express understanding that the actual cost of Fuel shall be a “pass through” in accordance with the terms of the PSA. However, the element of coal transportation and transmission losses may vary from case to case and shall affect the Fuel Charge offered by each Bidder. The Bid for the Project shall, therefore, comprise the Fixed Charge and Fuel Charge, which shall be specified separately, and the Bidder seeking the lowest Tariff shall be the Selected Bidder.]

[(d) Since the Bidder is expected to source fuel through imports from captive mines situated outside India, the Bid for the Project shall be the Tariff comprising the Fixed Charge and the Fuel Charge which shall be specified

<sup>10</sup> Depending upon the choice of Fuel source, only the applicable Sub-clause may be retained and the remaining Sub-clauses should be omitted. However, in case the Fuel to be procured under Sub-clause (a) is to be supplemented by imported Fuel, the Utility may retain both Sub-clause (a) and Sub-clause (d).

<sup>11</sup> The Utility shall specify the ceiling, but it may, in its discretion, also specify the floor for the Fuel Charge at RFP stage.

<sup>12</sup> The Utility shall specify an indicative cost based on approximate market prices.



separately. As a condition of bidding, the Fuel Charge to be offered by the Bidder shall not exceed an amount that reflects [80% (eighty per cent)/ 85% (eighty five per cent)/ 90% (ninety per cent)]<sup>13</sup> of the price of Fuel computed with reference to the average [API 4 Index (South Africa)]<sup>\$</sup> for a period of 180 (one hundred and eighty) days immediately preceding the date of Bid in accordance with Clause 22.2.2 of the draft PSA forming part of the Bid Documents. [Further, the Fuel Charge shall not be lower than an amount that reflects \*\*\*% (\*\*\*) per cent) of the price of Fuel computed with reference to the aforesaid index]<sup>14</sup>. The Fuel Charge to be offered by the bidder shall be quoted in US cents per kWh. For the purposes of evaluation of the Bid, the exchange rate to be used for conversion into Indian Rupees shall be the mean of the buying and selling rate quoted by the State Bank of India on the closing of the working day that precedes the date of Bid. As specified in the PSA, the freight and transportation charges shall be payable separately in accordance with the provisions of Clause 22.2.4 thereof. The Bidder seeking the lowest Tariff shall be the selected Bidder.]

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<sup>13</sup> The relevant figure may be determined and retained by the Utility prior to invitation of Bids and the remaining figures shall be omitted.

<sup>\$</sup> An alternative Index, if any, may be specified by the Utility prior to invitation of Bids.

<sup>14</sup> The Utility shall specify the ceiling, but it may, in its discretion, also specify the floor for the Fuel Charge at RFP stage.

#### **4. FRAUD AND CORRUPT PRACTICES**

- 4.1 The Bidders and their respective officers, employees, agents and advisers shall observe the highest standard of ethics during the Bidding Process and subsequent to the issue of the LOA and during the subsistence of the PSA. Notwithstanding anything to the contrary contained herein, or in the LOA or the PSA, the Utility may reject a Bid, withdraw the LOA, or terminate the PSA, as the case may be, without being liable in any manner whatsoever to the Bidder or Supplier, as the case may be, if it determines that the Bidder or Supplier, as the case may be, has, directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice in the Bidding Process. In such an event, the Utility shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Utility under the Bidding Documents and/ or the PSA, or otherwise.
- 4.2 Without prejudice to the rights of the Utility under Clause 4.1 hereinabove and the rights and remedies which the Utility may have under the LOA or the PSA, or otherwise if a Bidder or Supplier, as the case may be, is found by the Utility to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice during the Bidding Process, or after the issue of the LOA or the execution of the PSA, such Bidder or Supplier shall not be eligible to participate in any tender or RFP issued by the Utility during a period of 2 (two) years from the date such Bidder or Supplier, as the case may be, is found by the Utility to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practices, as the case may be.
- 4.3 For the purposes of this Clause 4, the following terms shall have the meaning hereinafter respectively assigned to them:
- (a) “**corrupt practice**” means (i) the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence the actions of any person connected with the Bidding Process (for avoidance of doubt, offering of employment to or employing or engaging in any manner whatsoever, directly or indirectly, any official of the Utility who is or has been associated in any manner, directly or indirectly, with the Bidding Process or the LOA or has dealt with matters concerning the PSA or arising therefrom, before or after the execution thereof, at any time prior to the expiry of one year from the date such official resigns or retires from or otherwise ceases to be in the service of the Utility, shall be deemed to constitute influencing the actions of a person connected with the Bidding Process); or (ii) save and except as permitted under the Clause 2.1.15 of this RFP, engaging in any manner whatsoever, whether during the Bidding Process or after the issue of the LOA or after the execution of the PSA, as the case may be, any person in respect of any matter relating to the Project or the LOA or the PSA, who at any time has been or is a legal, financial or

technical adviser of the Utility in relation to any matter concerning the Project;

- (b) “**fraudulent practice**” means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Bidding Process;
- (c) “**coercive practice**” means impairing or harming, or threatening to impair or harm, directly or indirectly, any person or property to influence any person’s participation or action in the Bidding Process;
- (d) “**undesirable practice**” means (i) establishing contact with any person connected with or employed or engaged by the Utility with the objective of canvassing, lobbying or in any manner influencing or attempting to influence the Bidding Process; or (ii) having a Conflict of Interest; and
- (e) “**restrictive practice**” means forming a cartel or arriving at any understanding or arrangement among Bidders with the objective of restricting or manipulating a full and fair competition in the Bidding Process.

## **5. PRE-BID CONFERENCE**

- 5.1 Pre-Bid conferences of the Bidders shall be convened at the designated date, time and place. Only those persons who have purchased the RFP document shall be allowed to participate in the Pre-Bid Conferences. A maximum of five representatives of each Bidder shall be allowed to participate on production of authority letter from the Bidder.
- 5.2 During the course of Pre-Bid conference(s), the Bidders will be free to seek clarifications and make suggestions for consideration of the Utility. The Utility shall endeavour to provide clarifications and such further information as it may, in its sole discretion, consider appropriate for facilitating a fair, transparent and competitive Bidding Process.

## **6. MISCELLANEOUS**

- 6.1 The Bidding Process shall be governed by, and construed in accordance with, the laws of India and the Courts at [New Delhi] shall have exclusive jurisdiction over all disputes arising under, pursuant to and/ or in connection with the Bidding Process.
- 6.2 The Utility, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to;
- (a) suspend and/ or cancel the Bidding Process and/ or amend and/ or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto;
  - (b) consult with any Bidder in order to receive clarification or further information;
  - (c) retain any information and/ or evidence submitted to the Utility by, on behalf of, and/ or in relation to any Bidder; and/ or
  - (d) independently verify, disqualify, reject and/ or accept any and all submissions or other information and/ or evidence submitted by or on behalf of any Bidder.
- 6.3 It shall be deemed that by submitting the Bid, the Bidder agrees and releases the Utility, its employees, agents and advisers, irrevocably, unconditionally, fully and finally from any and all liability for claims, losses, damages, costs, expenses or liabilities in any way related to or arising from the exercise of any rights and/ or performance of any obligations hereunder, pursuant hereto and/ or in connection with the Bidding Process and waives, to the fullest extent permitted by applicable laws, any and all rights and/ or claims it may have in this respect, whether actual or contingent, whether present or in future.
- 6.4 The Bidding Documents and RFQ are to be taken as mutually explanatory and, unless otherwise expressly provided elsewhere in this RFP, in the event of any conflict between them the priority shall be in the following order:
- (a) the Bidding Documents;
  - (b) the RFQ.
- i.e. the Bidding Documents at (a) above shall prevail over the RFQ at (b) above.

APPENDIX – I

**Letter comprising the Bid**  
(Refer Clauses 2.1.5 and 2.14)

Dated:

[The \*\*\*\*\*,  
\*\*\*\*\*  
\*\*\*\*\*]

Sub: Bid for \*\*\*\*\* Project

Dear Sir,

With reference to your RFP document dated \*\*\*\*\*<sup>\$</sup>, I/we, having examined the Bidding Documents and understood their contents, hereby submit my/our Bid for the aforesaid Project. The Bid is unconditional and unqualified.

2. I/ We acknowledge that the Utility will be relying on the information provided in the Bid and the documents accompanying the Bid for selection of the Supplier for the aforesaid Project, and we certify that all information provided therein is true and correct; nothing has been omitted which renders such information misleading; and all documents accompanying the Bid are true copies of their respective originals.
3. This statement is made for the express purpose of our selection as Supplier for the development, construction, operation and maintenance of the aforesaid Project and for sale of power to the Utility.
4. I/ We shall make available to the Utility any additional information it may find necessary or require to supplement or authenticate the Bid.
5. I/ We acknowledge the right of the Utility to reject our Bid without assigning any reason or otherwise and hereby waive, to the fullest extent permitted by applicable law, our right to challenge the same on any account whatsoever.
6. I/ We certify that in the last three years, we/ any of the Consortium Members<sup>£</sup> or our/ their Associates have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award, nor been expelled from any project or contract by any public authority nor have had any contract terminated by any public authority for breach on our part.
7. I/ We declare that:
  - (a) I/ We have examined and have no reservations to the Bidding Documents, including any Addendum issued by the Utility; and

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<sup>\$</sup> All blank spaces shall be suitably filled up by the Applicant to reflect the particulars relating to such Applicant.

<sup>£</sup> If the Bidder is not a Consortium, the provisions applicable to Consortium may be omitted.

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- (b) I/ We do not have any conflict of interest in accordance with Clauses 2.1.14 and 2.1.15 of the RFP document; and
  - (c) I/ We have not directly or indirectly or through an agent engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice, as defined in Clause 4.3 of the RFP document, in respect of any tender or request for proposal issued by or any agreement entered into with the Utility or any other public sector enterprise or any government, Central or State; and
  - (d) I/ We hereby certify that we have taken steps to ensure that in conformity with the provisions of Section 4 of the RFP, no person acting for us or on our behalf has engaged or will engage in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice; and
  - (e) the undertakings given by us along with the Application in response to the RFQ for the Project were true and correct as on the date of making the Application and are also true and correct as on the Bid Due Date and I/we shall continue to abide by them.
- 8. I/ We understand that you may cancel the Bidding Process at any time and that you are neither bound to accept any Bid that you may receive nor to invite the Bidders to Bid for the Project, without incurring any liability to the Bidders, in accordance with Clause 2.16 of the RFP document.
  - 9. I/ We believe that we/ our Consortium satisfy(s) the Net Worth criteria and meet(s) the requirements as specified in the RFQ document.
  - 10. I/ We declare that we/ any Member of the Consortium, or our/ its Associates are not a Member of a/ any other Consortium submitting a Bid for the Project.
  - 11. I/ We certify that in regard to matters other than security and integrity of the country, we/ any Member of the Consortium or any of our/ their Associates have not been convicted by a Court of Law or indicted or adverse orders passed by a regulatory authority which could cast a doubt on our ability to undertake the Project or which relates to a grave offence that outrages the moral sense of the community.
  - 12. I/ We further certify that in regard to matters relating to security and integrity of the country, we/ any Member of the Consortium or any of our/ their Associates have not been charge-sheeted by any agency of the Government or convicted by a Court of Law.
  - 13. I/ We further certify that no investigation by a regulatory authority is pending either against us or against our Associates or against our CEO or any of our

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directors/ managers/ employees.<sup>£</sup>

14. [I/ We further certify that we are not disqualified in terms of the additional criteria specified by the Department of Disinvestment in their OM No. 6/4/2001-DD-II dated July 13, 2001, a copy of which forms part of the RFP at Appendix-V thereof.]
15. I/ We undertake that in case due to any change in facts or circumstances during the Bidding Process, we are attracted by the provisions of disqualification in terms of the guidelines referred to above, we shall intimate the Utility of the same immediately.
16. I/ We acknowledge and undertake that our Consortium was pre-qualified and short-listed on the basis of Technical Capacity and Financial Capacity of those of its Members who shall, for a period of 2 (two) years from the date of commercial operation of the Project, hold equity share capital not less than: (i) 26% (twenty six per cent) of the subscribed and paid-up equity of the Supplier; and (ii) 5% (five per cent) of the Total Project Cost specified in the PSA. We further agree and acknowledge that the aforesaid obligation shall be in addition to the obligations contained in the PSA in respect of Change in Ownership.
17. I/ We acknowledge and agree that in the event of a change in control of an Associate whose Technical Capacity and/ or Financial Capacity was taken into consideration for the purposes of short-listing and pre-qualification under and in accordance with the RFQ, I/We shall inform the Utility forthwith along with all relevant particulars and the Utility may, in its sole discretion, disqualify our Consortium or withdraw the Letter of Award, as the case may be. I/We further acknowledge and agree that in the event such change in control occurs after signing of the PSA but prior to Financial Close of the Project, it would, notwithstanding anything to the contrary contained in the Agreement, be deemed  
  
a breach thereof, and the PSA shall be liable to be terminated without the Utility being liable to us in any manner whatsoever.
18. I/ We understand that the Selected Bidder shall either be an existing Company incorporated under the Indian Companies Act, 1956, or shall incorporate as such prior to execution of the PSA. In case where the Utility has already established an SPV for the Project, the Selected Bidder shall acquire the entire equity thereof.

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<sup>£</sup> In case the Applicant is unable to provide the certification specified in para 13, it may precede the paragraph by the words, viz. "Except as specified in Schedule \*\*\*\* hereto". The exceptions to the certification or any disclosures relating thereto may be clearly stated in a Schedule to be attached to the Application. The Utility will consider the contents of such Schedule and determine whether or not the exceptions/disclosures are of a nature that could cast a doubt on the ability or suitability of the Applicant to undertake the Project.



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19. I/ We hereby irrevocably waive any right or remedy which we may have at any stage at law or howsoever otherwise arising to challenge or question any decision taken by the Utility in connection with the selection of the Bidder, or in connection with the Bidding Process itself, in respect of the above mentioned Project and the terms and implementation thereof.
20. In the event of my/ our being declared as the Selected Bidder, I/we agree to enter into a PSA in accordance with the draft that has been provided to me/us prior to the Bid Due Date. We agree not to seek any changes in the aforesaid draft and agree to abide by the same.
21. I/ We have studied all the Bidding Documents carefully and also surveyed the Site. We understand that except to the extent as expressly set forth in the PSA, we shall have no claim, right or title arising out of any documents or information provided to us by the Utility or in respect of any matter arising out of or relating to the Bidding Process including the award of Contract.
22. I/ We offer a Bid Security of Rs.\*\*\*\*\* (Rupees \*\*\*\*\* only) to the Utility in accordance with the RFP Document.
23. The Bid Security in the form of a Demand Draft/ Bank Guarantee (strike out whichever is not applicable) is attached.
24. The documents accompanying the Bid, as specified in Clause 2.11.2 of the RFP, have been submitted in a separate envelope and marked as “Enclosures of the Bid”.
25. I/ We agree and understand that the Bid is subject to the provisions of the Bidding Documents. In no case, I/we shall have any claim or right of whatsoever nature if the Project / Contract is not awarded to me/us or our Bid is not opened or rejected.
26. The Tariff has been quoted by me/us after taking into consideration all the terms and conditions stated in the RFP, draft PSA, our own estimates of costs and revenues, and after a careful assessment of the site and all the conditions that may affect the project cost and implementation of the project.
27. I/ We agree and undertake to abide by all the terms and conditions of the RFP document.
28. { We, the Consortium Members agree and undertake to be jointly and severally liable for all the obligations of the Supplier under the PSA till occurrence of Financial Close in accordance with the PSA. }
29. I/ We undertake to feed electric supply into the grid at a point that is economical and efficient, as determined by the RLDC or SLDC, as the case may be.

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30. I/ We undertake to bear the transmission charges and transmission losses upto the point of delivery of electricity to the Utility from out of the Tariff offered below and in accordance with the terms to be set forth in the Power Supply Agreement.
31. I/ We shall keep this offer valid for 120 (one hundred and twenty) days from the Bid Due Date specified in the RFP.
32. I/ We hereby submit the following Bid and offer, as on the Bid Due Date, in accordance with the provisions of the PSA and Clause 3.5 of this RFP, -

A Tariff of Rs. .... (Rupees .....and paise .....)  
comprising a Fixed Charge of Rs. .... (Rupees ..... and paise .....  
\$ per kWh and a Fuel Charge of Rs..... (Rupees .....  
and paise ..... per kWh cents<sup>@</sup> ..... per kWh as on the Bid  
Due Date on the express understanding that the Lowest Bidder shall be  
selected on the basis of the lowest Tariff offered.

In witness thereof, I/we submit this Bid under and in accordance with the terms of the RFP document.

Yours faithfully,

Date: (Signature, name and designation of the Authorised signatory)

Place: Name and seal of Bidder/Lead Member

Note: Paragraphs in curly parenthesis may be omitted by the Bidder, if not applicable to it, or modified as necessary to reflect Bidder-specific particulars.

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<sup>\$</sup> Paise may be quoted only in whole numbers.

<sup>@</sup> For the purposes of evaluation of Bids for supply of electricity which includes Fuel supply from Captive Mines abroad, the cost of Fuel shall be quoted in Indian rupees and converted into US cents using the RBI Reference Rate for the working day preceding the Bid Due Date.

## APPENDIX – II

**Bank Guarantee for Bid Security***(Refer Clauses 2.1.7 and 2.20.1)*

B.G. No. Dated:

1. In consideration of you, \*\*\*\*\*, having its office at \*\*\*\*\*, (hereinafter referred to as the “Utility”, which expression shall unless it be repugnant to the subject or context thereof include its, successors and assigns) having agreed to receive the Bid of ..... (a company registered under the Companies Act, 1956<sup>\$</sup>) and having its registered office at ..... (and acting on behalf of its Consortium<sup>Y</sup>) (hereinafter referred to as the “Bidder” which expression shall unless it be repugnant to the subject or context thereof include its/their executors, administrators, successors and assigns), for the \*\*\*\*\* Project on DBFOT basis (hereinafter referred to as “the Project”) pursuant to the RFP Document dated ..... issued in respect of the Project and other related documents including without limitation the draft PSA (hereinafter collectively referred to as “Bidding Documents”), we (Name of the Bank) having our registered office at ..... and one of its branches at ..... (hereinafter referred to as the “Bank”), at the request of the Bidder, do hereby in terms of Clause 2.1.7 read with Clause 2.1.8 of the RFP Document, irrevocably, unconditionally and without reservation guarantee the due and faithful fulfilment and compliance of the terms and conditions of the Bidding Documents (including the RFP Document) by the said Bidder and unconditionally and irrevocably undertake to pay forthwith to the Utility an amount of Rs. \*\*\*\*\* (Rupees \*\*\*\*\* only) (hereinafter referred to as the “Guarantee”) as our primary obligation without any demur, reservation, recourse, contest or protest and without reference to the Bidder if the Bidder shall fail to fulfil or comply with all or any of the terms and conditions contained in the said Bidding Documents.
2. Any such written demand made by the Utility stating that the Bidder is in default of the due and faithful fulfilment and compliance with the terms and conditions contained in the Bidding Documents shall be final, conclusive and binding on the Bank.
3. We, the Bank, do hereby unconditionally undertake to pay the amounts due and payable under this Guarantee without any demur, reservation, recourse, contest or protest and without any reference to the Bidder or any other person and irrespective of whether the claim of the Utility is disputed by the Bidder or not, merely on the first demand from the Utility stating that the amount claimed is due to the Utility by reason of failure of the Bidder to fulfil and comply with the terms and conditions contained in the Bidding Documents including failure of the said Bidder to keep its Bid open during the Bid validity

<sup>\$</sup> A Bidder who is registered abroad may substitute the words, viz. of “a company registered under the Companies Act, 1956” by the words, viz. “a company duly organized and validly existing under the laws of the jurisdiction of its incorporation”.

<sup>Y</sup> Omit if the Bidder is not a Consortium.

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period as setforth in the said Bidding Documents for any reason whatsoever. Any such demand made on the Bank shall be conclusive as regards amount due and payable by the Bank under this Guarantee. However, our liability under this Guarantee shall be restricted to an amount not exceeding Rs. \*\*\*\*\* (Rupees \*\*\*\*\* only).

4. This Guarantee shall be irrevocable and remain in full force for a period of 180 (one hundred and eighty) days from the Bid Due Date inclusive of a claim period of 60 (sixty) days or for such extended period as may be mutually agreed between the Utility and the Bidder, and agreed to by the Bank, and shall continue to be enforceable till all amounts under this Guarantee have been paid.
5. We, the Bank, further agree that the Utility shall be the sole judge to decide as to whether the Bidder is in default of due and faithful fulfilment and compliance with the terms and conditions contained in the Bidding Documents including, *inter alia*, the failure of the Bidder to keep its Bid open during the Bid validity period set forth in the said Bidding Documents, and the decision of the Utility that the Bidder is in default as aforesaid shall be final and binding on us, notwithstanding any differences between the Utility and the Bidder or any dispute pending before any Court, Tribunal, Arbitrator or any other authority.
6. The Guarantee shall not be affected by any change in the constitution or winding up of the Bidder or the Bank or any absorption, merger or amalgamation of the Bidder or the Bank with any other person.
7. In order to give full effect to this Guarantee, the Utility shall be entitled to treat the Bank as the principal debtor. The Utility shall have the fullest liberty without affecting in any way the liability of the Bank under this Guarantee from time to time to vary any of the terms and conditions contained in the said Bidding Documents or to extend time for submission of the Bids or the Bid validity period or the period for conveying acceptance of Letter of Award by the Bidder or the period for fulfilment and compliance with all or any of the terms and conditions contained in the said Bidding Documents by the said Bidder or to postpone for any time and from time to time any of the powers exercisable by it against the said Bidder and either to enforce or forbear from enforcing any of the terms and conditions contained in the said Bidding Documents or the securities available to the Utility, and the Bank shall not be released from its liability under these presents by any exercise by the Utility of the liberty with reference to the matters aforesaid or by reason of time being given to the said Bidder or any other forbearance, act or omission on the part of the Utility or any indulgence by the Utility to the said Bidder or by any change in the constitution of the Utility or its absorption, merger or amalgamation with any other person or any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of releasing the Bank from its such liability.

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8. Any notice by way of request, demand or otherwise hereunder shall be sufficiently given or made if addressed to the Bank and sent by courier or by registered mail to the Bank at the address set forth herein.
9. We undertake to make the payment on receipt of your notice of claim on us addressed to [name of Bank along with branch address] and delivered at our above branch which shall be deemed to have been duly authorised to receive the said notice of claim.
10. It shall not be necessary for the Utility to proceed against the said Bidder before proceeding against the Bank and the guarantee herein contained shall be enforceable against the Bank, notwithstanding any other security which the Utility may have obtained from the said Bidder or any other person and which shall, at the time when proceedings are taken against the Bank hereunder, be outstanding or unrealised.
11. We, the Bank, further undertake not to revoke this Guarantee during its currency except with the previous express consent of the Utility in writing.
12. The Bank declares that it has power to issue this Guarantee and discharge the obligations contemplated herein, the undersigned is duly authorised and has full power to execute this Guarantee for and on behalf of the Bank.
13. For the avoidance of doubt, the Bank's liability under this Guarantee shall be restricted to Rs. \*\*\* crore (Rupees \*\*\*\*\* crore only). The Bank shall be liable to pay the said amount or any part thereof only if the Utility serves a written claim on the Bank in accordance with paragraph 9 hereof, on or before [\*\*\* (indicate date falling 180 days after the Bid Due Date)].

Signed and Delivered by ..... Bank

By the hand of Mr./Ms ....., its ..... and authorised official.

(Signature of the Authorised Signatory)

(Official Seal)

APPENDIX – III

**Power of Attorney for signing of Bid**

*(Refer Clause 2.1.9)*

Know all men by these presents, We, ..... (name of the firm and address of the registered office) do hereby irrevocably constitute, nominate, appoint and authorise Mr. / Ms (Name), son/daughter/wife of ..... and presently residing at ....., who is presently employed with us/ the Lead Member of our Consortium and holding the position of ....., as our true and lawful attorney (hereinafter referred to as the “Attorney”) to do in our name and on our behalf, all such acts, deeds and things as are necessary or required in connection with or incidental to submission of our bid for the \*\*\*\*\* Project proposed or being developed by the \*\*\*\*\* (the “Utility”) including but not limited to signing and submission of all applications, bids and other documents and writings, participate in bidders' and other conferences and providing information / responses to the Utility, representing us in all matters before the Utility, signing and execution of all contracts including the Power Supply Agreement and undertakings consequent to acceptance of our bid, and generally dealing with the Utility in all matters in connection with or relating to or arising out of our bid for the said Project and/or upon award thereof to us and/or till the entering into of the Power Supply Agreement with the Utility.

AND we hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this Power of Attorney and that all acts, deeds and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us.

IN WITNESS WHEREOF WE, ....., THE ABOVE NAMED PRINCIPAL HAVE EXECUTED THIS POWER OF ATTORNEY ON THIS ..... DAY OF ....., 20.....

For.....

(Signature, name,  
designation and address)

Witnesses:

- 1.
- 2.

Accepted

Notarised

(Signature, name, designation and address  
of the Attorney)

Notes:

- *The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.*
- *Wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders resolution/ power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.*
- *For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Bidders from countries that have signed the Hague Legislation Convention 1961 are not required to be legalised by the Indian Embassy if it carries a conforming Apostille certificate.*

APPENDIX – IV

**Power of Attorney for Lead Member of Consortium**

*(Refer Clause 2.1.10)*

Whereas the \*\*\*\*\* (the “Utility”) has invited bids from pre-qualified and short-listed parties for the \*\*\*\*\* Project (the “Project”).

Whereas, ....., ..... and ..... (collectively the “Consortium”) being Members of the Consortium are interested in bidding for the Project in accordance with the terms and conditions of the Request for Proposal and other connected documents in respect of the Project, and

Whereas, it is necessary for the Members of the Consortium to designate one of them as the Lead Member with all necessary power and authority to do for and on behalf of the Consortium, all acts, deeds and things as may be necessary in connection with the Consortium’s bid for the Project and its execution.

**NOW THEREFORE KNOW ALL MEN BY THESE PRESENTS**

We, ..... having our registered office at ....., M/s. ...., having our registered office at ....., and M/s. ...., having our registered office at ....., (hereinafter collectively referred to as the “Principals”) do hereby irrevocably designate, nominate, constitute, appoint and authorise M/s ....., having its registered office at ....., being one of the Members of the Consortium, as the Lead Member and true and lawful attorney of the Consortium (hereinafter referred to as the “Attorney”) and hereby irrevocably authorise the Attorney (with power to sub-delegate) to conduct all business for and on behalf of the Consortium and any one of us during the bidding process and, in the event the Consortium is awarded the Contract, during the execution of the Project, and in this regard, to do on our behalf and on behalf of the Consortium, all or any of such acts, deeds or things as are necessary or required or incidental to the submission of its bid for the Project, including but not limited to signing and submission of all applications, bids and other documents and writings, accept the Letter of Award, participate in bidders’ and other conferences, respond to queries, submit information/ documents, sign and execute contracts and undertakings consequent to acceptance of the bid of the Consortium and generally to represent the Consortium in all its dealings with the Utility, and/ or any other Government Agency or any person, in all matters in connection with or relating to or arising out of the Consortium’s bid for the Project and/ or upon award thereof till the Power Supply Agreement is entered into with the Utility.

AND hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this Power of Attorney and that all acts, deeds and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us/ Consortium.



Appendix - IV  
Page 2

IN WITNESS WHEREOF WE THE PRINCIPALS ABOVE NAMED HAVE  
EXECUTED THIS POWER OF ATTORNEY ON THIS ..... DAY OF  
....., 20....

For .....

(Signature, Name & Title)

For .....

(Signature, Name & Title)

For .....

(Signature, Name & Title)

(Executants)

(To be executed by all the Members of the Consortium)

Witnesses:

1.

2.

Notes:

- *The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.*
- *Wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders resolution/ power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.*
- *For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction*

Appendix - IV

Page 3

*where the Power of Attorney is being issued. However, the Power of Attorney provided by Bidders from countries that have signed the Hague Legislation Convention 1961 are not required to be legalised by the Indian Embassy if it carries a conforming Appostille certificate.*

APPENDIX – V<sup>15</sup>

**Guidelines of the Department of Disinvestment**  
(Refer Clause 1.2.1)

No. 6/4/2001-DD-II  
Government of India  
Department of Disinvestment

Block 14, CGO Complex  
New Delhi.  
Dated 13<sup>th</sup> July 2001.

**OFFICE MEMORANDUM**

Sub: Guidelines for qualification of Bidders seeking to acquire stakes in Public Sector Enterprises through the process of disinvestment

Government has examined the issue of framing comprehensive and transparent guidelines defining the criteria for bidders interested in PSE-disinvestment so that the parties selected through competitive bidding could inspire public confidence. Earlier, criteria like net worth, experience etc. used to be prescribed. Based on experience and in consultation with concerned departments, Government has decided to prescribe the following additional criteria for the qualification/ disqualification of the parties seeking to acquire stakes in public sector enterprises through disinvestment:

- (a) In regard to matters other than the security and integrity of the country, any conviction by a Court of Law or indictment/ adverse order by a regulatory authority that casts a doubt on the ability of the bidder to manage the public sector unit when it is disinvested, or which relates to a grave offence would constitute disqualification. Grave offence is defined to be of such a nature that it outrages the moral sense of the community. The decision in regard to the nature of the offence would be taken on case to case basis after considering the facts of the case and relevant legal principles, by the Government of India.
- (b) In regard to matters relating to the security and integrity of the country, any charge-sheet by an agency of the Government/ conviction by a Court of Law for an offence committed by the bidding party or by any sister concern of the bidding party would result in disqualification. The decision in regard to the relationship between the sister concerns would be taken, based on the relevant facts and after examining whether the two concerns are substantially controlled by the same person/ persons.
- (c) In both (a) and (b), disqualification shall continue for a period that Government deems appropriate.
- (d) Any entity, which is disqualified from participating in the disinvestment process, would not be allowed to remain associated with it or get associated merely because it has preferred an appeal against the order

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<sup>15</sup> These guidelines may be modified or substituted by the Government from time to time.

based on which it has been disqualified. The mere pendency of appeal will have no effect on the disqualification.

- (e) The disqualification criteria would come into effect immediately and would apply to all bidders for various disinvestment transactions, which have not been completed as yet.
- (f) Before disqualifying a concern, a Show Cause Notice why it should not be disqualified would be issued to it and it would be given an opportunity to explain its position.
- (g) Henceforth, these criteria will be prescribed in the advertisements seeking Expression of Interest (EOI) from the interested parties. The interested parties would be required to provide the information on the above criteria, along with their Expressions of Interest (EOI). The bidders shall be required to provide with their EOI an undertaking to the effect that no investigation by a regulatory authority is pending against them. In case any investigation is pending against the concern or its sister concern or against its CEO or any of its Directors/ Managers/ employees, full details of such investigation including the name of the investigating agency, the charge/ offence for which the investigation has been launched, name and designation of persons against whom the investigation has been launched and other relevant information should be disclosed, to the satisfaction of the Government. For other criteria also, a similar undertaking shall be obtained along with EOI.

sd/-

(A.K. Tewari)

Under Secretary to the Government of India

APPENDIX- VI

**LIST OF BID-SPECIFIC CLAUSES<sup>\$</sup>**

**A. Clauses and appendices with non-numerical footnotes**

1. Clause 2.9.3: Amendment of RFP
2. Clause 3.5.2 (d): Bid Parameter
3. Appendix-I: Letter comprising the Bid (Para 1, 6, 13 and 32)
4. Appendix-II: Bank Guarantee for Bid Security
5. Appendix VI: List of Bid-specific clauses

**B. Clauses and appendices with curly brackets**

1. Appendix-I: Letter comprising the Bid (Para 28)

**C. Clauses and appendices with blank spaces**

1. Letter of invitation
2. Appendix-I: Letter comprising the Bid (Para 32)
3. Appendix-II: Bank Guarantee for Bid Security (Para 1 and signatures)
4. Appendix-III: Power of Attorney for signing of Bid
5. Appendix-IV: Power Of Attorney For Lead Member Of Consortium

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<sup>\$</sup> This Appendix-VI contains a list of clauses and appendices that would need to be suitably modified for reflecting applicant-specific provisions. This Appendix-VI may, therefore, be included in the RFP document to be issued to prospective Applicants. The blank spaces in Appendices may be filled up by the Applicant and the footnotes may be deleted when it submits its proposal.

APPENDIX-VII

**LIST OF PROJECT-SPECIFIC CLAUSES<sup>16</sup>**

**A. Clauses and appendices with serially numbered footnotes**

1. Letter of Invitation (Footnote No. 1)
2. Clause 1.1: Background (Footnote No. 2)
3. Clause 1.1.1: Background (Footnote No. 3 and 4)
4. Clause 1.1.4: Background (Footnote No. 5)
5. Clause 1.2.3: Brief description of Bidding Process (Footnote No. 6)
6. Clause 1.2.4: Brief description of Bidding Process (Footnote No. 7)
7. Clause 1.3: Schedule of Bidding Process (Footnote No. 8)
8. Clause 2.1.18: General terms of Bidding (Footnote No. 9)
9. Clause 3.5.1: Bid Parameter (Footnote No. 10)
10. Clause 3.5.2: Bid Parameter: (Footnote No. 11, 12, 13 and 14)
11. Appendix-V: Guidelines of the Department of Disinvestment (Footnote No. 15)
12. Appendix VII: List of Project-specific clauses (Footnote No. 16)

**B. Clauses and appendices with square parenthesis**

1. Letter of invitation
2. Glossary: Definition of CIL
3. Title of the Utility
4. Clause 1.1.3: Background
5. Clause 1.1.4: Background
6. Clause 1.2.1: Brief description of Bidding Process
7. Clause 1.2.3: Brief description of Bidding Process
8. Clause 1.2.4: Brief description of Bidding Process
9. Clause 1.2.6: Brief description of Bidding Process
10. Clause 1.3: Schedule of Bidding Process
11. Clause 2.1.18: General terms of Bidding
12. Clause 2.20.2: Bid Security
13. Clause 3.5.2: Bid Parameter
14. Clause 6.1: Miscellaneous
15. Appendix-I: Letter comprising the Bid (Para 14)
16. Appendix-II: Bank Guarantee for Bid Security (Para 1, 9 and 13)

**C. Clauses and appendices with asterisk**

1. Letter of Invitation: Subject line
2. Glossary: Definition of Government
3. Clause 1.1.1: Background

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<sup>16</sup> This Appendix-VII contains a list of clauses and appendices that would need to be suitably modified, prior to issue of the RFP document, for reflecting project-specific provisions. This Appendix-VII should be omitted before issuing the RFP document to prospective Applicants.

4. Clause 1.2.3: Brief description of Bidding Process
5. Clause 1.2.9: Brief description of Bidding Process
6. Clause 2.1.7: General terms of Bidding
7. Clause 2.1.18: General terms of Bidding
8. Clause 2.11.4: Sealing and Marking of Bids
9. Clause 2.11.5: Sealing and Marking of Bids
10. Clause 3.5.2: Bid Parameter
11. Appendix-I: Letter comprising the Bid (Address, subject, Para 1 and 22)
12. Appendix-II: Bank Guarantee for Bid Security (Para 1, 3 and 13)
13. Appendix-III: Power of Attorney for signing of Bid
14. Appendix-IV: Power Of Attorney For Lead Member Of Consortium

TRUE COPY







## GOVERNMENT OF KERALA

No.4009/C2/13/PD

Power (C) Department,  
Thiruvananthapuram,  
Dated 17-12-2013.

From

The Additional Chief Secretary.

To

The Secretary,  
K. S. E. Board, Thiruvananthapuram.

Sir,

Sub: - Model Bidding Documents for thermal Power Stations -  
Remarks sought for - Regarding.

Ref: - 1. Letter No. 23/17/2011-R& R (Vol.V) dated 08/05/13 from  
the Director, Ministry of Power, New Delhi addressed to the  
States and State Electricity Boards.

2. D. O Letter No. 23/17/2011-R&R (Vol.V) dated 26-11-2013  
from the Secretary, Ministry of Power, New Delhi.

I am directed to invite your attention to the reference 1<sup>st</sup> cited wherein the Secretary, Ministry of Power has informed that the Ministry of Power has revised and finalised the standard Bidding Documents for long term procurement of Power under case 1 & 2 and guidelines to the revised frame work separately. The Director, Ministry of Power had requested that all power utilities intending to invite prospective power procedures to construct and operate Thermal Power Stations set up on DB FOO basis for long term electricity supply may adopt the aforesaid model Bidding Documents for inviting bids hence forth.

I am also to forward herewith a copy of the reference 2<sup>nd</sup> cited wherein Secretary, Ministry of Power requested to review the Power Procurement plan of the State and have the bidding process for long term procurement of power to meet the requirement of their consumers initiated urgently by the State distribution utilities.

I am therefore to request you to inform Government the steps taken to review the Power Procurement plan and to have the bidding process initiated as directed by the Secretary, Ministry of Power.

Yours faithfully,  
Sd/-

**K.J ANTONY,**  
Additional Secretary  
Per Additional Chief Secretary.

Approved for Issue,

Section Officer.

CE (Commercial & Tariff)	
CE	26/12
BY CE	
DY. CE	
SOR	
Sr. CA to	26/12/13
WARD No.	3208

TRUE COPY

CECCT

SECRETARY  
K.S.E. Board

URGENT

EX II

26/12

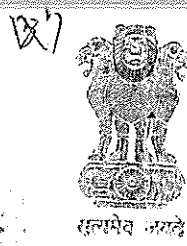
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ACG

26/12/13



प्रदीप कुमार सिन्हा  
सचिव  
प्रधान मन्त्रालय  
PRADEEP K. SINHA  
Secretary  
Government of India.



Ministry of Power  
Shram Shakti Bhawan  
New Delhi - 110001

विद्युत मंत्रालय  
श्रम शक्ति भवन  
नई दिल्ली-110001  
Tel : 23710271/23711316  
Fax : 23721487  
E-mail : secy-power@nic.in

D.O.No. 23/17/2011-R&R(Vol-V)

26.11.2013

Dear Ms Niveditha,

As you are aware, the Ministry of Power has revised and finalized the Standard Bidding Documents (RfQ, RfP and MPSA) for long term procurement of power under Case 1 & 2 basis in consultation with all the stakeholders and circulated them widely recently. I compliment and thank you for the valuable suggestions and cooperation received from your State and Utilities in the formulation of these documents. The Guidelines to give effect to the revised framework have also been amended, notified and circulated separately. A chapter on the Overview given in the documents gives in detail the underlying principles on which these documents have been framed. With these in place, it is expected that the fuel risks, uncertainties and other limitations in the previous SBDs have been addressed. I am enclosing a copy of the documents for your personal reference.

2. The release of the revised Standard Bidding Document has ended the uncertainty relating to the bidding format, which will help the States to go ahead with their long term power procurement plan. I request you to immediately review the Power Procurement Plan of the State and have the bidding process for long-term procurement of power to meet the requirement of their consumers initiated urgently by the State distribution utilities. I would appreciate if we are apprised of the developments in this regard.

Best wishes,

Yours sincerely,

(Pradeep K Sinha)

Encl : as above

Ms. Niveditha P. Haran  
Addl. Chief Secretary (Power)  
Government of Kerala,  
Secretariat,  
Thiruvananthapuram-695001

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No. CE(C&amp;T)/DBFOO/LT/2013-14/199

30-07-2014

To

**Smt. Jyoti Arora,**  
Joint Secretary, Ministry of Power,  
Government of India,  
Shram Shakti Bhawan, Rafi Marg,  
New Delhi – 110 001.

Madam,

Sub : Long term procurement of power on DBFOO basis – Bidding documents  
– clarifications - reg.

Ref : Guidelines No. 23/17/2011-R&R(Vol-V) dated 08-11-2013 issued by the  
Ministry of Power.

All power utilities intending to invite prospective power producers to construct and operate Thermal Power Stations set up on Design, Build, Finance, Own and Operate (DBFOO) basis for the long term supply of electricity are to adopt the Model Bidding Documents for inviting bids henceforth, in line with the guidelines issued by the Ministry of Power dated 08-11-2013.

Accordingly, Kerala State Electricity Board Ltd. has invited applications from interested eligible parties and / or Consortia to participate in the Qualification Stage of bidding process for the procurement of 450 MW and 400 MW Round The Clock (RTC) power through Public – Private Partnership (PPP) from Thermal Power Stations using linkage coal / coal from captive mines as fuel and set up on Design, Build, Finance, Own and Operate (DBFOO) basis for a period of 25 years, vide RFQ dated 05-03-2014 and 25-04-2014 respectively. There was a good response from power producers for both the Applications and 23 applicants were pre qualified and found eligible to participate in the Bid Stage.

**TRUE COPY**

- 1 -

**KERALA STATE ELECTRICITY BOARD LTD.**

Vydyuthi Bhavanam, Pattom, Thiruvananthapuram - 695004

Ph: +91 471 2442125, Mob: 9847797000, Fax : +91 471 2441328

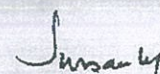
E-mail: sivasankar@ksebnnet.com



The prequalified applicants for the 450 MW power procurement were requested to participate in the Bid Stage and to submit their financial proposal for the procurement of power. The bidding documents, viz., RFP and draft PSA were provided to the Bidders on 25-06-2014. The first Pre Bid meeting was convened on 23-07-2014, wherein about 26 representatives from various firms participated. The bidders were apprehensive regarding the basic structure of the bidding documents and sought clarifications and made suggestions regarding the various provisions of the RFP and the draft PSA. As per the guidelines issued by the Ministry of Power, utilities are unable to make modifications or alterations in the bidding documents except in clauses which are permitted to be customized to suit the requirements of the Utility. The soft copy of the queries forwarded by the bidders and the bidding documents issued by Kerala State Electricity Board Ltd. are attached herewith.

It is requested that Ministry of Power may kindly provide guidance to Kerala State Electricity Board Ltd. regarding the modifications or alterations, if any, to be made in the bidding documents based on the clarifications sought by the Bidders. The Bid Due Date is 12<sup>th</sup> August 2014.

Yours faithfully,



**CHAIRMAN & MANAGING DIRECTOR.**

Acc : as above

TRUE COPY





CMD  
KSEB

No. 23/09/2014- R&amp;R(Part)

Government of India

Ministry of Power

186

ANNEXURE A-5

Shram Shakti Bhawan, Rafi Marg,  
New Delhi, the 06<sup>th</sup> August 2014.To  
The CMD, KSEB  
Jydyuthi Bhavanam  
Pattom, Thiruvananthapuram

07 AUG 2014

DR

4/15/2014/CS

Subject: Long term procurement of power on DBFOO basis- Bidding documents-clarifications-reg.

Ref: KSEB Letter No. CE (C&T)/DBFOO/LT/2013-14/199 Dated 30.07.2014

Sir,

Upon perusal of the documents sent vide mail dated 30.07.14, it has been observed that there appears to be structural incongruity in the SBDs uploaded by KSEB. It has been observed that the bids have been called for the procurement of power from thermal power stations setup on DBFOO basis using two fuel options i.e Captive coal and linkage based projects, in the same contract. However, this is not in line with the provisions of SBDs notified by this Ministry for DBFOO model which provides for separate bidding framework for the different fuel options provided in the SBDs as per the foot note 10 of RFP to MPSA reproduced as below:

*"10 Depending upon the choice of Fuel source, only the applicable sub-clause may be retained and the remaining Sub-clauses should be omitted. However, in case the Fuel to be procured under Sub-clause (a) to be supplemented by imported fuel, the Utility may retain both Sub-clause (a) and Sub-clause (d)."*

2. This provision was also highlighted in the meetings held with stakeholders and workshop held on 27.02.14. As such it is suggested to take appropriate action to make the SBDs framed by KSEB in line with the SBDs notified by this Ministry.

3. Further, it was also mentioned in the workshop held on 27.02.14 that the states may consider PFC as a bidding consultant for undertaking bidding process for medium and long term procurement through the documents notified by Ministry. This Ministry has time and again requested all states to take action for procurement of power based on anticipated demand well in advance and in case any guidance/ clarification is required, you are most welcome to consult the Officers of this Ministry/ CEA/ PFC.

Yours faithfully

  
(Rajendra Singh)

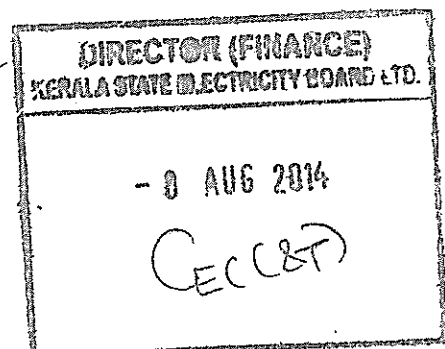
Under Secretary to the Government of India  
Ph: 011-2373 0265

TRUE COPY

B. in

Copy to: 1. Chairperson, Central Electricity Authority  
2. CMD, Power Finance Corporation

CE (Commercial & Tariff)	
CE	
DY. CE (Commercial)	
DY. CE (Tariff)	
SCR	
Sr. CA to CE	
INWARD No.	





Office of the Chief Engineer (Commercial & Tariff)  
8<sup>th</sup> Floor, Vidyuthi Bhavanam, Pattom, Thiruvananthapuram - 695 004, Kerala.  
Phone: +91 471 2514554, 9446008137 Fax: 0471 2514405  
E-mail: [cecomm1@ksebnet.com](mailto:cecomm1@ksebnet.com), [dcecomm1@ksebnet.com](mailto:dcecomm1@ksebnet.com)

No. CE(C&T)/DBFOO/LT/2013-14/ 211

23-08-2014

To

**Sri. Pranay Kumar,**  
Director, Ministry of Power,  
Government of India,  
Shram Shakti Bhawan, Rafi Marg,  
New Delhi – 110 001.

Sir,

Sub : Long term procurement of power on DBFOO basis – Bidding documents – clarifications - reg.

- Ref : 1. Guidelines No. 23/17/2011-R&R(Vol-V) dated 08-11-2013 issued by the Ministry of Power.  
2. Letter No. CE(C&T)/DBFOO/LT/2013-14/199 dated 30-07-2014 of the CMD, KSEB Ltd. to Smt. Jyoti Arora, Joint Secretary, MoP.  
3. Letter dated 06-08-2014 of Sri. Rajendra Singh, Under Secretary to the Government of India, MoP, New Delhi.

Kind attention is invited to the references cited. As directed vide ref (3), necessary action is being taken by KSEB Ltd. to frame the documents for the long term procurement of 450 MW RTC power on DBFOO basis in line with the model documents notified by the MoP.

Clarification on the following clauses of the model PSA are urgently required for replying the queries raised by almost all the bidders. The list of queries was forwarded to that office vide letter under reference (2). It is requested that clarification may please be issued on the following points in the model bidding documents.

1. Clause 1.2.8 of the model RFQ states as follows:

*"1.2.8 Bids will be invited ..... For the purposes of bidding hereunder, the Fixed Charge [and Fuel Charge] will constitute the tariff for the Power Station(the "Tariff"). The element of coal transportation and transmission losses may vary from case to case and shall also form part of the Fuel Charge by way of adjustment."*

---

Registered Office : Vidyuthi Bhavanam, Pattom, Thiruvananthapuram – 695 004. Website : [www.kseb.in](http://www.kseb.in)

TRUE COPY

Sub clauses (a) and (c) of Clause 1.2.8 of the model RFQ and sub clauses (a) and (c) of Clause 3.5.2 of the model RFP state as follows:

*"..... However the element of coal transportation and transmission losses may vary from case to case and shall affect the Fuel Charge offered by each Bidder."*

Also Clause 22.2 of the model PSA states that

*"..... For the avoidance of doubt, the Supplier represents and warrants that the Fuel Charge referred to hereinabove conforms with the provisions of Clause 22.2.3 and comprises (a) Rs..... (Rupees ..... ) per kWh on account of cost of Fuel, (b) Rs..... (Rupees ..... ) per kWh on account of transportation, and (c) Rs. .... (Rupees ..... ) per kWh on account of washing."*

It is not mentioned in any of the three documents, that in which component of tariff, the transmission losses for inter-state and intra-state transmission of electricity from the Point of Grid Connection to the Delivery point as stated in Clause 5.5 of the PSA is to be loaded. There is no provision for specifying the same in the Bid (item 32 of Appendix –I).

2. Clause 22.2.4 of the model PSA deals with the total cost of transportation of domestic fuel. The last sentence in square brackets states that

*"The Supplier shall procure Fuel from its Captive Mines, and the cost of transportation shall be deemed to be included in the Landed Fuel Cost specified in Clause 22.2.3".*

It is mentioned in footnote 27 that

*"In the event Fuel is to be procured from captive mines, the word in square parenthesis shall be retained and the remaining words shall be excluded. In all other cases, the words in square parenthesis may be omitted."*

It may please be clarified whether the Fuel Charge as mentioned in clause 22.2.1 comprises of (a) only ie. Rs. per kWh on account of cost of fuel and does not include cost of transportation and cost of washing for generators procuring fuel from its Captive mines.

3. All the bidders have expressed their concern whether Ministry of Coal would agree to assign the FSA in favour of the Utility. (Refer Clause 5.2.3 and 22.4.1 of model PSA.

4. If the offered quantum of the lowest bidder is less than the total quantum required by the Utility, kindly clarify how the balance quantity would be procured.

Kindly provide clarifications on the above at the earliest.

Yours faithfully,

  
**Chief Engineer**  
**Commercial & Tariff**  
LL  
23/8

TRUE COPY



## KERALA STATE ELECTRICITY BOARD LIMITED



Office of the Chief Engineer (Commercial & Tariff)  
8<sup>th</sup> Floor, Vidyuthi Bhavanam, Pattom, Thiruvananthapuram - 695 004, Kerala.  
Phone: +91 471 2514554, 9446008137 Fax: 0471 2514405  
E-mail: [cecommml@ksebnnet.com](mailto:cecommml@ksebnnet.com), [dcecommml@ksebnnet.com](mailto:dcecommml@ksebnnet.com)

No. CE(C&T)/DBFOO/LT/2013-14/18

16-09-2014

To

✓ Sri. Pranay Kumar,  
Director, Ministry of Power,  
Government of India,  
Shram Shakti Bhawan, Rafi Marg,  
New Delhi - 110 001.

Sir,

Sub : Long term procurement of 450 MW power on DBFOO basis – modified  
Bidding documents - reg.

- Ref : 1. Guidelines No. 23/17/2011-R&R(Vol-V) dated 08-11-2013 issued by  
the Ministry of Power.  
2. RFP No. 01/CE(C&T)/LT/DBFOO/2013-14 dated 25-06-2014.  
3. Letter dated 06-08-2014 of Sri. Rajendra Singh, Under Secretary to the  
Government of India, MoP, New Delhi.  
4. This office letter No. CE(C&T)/DBFOO/LT/2013-14/211 dated 23-08-  
2014.

Kind attention is invited to the Ministry of Power letter under ref 3. Considering the directions therein, the bidding documents viz., RFP and draft PSA issued to the qualified applicants for the long term procurement of 450 MW RTC power were withdrawn. The participation of bidders in the subject tender has been limited only to those bidders having concessional fuel from CIL or a subsidiary thereof as fuel source and fresh bidding documents were issued accordingly.

It is requested that the clarifications requested vide letter under reference (4) may please be provided at the earliest, so as to prepare reply to the queries raised by the bidders.

TRUE COPY

*[Signature]*

Yours faithfully,

*[Signature]*

Chief Engineer  
Commercial & Tariff

Registered Office : Vidyuthi Bhavanam, Pattom, Thiruvananthapuram - 695 004. Website : [www.kseb.in](http://www.kseb.in)



**ANNEXURE A-8**

Request For Proposal

For Procurement of Electricity

on Long Term Basis

RFP No. 01/CE(C&T)/LT/DBFOO/2013-14 dated 05-09-2014

Issued by

KERALA STATE ELECTRICITY BOARD LIMITED

TRUE COPY



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Request for Proposal (RFP)

## DISCLAIMER

The information contained in this Request for Proposal document (the “**RFP**”) or subsequently provided to Bidder(s), whether verbally or in documentary or any other form by or on behalf of the Utility or any of its employees or advisors, is provided to Bidder(s) on the terms and conditions set out in this RFP and such other terms and conditions subject to which such information is provided.

This RFP is not an agreement and is neither an offer nor invitation by the Utility to the prospective Bidders or any other person. The purpose of this RFP is to provide interested parties with information that may be useful to them in making their financial offers (Bids) pursuant to this RFP. This RFP includes statements, which reflect various assumptions and assessments arrived at by the Utility in relation to the Project. Such assumptions, assessments and statements do not purport to contain all the information that each Bidder may require. This RFP may not be appropriate for all persons, and it is not possible for the Utility, its employees or advisors to consider the investment objectives, financial situation and particular needs of each party who reads or uses this RFP. The assumptions, assessments, statements and information contained in the Bidding Documents, may not be complete, accurate, adequate or correct. Each Bidder should, therefore, conduct its own investigations and analysis and should check the accuracy, adequacy, correctness, reliability and completeness of the assumptions, assessments, statements and information contained in this RFP and obtain independent advice from appropriate sources.

Information provided in this RFP to the Bidder(s) is on a wide range of matters, some of which may depend upon interpretation of law. The information given is not intended to be an exhaustive account of statutory requirements and should not be regarded as a complete or authoritative statement of law. The Utility accepts no responsibility for the accuracy or otherwise for any interpretation or opinion on law expressed herein.

The Utility, its employees and advisors make no representation or warranty and shall have no liability to any person, including any Applicant or Bidder under any law, statute, rules or regulations or tort, principles of restitution or unjust enrichment or otherwise for any loss, damages, cost or expense which may arise from or be incurred or suffered on account of anything contained in this RFP or otherwise, including the accuracy, adequacy, correctness, completeness or reliability of the RFP and any assessment, assumption, statement or information contained therein or deemed to form part of this RFP or arising in any way for participation in this Bid Stage.

The Utility also accepts no liability of any nature whether resulting from negligence or otherwise howsoever caused arising from reliance of any Bidder upon the statements contained in this RFP.

The Utility may in its absolute discretion, but without being under any obligation to

do so, update, amend or supplement the information, assessment or assumptions contained in this RFP.

The issue of this RFP does not imply that the Utility is bound to select a Bidder or to appoint the Selected Bidder or Supplier, as the case may be, for the Project and the Utility reserves the right to reject all or any of the Bidders or Bids without assigning any reason whatsoever.

The Bidder shall bear all its costs associated with or relating to the preparation and submission of its Bid including but not limited to preparation, copying, postage, delivery fees, expenses associated with any demonstrations or presentations which may be required by the Utility or any other costs incurred in connection with or relating to its Bid. All such costs and expenses will remain with the Bidder and the Utility shall not be liable in any manner whatsoever for the same or for any other costs or other expenses incurred by a Bidder in preparation or submission of the Bid, regardless of the conduct or outcome of the Bidding Process.

## GLOSSARY

<b>Associate</b>	As defined in Clause 2.1.14
<b>Bank Guarantee</b>	As defined in Clause 2.20.1
<b>Bid(s)</b>	As defined in Clause 1.2.2
<b>Bidders</b>	As defined in Clause 1.2.2
<b>Bidding Documents</b>	As defined in Clause 1.1.7
<b>Bid Due Date</b>	As defined in Clause 1.1.7
<b>Bidding Process</b>	As defined in Clause 1.2.1
<b>Bid Security</b>	As defined in Clause 1.2.4
<b>Bid Stage</b>	As defined in Clause 1.2.1
<b>CIL</b>	As defined in Clause 3.5.2
<b>Conflict of Interest</b>	As defined in Clause 2.1.14
<b>Contract</b>	As defined in Clause 1.1.5
<b>Damages</b>	As defined in Clause 2.1. 14
<b>BOO</b>	As defined in Clause 1.1.1
<b>Demand Draft</b>	As defined in Clause 2.20.1
<b>Government</b>	Government of India / Kerala
<b>Lowest Bidder</b>	As defined in Clause 1.2.6
<b>LOA</b>	As defined in Clause 3.3.5
<b>Member</b>	Member of a Consortium
<b>PSA</b>	As defined in Clause 1.1.2
<b>PPP</b>	Public Private Partnership
<b>Project</b>	As defined in Clause 1.1.1
<b>Re. or Rs. or INR</b>	Indian Rupee
<b>RFP or Request for Proposals</b>	As defined in the Disclaimer
<b>RFQ</b>	As defined in Clause 2.1.2
<b>Selected Bidder</b>	As defined in Clause 3.3.1
<b>Supplier</b>	As defined in Clause 1.1.2
<b>Tariff</b>	As defined in Clause 1.2.6
<b>Utility</b>	As defined in Clause 1.1.1

The words and expressions beginning with capital letters and defined in this document shall, unless repugnant to the context, have the meaning ascribed thereto herein. The words and expressions beginning with capital letters and not defined herein, but defined in the RFQ, shall, unless repugnant to the context, have the meaning ascribed thereto therein.

## Invitation for Proposal



# KERALA STATE ELECTRICITY BOARD LIMITED

## 1. INTRODUCTION

### 1.1 Background

- 1.1.1 The Kerala State Electricity Board Limited (the "Utility") is engaged in the generation, transmission and distribution of electricity in the State of Kerala and as part of this endeavour, the Utility has decided to procure electricity on a long term basis from a power station (the "Project") through Public-Private Partnership (the "PPP") on Design, Build, Finance, Own and Operate (the "DBFOO") basis, and has decided to carry out the bidding process for selection of a corporate entity as the Bidder to whom the contract may be awarded for production of electricity and supply thereof as per the terms and conditions specified in the Bidding Documents.

Brief particulars of the Project are as follows:

Capacity Required (in MW)	Period when supply must commence
450	1 <sup>st</sup> December 2016

- 1.1.2 The Selected Bidder, who is either a company incorporated under the Companies Act, 1956 / 2013 or undertakes to incorporate as such prior to execution of the Power Supply Agreement (the "**Supplier**"), shall be responsible for designing, engineering, financing, procurement, construction, operation and maintenance of the Power Station for production of electricity and supply thereof under and in accordance with the provisions of a long-term agreement for supply of Power (the "**Power Supply Agreement**" or the "**PSA**") to be entered into between the Selected Bidder and the Utility in the form provided by the Utility as part of the Bidding Documents pursuant hereto.
- 1.1.3 The scope of work will broadly include designing, building, financing, operation and maintenance of the Power Station and supply of power in accordance with the terms in the PSA.
- 1.1.4 Applicants may bid for the capacity specified in Clause 1.1.1, or a part thereof, not being less than 25% (twenty five per cent) of such capacity. Provided, however, that the Utility may, in its sole discretion, accept only those Bids which match the lowest Bid.
- 1.1.5 The PSA sets forth the detailed terms and conditions for grant of the contract to the Supplier, including the scope of the Supplier's services and obligations (the "**Contract**").

- 1.1.6 The statements and explanations contained in this RFP are intended to provide a better understanding to the Bidders about the subject matter of this RFP and should not be construed or interpreted as limiting in any way or manner the scope of services and obligations of the Supplier set forth in the PSA or the Utility's rights to amend, alter, change, supplement or clarify the scope of work, the Contract to be awarded pursuant to this RFP or the terms thereof or herein contained. Consequently, any omissions, conflicts or contradictions in the Bidding Documents including this RFP are to be noted, interpreted and applied appropriately to give effect to this intent, and no claims on that account shall be entertained by the Utility.
- 1.1.7 The Utility shall receive Bids pursuant to this RFP in accordance with the terms set forth in this RFP and other documents to be provided by the Utility pursuant to this RFP, as modified, altered, amended and clarified from time to time by the Utility (collectively the "**Bidding Documents**"), and all Bids shall be prepared and submitted in accordance with such terms on or before the date specified in Clause 1.3 for submission of Bids (the "**Bid Due Date**").

## 1.2 Brief description of Bidding Process

- 1.2.1 The Utility has adopted a two-stage process (collectively referred to as the "**Bidding Process**") for selection of the Bidder for award of the Project. The first stage (the "**Qualification Stage**") of the process involved pre-qualification of interested parties/ Consortia in accordance with the provisions of the RFQ. At the end of the Qualification Stage, the Utility short-listed Applicants who are eligible for participation in this second stage of the Bidding Process (the "**Bid Stage**") comprising Request for Proposals.

GOI has issued guidelines (see Appendix-V of RFP) for qualification of bidders seeking to acquire stakes in any public sector enterprise through the process of disinvestment. These guidelines shall apply *mutatis mutandis* to this Bidding Process. The Utility shall be entitled to disqualify an Applicant in accordance with the aforesaid guidelines at any stage of the Bidding Process. Applicants must satisfy themselves that they are qualified to bid, and should give an undertaking to this effect in the form at Appendix-I.

- 1.2.2 In the Bid Stage, the aforesaid short-listed Applicants, including their successors, (the "**Bidders**", which expression shall, unless repugnant to the context, include the Members of the Consortium) are being called upon to submit their financial offers (the "**Bids**") in accordance with the terms specified in the Bidding Documents. The Bid shall be valid for a period of not less than 120 days from the date specified in Clause 1.3 for submission of bids (the "**Bid Due Date**").
- 1.2.3 The Bidding Documents include the draft PSA for the Project which is enclosed. Subject to the provisions of Clause 2.1.3, the aforesaid documents and any addenda issued subsequent to this RFP Document, will be deemed to form part of the Bidding Documents.

- 1.2.4 A Bidder is required to deposit, along with its Bid, a bid security of Rs. 5 lakh (Rupees five lakh) per MW of capacity offered by the Bidder (the "**Bid Security**"), refundable not later than 60 (sixty) days from the Bid Due Date, except in the case of the Selected Bidder whose Bid Security shall be retained till it has provided a Performance Security under the PSA. The Bidders will have an option to provide Bid Security in the form of a demand draft or a bank guarantee acceptable to the Utility, and in such event, the validity period of the demand draft or bank guarantee, as the case may be, shall not be less than 180 (one hundred and eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Utility and the Bidder from time to time. The Bid shall be summarily rejected if it is not accompanied by the Bid Security.
- 1.2.5 During the Bid Stage, Bidders are invited to examine the Bidding Documents in greater detail, and to carry out, at their cost, such studies as may be required for submitting their respective Bids for award of the Contract including implementation of the Project.
- 1.2.6 Bids are invited for the Project on the basis of a tariff to be offered by a Bidder for and in respect of the Project. For the purposes of evaluation hereunder, the Fixed Charge [and Fuel Charge] will constitute the tariff for the Power Station (the "**Tariff**"). The contract period shall be pre-determined and specified in the Bidding Documents.

In this RFP, the term "**Lowest Bidder**" shall mean the Bidder who is offering the lowest Tariff.

- 1.2.7 Generally, the Lowest Bidder shall be the Selected Bidder. The remaining Bidders shall be kept in reserve and may, in accordance with the process specified in Clause 3 of this RFP, be invited to match the Bid submitted by the Lowest Bidder in case such Lowest Bidder withdraws or is not selected for any reason. In the event that none of the other Bidders match the Bid of the Lowest Bidder, the Utility may, in its discretion, either invite fresh Bids from the remaining Bidders or annul the Bidding Process.
- 1.2.8 Further and other details of the process to be followed at the Bid Stage and the terms thereof are spelt out in this RFP.
- 1.2.9 Any queries or request for additional information concerning this RFP shall be submitted in writing or by fax and e-mail to the officer designated in Clause 2.11.5 below. The envelopes/ communication shall clearly bear the following identification/ title:

"Queries/Request for Additional Information: RFP for Procurement of 450 MW Electricity on DBFOO basis".

### 1.3 Schedule of Bidding Process

Event Description	Date
1. Last date for receiving queries	26-09-2014
2. Pre-Bid meeting - 1	10-10-2014
3. Utility response to queries latest by	17-10-2014
4. Bid Due Date	24-10-2014, 1.30 pm
5. Opening of Bids	24-10-2014, 2.00 pm
6. Letter of Award (LOA)	Within 30 days of Bid Due Date
7. Validity of Bids	120 days of Bid Due Date
8. Signing of PSA	Within 30 days of award LOA

## 2. INSTRUCTIONS TO BIDDERS

### A. GENERAL

#### 2.1. General terms of Bidding

- 2.1.1 No Bidder shall submit more than one Bid for the Project. A Bidder bidding individually or as a member of a Consortium shall not be entitled to submit another bid either individually or as a member of any Consortium, as the case may be.
- 2.1.2 Unless the context otherwise requires, the terms not defined in this RFP, but defined in the Request for Qualification document for the Project (the “**RFQ**”) shall have the meaning assigned thereto in the RFQ.
- 2.1.3 The Bidders are expected to carry out their own surveys, investigations and other detailed examination of the Project before submitting their Bids. Any variations or deviations found subsequently shall not confer any right on the Bidders, and the Utility shall have no liability whatsoever in relation to or arising out of any variations or deviations detected subsequently.
- 2.1.4 Notwithstanding anything to the contrary contained in this RFP, the detailed terms specified in the draft PSA shall have overriding effect; provided, however, that any conditions or obligations imposed on the Bidder hereunder shall continue to have effect in addition to its obligations under the PSA.
- 2.1.5 The Bid should be furnished in the format at Appendix–I, clearly indicating the bid amount in both figures and words, in Indian Rupees, and signed by the Bidder’s authorised signatory. In the event of any difference between figures and words, the amount indicated in words shall be taken into account.
- 2.1.6 The Bid shall consist of a Tariff to be quoted by the Bidder, as per the terms and conditions of this RFP and the provisions of the PSA.
- 2.1.7 The Bidder shall deposit a Bid Security of Rs. 5 lakh (Rupees five lakhs) per MW of capacity offered by the Bidder in accordance with the provisions of this RFP. The Bidder has the option to provide the Bid Security either as a Demand Draft or in the form of a Bank Guarantee acceptable to the Utility, as per format at Appendix–II.
- 2.1.8 The validity period of the Bank Guarantee or Demand Draft, as the case may be, shall not be less than 180 (one hundred and eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Utility and the Bidder. The Bid shall be summarily rejected if it is not accompanied by the Bid Security. The Bid Security shall be refundable no later than 60 (sixty) days from the Bid Due Date except in the case of the Selected Bidder whose Bid Security shall be retained till it has provided a Performance Security under the PSA.

- 2.1.9 The Bidder should submit a Power of Attorney as per the format at Appendix– III, authorising the signatory of the Bid to commit the Bidder.
- 2.1.10 In case the Bidder is a Consortium, the Members thereof should furnish a Power of Attorney in favour of the Lead Member in the format at Appendix– IV.
- 2.1.11 Any condition or qualification or any other stipulation contained in the Bid shall render the Bid liable to rejection as a non-responsive Bid.
- 2.1.12 The Bid and all communications in relation to or concerning the Bidding Documents and the Bid shall be in English language.
- 2.1.13 The documents including this RFP and all attached documents provided by the Utility are and shall remain or become the property of the Utility and are transmitted to the Bidders solely for the purpose of preparation and the submission of a Bid in accordance herewith. Bidders are to treat all information as strictly confidential and shall not use it for any purpose other than for preparation and submission of their Bid. The provisions of this Clause shall also apply mutatis mutandis to Bids and all other documents submitted by the Bidders, and the Utility will not return to the Bidders any Bid, document or any information provided along therewith.
- 2.1.14 A Bidder shall not have a conflict of interest (the “**Conflict of Interest**”) that affects the Bidding Process. Any Bidder found to have a Conflict of Interest shall be disqualified. In the event of disqualification, the Utility shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Utility and not by way of penalty for, *inter alia*, the time, cost and effort of the Utility, including consideration of such Bidder’s proposal (the “**Damages**”), without prejudice to any other right or remedy that may be available to the Utility under the Bidding Documents and/ or the PSA or otherwise. Without limiting the generality of the above, a Bidder shall be deemed to have a Conflict of Interest affecting the Bidding Process, if:
- (i) the Bidder, its Member or Associate (or any constituent thereof) and any other Bidder, its Member or any Associate thereof (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this disqualification shall not apply in cases where the direct or indirect shareholding of a Bidder, its Member or an Associate thereof (or any shareholder thereof having a shareholding of more than 5% (five per cent) of the paid up and subscribed share capital of such Bidder, Member or Associate, as the case may be) in the other Bidder, its Member or Associate, is less than 5% (five per cent) of the subscribed and paid up equity share capital thereof; provided further that this disqualification shall not apply to any ownership by a bank, insurance company, pension fund

or a public financial institution referred to in section 4A of the Companies Act 1956 / 2013. For the purposes of this Clause 2.1.14, indirect shareholding held through one or more intermediate persons shall be computed as follows: (aa) where any intermediary is controlled by a person through management control or otherwise, the entire shareholding held by such controlled intermediary in any other person (the "**Subject Person**") shall be taken into account for computing the shareholding of such controlling person in the Subject Person; and (bb) subject always to sub-clause (aa) above, where a person does not exercise control over an intermediary, which has shareholding in the Subject Person, the computation of indirect shareholding of such person in the Subject Person shall be undertaken on a proportionate basis; provided, however, that no such shareholding shall be reckoned under this sub-clause (bb) if the shareholding of such person in the intermediary is less than 26% of the subscribed and paid up equity shareholding of such intermediary; or

- (ii) a constituent of such Bidder is also a constituent of another Bidder; or
- (iii) such Bidder, its Member or any Associate thereof receives or has received any direct or indirect subsidy, grant, concessional loan or subordinated debt from any other Bidder, its Member or Associate, or has provided any such subsidy, grant, concessional loan or subordinated debt to any other Bidder, its Member or any Associate thereof; or
- (iv) such Bidder has the same legal representative for purposes of this Bid as any other Bidder; or
- (v) such Bidder, or any Associate thereof, has a relationship with another Bidder, or any Associate thereof, directly or through common third party/ parties, that puts either or both of them in a position to have access to each others' information about, or to influence the Bid of either or each other; or
- (vi) such Bidder or any Associate thereof has participated as a consultant to the Utility in the preparation of any documents, design or technical specifications of the Project.

*Explanation:*

In case a Bidder is a Consortium, then the term Bidder as used in this Clause 2.1.14, shall include each Member of such Consortium.

For purposes of this RFP, Associate means, in relation to the Bidder/ Consortium Member, a person who controls, is controlled by, or is under the common control with such Bidder/ Consortium Member (the "**Associate**"). As used in this definition, the expression "control" means, with respect to

a person which is a company or corporation, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person by operation of law.

2.1.15 A Bidder shall be liable for disqualification and forfeiture of Bid Security if any legal, financial or technical adviser of the Utility in relation to the Project is engaged by the Bidder, its Members or any Associate thereof, as the case may be, in any manner for matters related to or incidental to such Project during the Bidding Process or subsequent to the (i) issue of the LOA or (ii) execution of the PSA. In the event any such adviser is engaged by the Selected Bidder or Supplier, as the case may be, after issue of the LOA or execution of the PSA for matters related or incidental to the Project, then notwithstanding anything to the contrary contained herein or in the LOA or the PSA and without prejudice to any other right or remedy of the Utility, including the forfeiture and appropriation of the Bid Security or Performance Security, as the case may be, which the Utility may have thereunder or otherwise, the LOA or the PSA, as the case may be, shall be liable to be terminated without the Utility being liable in any manner whatsoever to the Selected Bidder or Supplier for the same. For the avoidance of doubt, this disqualification shall not apply where such adviser was engaged by the Bidder, its Member or Associate in the past but its assignment expired or was terminated 6 (six) months prior to the date of issue of RFQ for the Project. Nor will this disqualification apply where such adviser is engaged after a period of 3 (three) years from the date of commercial operation of this Project.

2.1.16 This RFP is not transferable.

2.1.17 Any award of Contract pursuant to this RFP shall be subject to the terms of Bidding Documents.

2.1.18 Other Bid conditions shall include:

- (a) The Bidder, in case it does not have the O&M experience specified in Clause 2.2.3 of the RFQ, by submitting its Bid, shall be deemed to acknowledge and agree that for a period of at least 5 (five) years from the date of commercial operation of the Project, it shall enter into an operation & maintenance (O&M) agreement with an entity having the specified experience, failing which the PSA shall be liable to termination.
- (b) The Bidder shall offer power only from a single power station.

## **2.2 Change in composition of the Consortium**

2.2.1 Where the Bidder is a Consortium, change in composition of the Consortium may be permitted by the Utility during the Bid Stage, only where:



- (a) the Lead Member continues to be the Lead Member of the Consortium;
- (b) the substitute is at least equal, in terms of Technical Capacity or Financial Capacity, to the Consortium Member who is sought to be substituted and the modified Consortium shall continue to meet the pre-qualification and short-listing criteria for Applicants; and
- (c) the new Member(s) expressly adopt(s) the Application already made on behalf of the Consortium as if it were a party to it originally, and is not an Applicant/Member/ Associate of any other Consortium bidding for this Project.

2.2.2 Approval for change in the composition of a Consortium shall be at the sole discretion of the Utility and must be approved by the Utility in writing. The Bidder must submit its application for change in composition of the Consortium no later than 15 (fifteen) days prior to the Bid Due Date.

2.2.3 The modified/ reconstituted Consortium shall submit a revised Jt. Bidding Agreement and a Power of Attorney, substantially in the form at Appendix-IV, prior to the Bid Due Date.

## **2.3 Change in Ownership**

2.3.1 By submitting the Bid, the Bidder acknowledges that it was pre-qualified and short-listed on the basis of Technical Capacity and Financial Capacity of those of its Consortium Members who shall, until the 2<sup>nd</sup> (second) anniversary of the date of commercial operation of the Project, hold equity share capital representing not less than: (i) 26% (twenty six per cent) of the subscribed and paid-up equity of the Supplier; and (ii) 5% (five per cent) of the Total Project Cost specified in the PSA. The Bidder further acknowledges and agrees that the aforesaid obligation shall be the minimum, and shall be in addition to such other obligations as may be contained in the PSA, and a breach hereof shall, notwithstanding anything to the contrary contained in the PSA, be deemed to be a breach of the PSA and dealt with as such thereunder. For the avoidance of doubt, the provisions of this Clause 2.3.1 shall apply only when the Bidder is a Consortium.

2.3.2 By submitting the Bid, the Bidder shall also be deemed to have acknowledged and agreed that in the event of a change in control of a Consortium Member or an Associate whose Technical Capacity and/ or Financial Capacity was taken into consideration for the purposes of short-listing and pre-qualification under and in accordance with the RFQ, the Bidder shall be deemed to have knowledge of the same and shall be required to inform the Utility forthwith along with all relevant particulars about the same and the Utility may, in its sole discretion, disqualify the Bidder or withdraw the LOA from the Selected Bidder, as the case may be. In the event such change in control occurs after signing of the PSA but prior to

Financial Close of the Project, it would, notwithstanding anything to the contrary contained in the PSA, be deemed to be a breach of the PSA, and the same shall be liable to be terminated without the Utility being liable in any manner whatsoever to the Supplier. In such an event, notwithstanding anything to the contrary contained in the PSA, the Utility shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Utility under the Bidding Documents and/ or the PSA or otherwise.

## **2.4 Cost of Bidding**

The Bidders shall be responsible for all of the costs associated with the preparation of their Bids and their participation in the Bidding Process. The Utility will not be responsible or in any way liable for such costs, regardless of the conduct or outcome of the Bidding Process.

## **2.5 Verification of information**

2.5.1 Bidders are encouraged to submit their respective Bids after familiarising themselves with the information and physical conditions relevant to the Project, including the transmission capacity, the site conditions, location, surroundings, climate, availability of power, water and other utilities for construction, access to site, handling and storage of materials, weather data, applicable laws and regulations, and any other matter considered relevant by them.

2.5.2 It shall be deemed that by submitting a Bid, the Bidder has:

- (a) made a complete and careful examination of the Bidding Documents;
- (b) received all relevant information requested from the Utility;
- (c) accepted the risk of inadequacy, error or mistake in the information provided in the Bidding Documents or furnished by or on behalf of the Utility relating to any of the matters referred to in Clause 2.5.1 above;
- (d) satisfied itself about all matters, things and information including matters referred to in Clause 2.5.1 hereinabove necessary and required for submitting an informed Bid, execution of the Project in accordance with the Bidding Documents and performance of all of its obligations thereunder;
- (e) acknowledged and agreed that inadequacy, lack of completeness or incorrectness of information provided in the Bidding Documents or ignorance of any of the matters referred to in Clause 2.5.1 hereinabove shall not be a basis for any claim for compensation, damages, extension of time for performance of its obligations, loss of profits etc. from the Utility, or a ground for termination of the PSA by the

Supplier;

- (f) acknowledged that it does not have a Conflict of Interest; and
- (g) agreed to be bound by the undertakings provided by it under and in terms hereof.

2.5.3 The Utility shall not be liable for any omission, mistake or error in respect of any of the above or on account of any matter or thing arising out of or concerning or relating to RFP, RFQ, the Bidding Documents or the Bidding Process, including any error or mistake therein or in any information or data given by the Utility.

## **2.6 Verification and Disqualification**

2.6.1 The Utility reserves the right to verify all statements, information and documents submitted by the Bidder in response to the RFQ, the RFP or the Bidding Documents and the Bidder shall, when so required by the Utility, make available all such information, evidence and documents as may be necessary for such verification. Any such verification, or lack of such verification, by the Utility shall not relieve the Bidder of its obligations or liabilities hereunder nor will it affect any rights of the Utility thereunder.

2.6.2 The Utility reserves the right to reject any Bid and appropriate the Bid Security if:

- (a) at any time, a material misrepresentation is made or uncovered, or
- (b) the Bidder does not provide, within the time specified by the Utility, the supplemental information sought by the Utility for evaluation of the Bid.

Such misrepresentation/ improper response shall lead to the disqualification of the Bidder. If the Bidder is a Consortium, then the entire Consortium and each Member may be disqualified / rejected. If such disqualification / rejection occurs after the Bids have been opened and the Lowest Bidder gets disqualified / rejected, then the Utility reserves the right to:

- (i) invite the remaining Bidders to submit their Bids in accordance with Clauses 3.3.3 and 3.3.4; or
- (ii) take any such measure as may be deemed fit in the sole discretion of the Utility, including annulment of the Bidding Process.

2.6.3 In case it is found during the evaluation or at any time before signing of the PSA or after its execution and during the period of subsistence thereof, including the Contract thereby granted by the Utility, that one or more of the pre-qualification conditions have not been met by the Bidder, or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith

if not yet appointed as the Supplier either by issue of the LOA or entering into of the PSA, and if the Selected Bidder has already been issued the LOA or has entered into the PSA, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by the Utility to the Selected Bidder or the Supplier, as the case may be, without the Utility being liable in any manner whatsoever to the Selected Bidder or Supplier. In such an event, the Utility shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Utility under the Bidding Documents and/ or the PSA, or otherwise.

## **B. DOCUMENTS**

### **2.7 Contents of the RFP**

2.7.1 This RFP comprises the Disclaimer set forth hereinabove, the contents as listed below, and will additionally include any Addenda issued in accordance with Clause 2.9.

#### **Invitation for Bids**

- Section 1. Introduction
- Section 2. Instructions to Bidders
- Section 3. Evaluation of Bids
- Section 4. Fraud and Corrupt Practices
- Section 5. Pre-Bid Conference
- Section 6. Miscellaneous

#### **Appendices**

- I. Letter comprising the Bid
- II. Bank Guarantee for Bid Security
- III. Power of Attorney for signing of Bid
- IV. Power of Attorney for Lead Member of Consortium
- V. Guidelines of the Department of Disinvestment

2.7.2 The draft PSA provided by the Utility as part of the Bidding Documents shall be deemed to be part of this RFP.

### **2.8 Clarifications**

2.8.1 Bidders requiring any clarification on the RFP may notify the Utility in writing or by fax and e-mail in accordance with Clause 1.2.9. They should

send in their queries on or before the date mentioned in the Schedule of Bidding Process specified in Clause 1.3. The Utility shall endeavour to respond to the queries within the period specified therein, but no later than 15 (fifteen) days prior to the Bid Due Date. The responses will be sent by fax or e-mail. The Utility will forward all the queries and its responses thereto, to all Bidders without identifying the source of queries.

- 2.8.2 The Utility shall endeavour to respond to the questions raised or clarifications sought by the Bidders. However, the Utility reserves the right not to respond to any question or provide any clarification, in its sole discretion, and nothing in this Clause shall be taken or read as compelling or requiring the Utility to respond to any question or to provide any clarification.
- 2.8.3 The Utility may also on its own motion, if deemed necessary, issue interpretations and clarifications to all Bidders. All clarifications and interpretations issued by the Utility shall be deemed to be part of the Bidding Documents. Verbal clarifications and information given by Utility or its employees or representatives shall not in any way or manner be binding on the Utility.

## **2.9 Amendment of RFP**

- 2.9.1 At any time prior to the Bid Due Date, the Utility may, for any reason, whether at its own initiative or in response to clarifications requested by a Bidder, modify the RFP by the issuance of Addenda.
- 2.9.2 Any Addendum issued hereunder will be in writing and shall be sent to all the Bidders.
- 2.9.3 In order to afford the Bidders a reasonable time for taking an Addendum into account, or for any other reason, the Utility may, in its sole discretion, extend the Bid Due Date<sup>\$</sup>.

## **C. PREPARATION AND SUBMISSION OF BIDS**

### **2.10 Format and Signing of Bid**

- 2.10.1 The Bidder shall provide all the information sought under this RFP. The Utility will evaluate only those Bids that are received in the required formats and complete in all respects.
- 2.10.2 The Bid and its copy shall be typed or written in indelible ink and signed by the authorised signatory of the Bidder who shall also initial each page, in blue ink. In case of printed and published documents, only the cover shall be initialled. All the alterations, omissions, additions or any other amendments

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<sup>\$</sup> While extending the Bid Due Date on account of an addendum, the Utility shall have due regard for the time required by Bidders to address the amendments specified therein. In the case of significant amendments, at least 15 (fifteen) days shall be provided between the date of amendment and the Bid Due Date, and in the case of minor amendments, at least 7 (seven) days shall be provided.

made to the Bid shall be initialled by the person(s) signing the Bid.

## **2.11 Sealing and Marking of Bids**

2.11.1 The Bidder shall submit the Bid in the format specified at Appendix-I, and seal it in an envelope and mark the envelope as "BID".

2.11.2 The documents accompanying the Bid shall be placed in a separate envelope and marked as "Enclosures of the Bid". The documents shall include:

(a) Bid Security in the format at Appendix-II;

(b) Power of Attorney for signing of Bid in the format at Appendix-III;

(c) If applicable, the Power of Attorney for Lead Member of Consortium in the format at Appendix-IV; and

(d) A copy of the PSA with each page initialled by the person signing the Bid in pursuance of the Power of Attorney referred to in Clause (b) hereinabove.

2.11.3 A true copy of the documents accompanying the Bid, as specified in Clause 2.11.2 (a), (b) and (c) above, shall be bound together in one hard cover and a copy of the PSA as specified in Clause 2.11.2 (d) shall be bound in another hard cover. The pages in each hard cover shall be numbered serially and every page shall be initialled in blue ink by the authorised signatory of the Bidder. This copy of the documents shall be placed in a separate envelope and marked "Copy of Documents".

2.11.4 The three envelopes specified in Clauses 2.11.1, 2.11.2 and 2.11.3 shall be placed in an outer envelope, which shall be sealed. Each of the four envelopes shall clearly bear the following identification:

"Bid for the RFP for Procurement of 450 MW Electricity on DBFOO basis".

and shall clearly indicate the name and address of the Bidder. In addition, the Bid Due Date should be indicated on the right hand top corner of each of the envelopes.

2.11.5 Each of the envelopes shall be addressed to:

ATTN OF	:	Mr. Dinesh D.
DESIGNATION	:	Chief Engineer (Commercial & Tariff)
ADDRESS	:	8 <sup>th</sup> Floor, Vydyuthi Bhavanam, Pattom,

Thiruvananthapuram – 695 004.

FAX NO : 0471- 2514405

E-MAIL ADDRESS : [cecommml@ksebnet.com](mailto:cecommml@ksebnet.com)  
[dcecommml@ksebnet.com](mailto:dcecommml@ksebnet.com)

2.11.6 If the envelopes are not sealed and marked as instructed above, the Utility assumes no responsibility for the misplacement or premature opening of the contents of the Bid submitted and consequent losses, if any, suffered by the Bidder.

2.11.7 Bids submitted by fax, telex, telegram or e-mail shall not be entertained and shall be rejected.

## **2.12 Bid Due Date**

2.12.1 Bids should be submitted before 1330 hours IST on the Bid Due Date at the address provided in Clause 2.11.5 in the manner and form as detailed in this RFP. A receipt thereof should be obtained from the person specified at Clause 2.11.5.

2.12.2 The Utility may, in its sole discretion, extend the Bid Due Date by issuing an Addendum in accordance with Clause 2.9 uniformly for all Bidders.

## **2.13 Late Bids**

Bids received by the Utility after the specified time on the Bid Due Date shall not be eligible for consideration and shall be summarily rejected.

## **2.14 Contents of the Bid**

2.14.1 The Bid shall be furnished in the format at Appendix–I and shall consist of a Tariff to be quoted by the Bidder. The Bidder shall specify (in Indian Rupees) the Tariff to undertake the Project in accordance with this RFP and the provisions of the PSA.

2.14.2 Generally, the Project will be awarded to the Lowest Bidder.

2.14.3 The opening of Bids and acceptance thereof shall be substantially in accordance with this RFP.

2.14.4 The proposed PSA shall be deemed to be part of the Bid.

## **2.15 Modifications/ Substitution/ Withdrawal of Bids**

2.15.1 The Bidder may modify, substitute or withdraw its Bid after submission, provided that written notice of the modification, substitution or withdrawal is received by the Utility prior to the Bid Due Date. No Bid shall be modified, substituted or withdrawn by the Bidder on or after the Bid Due Date.

2.15.2 The modification, substitution or withdrawal notice shall be prepared, sealed, marked, and delivered in accordance with Clause 2.11, with the envelopes being additionally marked "MODIFICATION", "SUBSTITUTION" or "WITHDRAWAL", as appropriate.

2.15.3 Any alteration/ modification in the Bid or additional information supplied subsequent to the Bid Due Date, unless the same has been expressly sought for by the Utility, shall be disregarded.

## **2.16 Rejection of Bids**

2.16.1 Notwithstanding anything contained in this RFP, the Utility reserves the right to reject any Bid and to annul the Bidding Process and reject all Bids at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons therefor. In the event that the Utility rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.

2.16.2 The Utility reserves the right not to proceed with the Bidding Process at any time, without notice or liability, and to reject any Bid without assigning any reasons.

## **2.17 Validity of Bids**

The Bids shall be valid for a period of not less than 120 (one hundred and twenty) days from the Bid Due Date. The validity of Bids may be extended by mutual consent of the respective Bidders and the Utility.

## **2.18 Confidentiality**

Information relating to the examination, clarification, evaluation and recommendation for the Bidders shall not be disclosed to any person who is not officially concerned with the process or is not a retained professional advisor advising the Utility in relation to, or matters arising out of, or concerning the Bidding Process. The Utility will treat all information, submitted as part of the Bid, in confidence and will require all those who have access to such material to treat the same in confidence. The Utility may not divulge any such information unless it is directed to do so by any statutory entity that has the power under law to require its disclosure or is to enforce or assert any right or privilege of the statutory entity and/ or the Utility or as may be required by law or in connection with any legal process.

## **2.19 Correspondence with the Bidder**

Save and except as provided in this RFP, the Utility shall not entertain any correspondence with any Bidder in relation to acceptance or rejection of any Bid.



## D. BID SECURITY

### 2.20 Bid Security

- 2.20.1 The Bidder shall furnish as part of its Bid, a Bid Security referred to in Clauses 2.1.7 and 2.1.8 hereinabove in the form of a bank guarantee issued by a nationalised bank, or a Scheduled Bank in India, other than Indus Ind Bank, and having a net worth of at least Rs. 1,000 crore (Rs. one thousand crore), in favour of the Utility in the format at Appendix-II (the “**Bank Guarantee**”) and having a validity period of not less than 180 (one hundred eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Utility and the Bidder from time to time. In case the Bank Guarantee is issued by a foreign bank outside India, confirmation of the same by any nationalised bank in India is required. For the avoidance of doubt, Scheduled Bank shall mean a bank as defined under Section 2(e) of the Reserve Bank of India Act, 1934.
- 2.20.2 Bid Security can also be in the form of a demand draft issued by a Scheduled Bank in India, drawn in favour of the Utility and payable at Thiruvananthapuram (the “**Demand Draft**”). The Utility shall not be liable to pay any interest on the Bid Security deposit so made and the same shall be interest free.
- 2.20.3 Any Bid not accompanied by the Bid Security shall be summarily rejected by the Utility as non-responsive.
- 2.20.4 Save and except as provided in Clauses 1.2.4 and 1.2.5 above, the Bid Security of unsuccessful Bidders will be returned by the Utility, without any interest, as promptly as possible on acceptance of the Bid of the Selected Bidder or when the Bidding process is cancelled by the Utility, and in any case within 60 (sixty) days from the Bid Due Date. Where Bid Security has been paid by deposit, the refund thereof shall be in the form of an account payee demand draft in favour of the unsuccessful Bidder(s). Bidders may by specific instructions in writing to the Utility give the name and address of the person in whose favour the said demand draft shall be drawn by the Utility for refund, failing which it shall be drawn in the name of the Bidder and shall be mailed to the address given on the Bid.
- 2.20.5 The Selected Bidder's Bid Security will be returned, without any interest, upon the Supplier signing the PSA and furnishing the Performance Security in accordance with the provisions thereof. The Utility may, at the Selected Bidder's option, adjust the amount of Bid Security in the amount of

Performance Security to be provided by him in accordance with the provisions of the PSA.

2.20.6 The Utility shall be entitled to forfeit and appropriate the Bid Security as Damages *inter alia* in any of the events specified in Clause 2.20.7 herein below. The Bidder, by submitting its Bid pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the Utility will suffer loss and damage on account of withdrawal of its Bid or for any other default by the Bidder during the period of Bid validity as specified in this RFP. No relaxation of any kind on Bid Security shall be given to any Bidder.

2.20.7 The Bid Security shall be forfeited as Damages without prejudice to any other right or remedy that may be available to the Utility under the Bidding Documents and/ or under the PSA, or otherwise, under the following conditions:

- (a) If a Bidder submits a non-responsive Bid;
- (b) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Clause 4 of this RFP;
- (c) If a Bidder withdraws its Bid during the period of Bid validity as specified in this RFP and as extended by mutual consent of the respective Bidder(s) and the Utility;
- (d) In the case of Selected Bidder, if it fails within the specified time limit-
  - (i) to sign and return the duplicate copy of LOA;
  - (ii) to sign the PSA; or
  - (iii) to furnish the Performance Security within the period prescribed thereof in the PSA; or
- (e) In case the Selected Bidder, having signed the PSA, commits any breach thereof prior to furnishing the Performance Security.

### 3. EVALUATION OF BIDS

#### 3.1 Opening and Evaluation of Bids

- 3.1.1 The Utility shall open the Bids at 1400 hours on the Bid Due Date, at the place specified in Clause 2.11.5 and in the presence of the Bidders who choose to attend.
- 3.1.2 The Utility will subsequently examine and evaluate the Bids in accordance with the provisions set out in this Section 3.
- 3.1.3 To facilitate evaluation of Bids, the Utility may, at its sole discretion, seek clarifications in writing from any Bidder regarding its Bid.

#### 3.2 Tests of responsiveness

- 3.2.1 Prior to evaluation of Bids, the Utility shall determine whether each Bid is responsive to the requirements of this RFP. A Bid shall be considered responsive only if:
  - (a) it is received as per the format at Appendix-I;
  - (b) it is received by the Bid Due Date including any extension thereof pursuant to Clause 2.12.2;
  - (c) it is signed, sealed, bound together in hard cover and marked as stipulated in Clauses 2.10 and 2.11;
  - (d) it is accompanied by the Bid Security as specified in Clause 2.1.7;
  - (e) it is accompanied by the Power(s) of Attorney as specified in Clauses 2.1.9 and 2.1.10, as the case may be;
  - (f) it contains all the information (complete in all respects) as requested in this RFP and/or Bidding Documents (in formats same as those specified);
  - (g) it does not contain any condition or qualification; and
  - (h) it is not non-responsive in terms hereof.
- 3.2.2 The Utility reserves the right to reject any Bid which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by the Utility in respect of such Bid.

#### 3.3 Selection of Bidder

- 3.3.1 Subject to the provisions of Clause 2.16.1, the Bidder whose Bid is adjudged as responsive in terms of Clause 3.2.1 and who quotes the lowest Tariff offered to the Utility in conformity with the provisions of Clause 3.5 shall be declared as the selected Bidder (the **"Selected Bidder"**). In the event that

the Utility rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.

- 3.3.2 In the event that two or more Bidders quote the same amount of Tariff (the **"Tie Bidders"**), the Utility shall identify the Selected Bidder by draw of lots, which shall be conducted, with prior notice, in the presence of the Tie Bidders who choose to attend.
- 3.3.3 In the event that the Lowest Bidder withdraws or is not selected for any reason in the first instance (the **"first round of bidding"**), the Utility may invite all the remaining Bidders to revalidate or extend their respective Bid Security, as necessary, and match the Bid of the aforesaid Lowest Bidder (the **"second round of bidding"**). If in the second round of bidding, only one Bidder matches the Lowest Bidder, it shall be the Selected Bidder. If two or more Bidders match the said Lowest Bidder in the second round of bidding, then the Bidder whose Bid was lower as compared to other Bidder(s) in the first round of bidding shall be the Selected Bidder. For example, if the third and fifth lowest Bidders in the first round of bidding offer to match the said Lowest Bidder in the second round of bidding, the said third lowest Bidder shall be the Selected Bidder.
- 3.3.4 In the event that no Bidder offers to match the Lowest Bidder in the second round of bidding as specified in Clause 3.3.3, the Utility may, in its discretion, invite fresh Bids (the **"third round of bidding"**) from all Bidders except the Lowest Bidder of the first round of bidding, or annul the Bidding Process, as the case may be. In case the Bidders are invited in the third round of bidding to revalidate or extend their Bid Security, as necessary, and offer fresh Bids, they shall be eligible for submission of fresh Bids provided, however, that in such third round of bidding only such Bids shall be eligible for consideration which are lower than the Bid of the second lowest Bidder in the first round of bidding.
- 3.3.5 After selection, a Letter of Award (the **"LOA"**) shall be issued, in duplicate, by the Utility to the Selected Bidder and the Selected Bidder shall, within 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgement thereof. In the event the duplicate copy of the LOA duly signed by the Selected Bidder is not received by the stipulated date, the Utility may, unless it consents to extension of time for submission thereof, appropriate the Bid Security of such Bidder as Damages on account of failure of the Selected Bidder to acknowledge the LOA, and the next eligible Bidder may be considered.
- 3.3.6 After acknowledgement of the LOA as aforesaid by the Selected Bidder, it shall cause the Supplier to execute the PSA within the period prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation, modification or amendment in the PSA.

### 3.4 Contacts during Bid Evaluation

Bids shall be deemed to be under consideration immediately after they are opened and until such time the Utility makes official intimation of award/ rejection to the Bidders. While the Bids are under consideration, Bidders and/or their representatives or other interested parties are advised to refrain, save and except as required under the Bidding Documents, from contacting by any means, the Utility and/ or their employees/ representatives on matters related to the Bids under consideration.

### **3.5 Bid Parameter**

- 3.5.1 The Bid shall comprise the Tariff offered by the Bidder for production and supply of electricity to the Utility in accordance with the provisions of the PSA. The Tariff comprising the Bid shall be offered in accordance with the provisions of Clause 3.5.2.<sup>10</sup>
- 3.5.2 (a) Since the Bidder is expected to source concessional fuel from Coal India Limited or a subsidiary thereof (the "**CIL**"), the cost of Fuel which shall be included in the Fuel Charge shall be a 'pass through' in accordance with the terms of the PSA. However, the element of coal transportation and transmission losses may vary from case to case and shall affect the Fuel Charge offered by each Bidder. The Bid for the Project shall, therefore, comprise the Fixed Charge and Fuel Charge, which shall be specified separately, and the Bidder seeking the lowest Tariff shall be the Selected Bidder.

#### 4. FRAUD AND CORRUPT PRACTICES

- 4.1 The Bidders and their respective officers, employees, agents and advisers shall observe the highest standard of ethics during the Bidding Process and subsequent to the issue of the LOA and during the subsistence of the PSA. Notwithstanding anything to the contrary contained herein, or in the LOA or the PSA, the Utility may reject a Bid, withdraw the LOA, or terminate the PSA, as the case may be, without being liable in any manner whatsoever to the Bidder or Supplier, as the case may be, if it determines that the Bidder or Supplier, as the case may be, has, directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice in the Bidding Process. In such an event, the Utility shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Utility under the Bidding Documents and/ or the PSA, or otherwise.
- 4.2 Without prejudice to the rights of the Utility under Clause 4.1 hereinabove and the rights and remedies which the Utility may have under the LOA or the PSA, or otherwise if a Bidder or Supplier, as the case may be, is found by the Utility to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice during the Bidding Process, or after the issue of the LOA or the execution of the PSA, such Bidder or Supplier shall not be eligible to participate in any tender or RFP issued by the Utility during a period of 2 (two) years from the date such Bidder or Supplier, as the case may be, is found by the Utility to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practices, as the case may be.
- 4.3 For the purposes of this Clause 4, the following terms shall have the meaning hereinafter respectively assigned to them:
- (a) **"corrupt practice"** means (i) the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence the actions of any person connected with the Bidding Process (for avoidance of doubt, offering of employment to or employing or engaging in any manner whatsoever, directly or indirectly, any official of the Utility who is or has been associated in any manner, directly or indirectly, with the Bidding Process or the LOA or has dealt with matters concerning the PSA or arising therefrom, before or after the execution thereof, at any time prior to the expiry of one year from the date such official resigns or retires from or otherwise ceases to be in the service of the Utility, shall be deemed to constitute influencing the actions of a person connected with the Bidding Process); or (ii) save and except as permitted under the Clause 2.1.15 of this RFP, engaging in any manner whatsoever, whether during the Bidding Process or after

the issue of the LOA or after the execution of the PSA, as the case may be, any person in respect of any matter relating to the Project or the LOA or the PSA, who at any time has been or is a legal, financial or technical adviser of the Utility in relation to any matter concerning the Project;

- (b) **"fraudulent practice"** means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Bidding Process;
- (c) **"coercive practice"** means impairing or harming, or threatening to impair or harm, directly or indirectly, any person or property to influence any person's participation or action in the Bidding Process;
- (d) **"undesirable practice"** means (i) establishing contact with any person connected with or employed or engaged by the Utility with the objective of canvassing, lobbying or in any manner influencing or attempting to influence the Bidding Process; or (ii) having a Conflict of Interest; and
- (e) **"restrictive practice"** means forming a cartel or arriving at any understanding or arrangement among Bidders with the objective of restricting or manipulating a full and fair competition in the Bidding Process.

## 5. PRE-BID CONFERENCE

- 5.1 Pre-Bid conferences of the Bidders shall be convened at the designated date, time and place. Only those persons who have purchased the RFP document shall be allowed to participate in the Pre-Bid Conferences. A maximum of five representatives of each Bidder shall be allowed to participate on production of authority letter from the Bidder.
- 5.2 During the course of Pre-Bid conference(s), the Bidders will be free to seek clarifications and make suggestions for consideration of the Utility. The Utility shall endeavour to provide clarifications and such further information as it may, in its sole discretion, consider appropriate for facilitating a fair, transparent and competitive Bidding Process.



## 6. MISCELLANEOUS

- 6.1 The Bidding Process shall be governed by, and construed in accordance with, the laws of India and the Courts at Thiruvananthapuram shall have exclusive jurisdiction over all disputes arising under, pursuant to and/ or in connection with the Bidding Process.
- 6.2 The Utility, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to;
- (a) suspend and/ or cancel the Bidding Process and/ or amend and/ or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto;
  - (b) consult with any Bidder in order to receive clarification or further information;
  - (c) retain any information and/ or evidence submitted to the Utility by, on behalf of, and/ or in relation to any Bidder; and/ or
  - (d) independently verify, disqualify, reject and/ or accept any and all submissions or other information and/ or evidence submitted by or on behalf of any Bidder.
- 6.3 It shall be deemed that by submitting the Bid, the Bidder agrees and releases the Utility, its employees, agents and advisers, irrevocably, unconditionally, fully and finally from any and all liability for claims, losses, damages, costs, expenses or liabilities in any way related to or arising from the exercise of any rights and/ or performance of any obligations hereunder, pursuant hereto and/ or in connection with the Bidding Process and waives, to the fullest extent permitted by applicable laws, any and all rights and/ or claims it may have in this respect, whether actual or contingent, whether present or in future.
- 6.4 The Bidding Documents and RFQ are to be taken as mutually explanatory and, unless otherwise expressly provided elsewhere in this RFP, in the event of any conflict between them the priority shall be in the following order:
- (a) the Bidding Documents; (b) the RFQ.
- i.e. the Bidding Documents at (a) above shall prevail over the RFQ at (b) above.

## APPENDIX – I

### Letter comprising the Bid (Refer Clauses 2.1.5 and 2.14)

Dated:

To

The Chief Engineer (Commercial & Tariff),  
Vydyuthi Bhavanam,  
Pattom, Thiruvananthapuram.

Sub: Bid for “Procurement of 450 MW Electricity on DBFOO basis”.

Dear Sir,

With reference to your RFP document dated ..... \$, I/we, having examined the Bidding Documents and understood their contents, hereby submit my/our Bid for the aforesaid Project. The Bid is unconditional and unqualified.

2. I/ We acknowledge that the Utility will be relying on the information provided in the Bid and the documents accompanying the Bid for selection of the Supplier for the aforesaid Project, and we certify that all information provided therein is true and correct; nothing has been omitted which renders such information misleading; and all documents accompanying the Bid are true copies of their respective originals.
3. This statement is made for the express purpose of our selection as Supplier for the development, construction, operation and maintenance of the aforesaid Project and for sale of power to the Utility.
4. I/ We shall make available to the Utility any additional information it may find necessary or require to supplement or authenticate the Bid.
5. I/ We acknowledge the right of the Utility to reject our Bid without assigning any reason or otherwise and hereby waive, to the fullest extent permitted by applicable law, our right to challenge the same on any account whatsoever.
6. I/ We certify that in the last three years, we/ any of the Consortium Members<sup>E</sup> or our/ their Associates have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award, nor been expelled from any project or contract by any public authority nor have had any contract terminated by any public authority for breach on our part.

<sup>\$</sup> All blank spaces shall be suitably filled up by the Bidder to reflect the particulars relating to such Bidder.

<sup>E</sup> If the Bidder is not a Consortium, the provisions applicable to Consortium may be omitted.

7. I/ We declare that:
  - (a) I/ We have examined and have no reservations to the Bidding Documents, including any Addendum issued by the Utility; and
  - (b) I/ We do not have any conflict of interest in accordance with Clauses 2.1.14 and 2.1.15 of the RFP document; and
  - (c) I/ We have not directly or indirectly or through an agent engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice, as defined in Clause 4.3 of the RFP document, in respect of any tender or request for proposal issued by or any agreement entered into with the Utility or any other public sector enterprise or any government, Central or State; and
  - (d) I/ We hereby certify that we have taken steps to ensure that in conformity with the provisions of Section 4 of the RFP, no person acting for us or on our behalf has engaged or will engage in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice; and
  - (e) the undertakings given by us along with the Application in response to the RFQ for the Project were true and correct as on the date of making the Application and are also true and correct as on the Bid Due Date and I/we shall continue to abide by them.
8. I/ We understand that you may cancel the Bidding Process at any time and that you are neither bound to accept any Bid that you may receive nor to invite the Bidders to Bid for the Project, without incurring any liability to the Bidders, in accordance with Clause 2.16 of the RFP document.
9. I/ We believe that we/ our Consortium satisfy(s) the Net Worth criteria and meet(s) the requirements as specified in the RFQ document.
10. I/ We declare that we/ any Member of the Consortium, or our/ its Associates are not a Member of a/ any other Consortium submitting a Bid for the Project.
11. I/ We certify that in regard to matters other than security and integrity of the country, we/ any Member of the Consortium or any of our/ their Associates have not been convicted by a Court of Law or indicted or adverse orders passed by a regulatory authority which could cast a doubt on our ability to undertake the Project or which relates to a grave offence that outrages the moral sense of the community.

12. I/ We further certify that in regard to matters relating to security and integrity of the country, we/ any Member of the Consortium or any of our/ their Associates have not been charge-sheeted by any agency of the Government or convicted by a Court of Law.
13. I/ We further certify that no investigation by a regulatory authority is pending either against us or against our Associates or against our CEO or any of our directors/ managers/ employees<sup>E</sup>.
14. I/ We further certify that we are not disqualified in terms of the additional criteria specified by the Department of Disinvestment in their OM No. 6/4/2001-DD-II dated July 13, 2001, a copy of which forms part of the RFP at Appendix-V thereof.
15. I/ We undertake that in case due to any change in facts or circumstances during the Bidding Process, we are attracted by the provisions of disqualification in terms of the guidelines referred to above, we shall intimate the Utility of the same immediately.
16. I/ We acknowledge and undertake that our Consortium was pre-qualified and short-listed on the basis of Technical Capacity and Financial Capacity of those of its Members who shall, for a period of 2 (two) years from the date of commercial operation of the Project, hold equity share capital not less than: (i) 26% (twenty six per cent) of the subscribed and paid-up equity of the Supplier; and (ii) 5% (five per cent) of the Total Project Cost specified in the PSA. We further agree and acknowledge that the aforesaid obligation shall be in addition to the obligations contained in the PSA in respect of Change in Ownership.
17. I/ We acknowledge and agree that in the event of a change in control of an Associate whose Technical Capacity and/ or Financial Capacity was taken into consideration for the purposes of short-listing and pre-qualification under and in accordance with the RFQ, I/We shall inform the Utility forthwith along with all relevant particulars and the Utility may, in its sole discretion, disqualify our Consortium or withdraw the Letter of Award, as the case may be. I/We further acknowledge and agree that in the event such change in control occurs after signing of the PSA but prior to Financial Close of the Project, it would, notwithstanding anything to the contrary contained in the Agreement, be deemed a breach thereof, and the PSA shall be liable to be terminated without the Utility being liable to us in any manner whatsoever.

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<sup>E</sup> In case the Bidder is unable to provide the certification specified in para 13, it may precede the paragraph by the words, viz. "Except as specified in Schedule \*\*\*\* hereto". The exceptions to the certification or any disclosures relating thereto may be clearly stated in a Schedule to be attached to the Application. The Utility will consider the contents of such Schedule and determine whether or not the exceptions/disclosures are of a nature that could cast a doubt on the ability or suitability of the Bidder to undertake the Project.

18. I/ We understand that the Selected Bidder shall either be an existing Company incorporated under the Indian Companies Act, 1956 / 2013, or shall incorporate as such prior to execution of the PSA. In case where the Utility has already established an SPV for the Project, the Selected Bidder shall acquire the entire equity thereof.
19. I/ We hereby irrevocably waive any right or remedy which we may have at any stage at law or howsoever otherwise arising to challenge or question any decision taken by the Utility in connection with the selection of the Bidder, or in connection with the Bidding Process itself, in respect of the above mentioned Project and the terms and implementation thereof.
20. In the event of my/ our being declared as the Selected Bidder, I/we agree to enter into a PSA in accordance with the draft that has been provided to me/us prior to the Bid Due Date. We agree not to seek any changes in the aforesaid draft and agree to abide by the same.
21. I/ We have studied all the Bidding Documents carefully. We understand that except to the extent as expressly set forth in the PSA, we shall have no claim, right or title arising out of any documents or information provided to us by the Utility or in respect of any matter arising out of or relating to the Bidding Process including the award of Contract.
22. I/ We offer a Bid Security of Rs. .... (Rupees ..... only) to the Utility in accordance with the RFP Document.
23. The Bid Security in the form of a Demand Draft/ Bank Guarantee (strike out whichever is not applicable) is attached.
24. The documents accompanying the Bid, as specified in Clause 2.11.2 of the RFP, have been submitted in a separate envelope and marked as "Enclosures of the Bid".
25. I/ We agree and understand that the Bid is subject to the provisions of the Bidding Documents. In no case, I/we shall have any claim or right of whatsoever nature if the Project / Contract is not awarded to me/us or our Bid is not opened or rejected.
26. The Tariff has been quoted by me/us after taking into consideration all the terms and conditions stated in the RFP, draft PSA, our own estimates of costs and revenues, and after a careful assessment of the site and all the conditions that may affect the project cost and implementation of the project.
27. I/ We agree and undertake to abide by all the terms and conditions of the RFP document.

28. {We, the Consortium Members agree and undertake to be jointly and severally liable for all the obligations of the Supplier under the PSA till occurrence of Financial Close in accordance with the PSA.}
29. I/ We undertake to feed electric supply into the grid at a point that is economical and efficient, as determined by the RLDC or SLDC, as the case may be.
30. I/ We undertake to bear the transmission charges and transmission losses upto the point of delivery of electricity to the Utility from out of the Tariff offered below and in accordance with the terms to be set forth in the Power Supply Agreement.
31. I/ We shall keep this offer valid for 120 (one hundred and twenty) days from the Bid Due Date specified in the RFP.
32. I/ We hereby submit the following Bid and offer, as on the Bid Due Date, in accordance with the provisions of the PSA and Clause 3.5 of this RFP, -
- A Tariff of Rs. .... (Rupees ..... and paise .....)  
comprising a Fixed Charge of Rs. .... (Rupees ..... and paise .....<sup>\$</sup>) per kWh and a Fuel Charge of Rs. .... (Rupees ..... and paise .....<sup>\$</sup>) per kWh as on the Bid Due Date on the express understanding that the Lowest Bidder shall be selected on the basis of the lowest Tariff offered.
33. I/ We also declare the following details of project from which power is proposed to be offered.
- (a) Name of Power Station :  
(b) Quantum of power offered :

In witness thereof, I/we submit this Bid under and in accordance with the terms of the RFP document.

Yours faithfully,

Date: (Signature, name and designation of the Authorised Signatory)

Place: Name and seal of the Bidder/ Lead Member

Note: Paragraphs in curly parenthesis may be omitted by the Bidder, if not applicable to it, or modified as necessary to reflect Bidder-specific particulars.

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<sup>\$</sup> Paise may be quoted only in whole numbers.

## APPENDIX – II

**Bank Guarantee for Bid Security***(Refer Clauses 2.1.7 and 2.20.1)*

BG. No.

Dated:

1. In consideration of you, the Kerala State Electricity Board Limited, having its office at Vidyuthi Bhavanam, Pattom, Thiruvananthapuram – 695 004, (hereinafter referred to as the “Utility”, which expression shall unless it be repugnant to the subject or context thereof include its, successors and assigns) having agreed to receive the Bid of ..... (a company registered under the Companies Act, 1956 / 2013<sup>\$</sup>) and having its registered office at ..... (and acting on behalf of its Consortium<sup>Y</sup>) (hereinafter referred to as the “Bidder” which expression shall unless it be repugnant to the subject or context thereof include its/their executors, administrators, successors and assigns), for the Procurement of Electricity on DBFOO basis (hereinafter referred to as “the Project”) pursuant to the RFP Document dated 25-06-2014 issued in respect of the Project and other related documents including without limitation the draft PSA (hereinafter collectively referred to as “Bidding Documents”), we ..... (Name of the Bank) having our registered office at ..... and one of its branches at ..... (hereinafter referred to as the “Bank”), at the request of the Bidder, do hereby in terms of Clause 2.1.7 read with Clause 2.1.8 of the RFP Document, irrevocably, unconditionally and without reservation guarantee the due and faithful fulfilment and compliance of the terms and conditions of the Bidding Documents (including the RFP Document) by the said Bidder and unconditionally and irrevocably undertake to pay forthwith to the Utility an amount of Rs. ....(Rupees ..... only) (hereinafter referred to as the “Guarantee”) as our primary obligation without any demur, reservation, recourse, contest or protest and without reference to the Bidder if the Bidder shall fail to fulfil or comply with all or any of the terms and conditions contained in the said Bidding Documents.
2. Any such written demand made by the Utility stating that the Bidder is in default of the due and faithful fulfilment and compliance with the terms and conditions contained in the Bidding Documents shall be final, conclusive and binding on the Bank.

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<sup>\$</sup> A Bidder who is registered abroad may substitute the words, viz. of “a company registered under the Companies Act, 1956 / 2013” by the words, viz. “a company duly organized and validly existing under the laws of the jurisdiction of its incorporation”.

<sup>Y</sup> Omit if the Bidder is not a Consortium.

3. We, the Bank, do hereby unconditionally undertake to pay the amounts due and payable under this Guarantee without any demur, reservation, recourse, contest or protest and without any reference to the Bidder or any other person and irrespective of whether the claim of the Utility is disputed by the Bidder or not, merely on the first demand from the Utility stating that the amount claimed is due to the Utility by reason of failure of the Bidder to fulfill and comply with the terms and conditions contained in the Bidding Documents including failure of the said Bidder to keep its Bid open during the Bid validity period as set forth in the said Bidding Documents for any reason whatsoever. Any such demand made on the Bank shall be conclusive as regards amount due and payable by the Bank under this Guarantee. However, our liability under this Guarantee shall be restricted to an amount not exceeding Rs. .... (Rupees ..... only).
4. This Guarantee shall be irrevocable and remain in full force for a period of 180 (one hundred and eighty) days from the Bid Due Date inclusive of a claim period of 60 (sixty) days or for such extended period as may be mutually agreed between the Utility and the Bidder, and agreed to by the Bank, and shall continue to be enforceable till all amounts under this Guarantee have been paid.
5. We, the Bank, further agree that the Utility shall be the sole judge to decide as to whether the Bidder is in default of due and faithful fulfilment and compliance with the terms and conditions contained in the Bidding Documents including, *inter alia*, the failure of the Bidder to keep its Bid open during the Bid validity period set forth in the said Bidding Documents, and the decision of the Utility that the Bidder is in default as aforesaid shall be final and binding on us, notwithstanding any differences between the Utility and the Bidder or any dispute pending before any Court, Tribunal, Arbitrator or any other authority.
6. The Guarantee shall not be affected by any change in the constitution or winding up of the Bidder or the Bank or any absorption, merger or amalgamation of the Bidder or the Bank with any other person.
7. In order to give full effect to this Guarantee, the Utility shall be entitled to treat the Bank as the principal debtor. The Utility shall have the fullest liberty without affecting in any way the liability of the Bank under this Guarantee from time to time to vary any of the terms and conditions contained in the said Bidding Documents or to extend time for submission of the Bids or the Bid validity period or the period for conveying acceptance of Letter of Award by the Bidder or the period for fulfilment and compliance with all or any of the terms and conditions contained in the said Bidding Documents by the said Bidder or to postpone for any time and from time to time any of the powers exercisable by it against the said Bidder and either to enforce or forbear from enforcing any of the terms and conditions contained in the said Bidding



Documents or the securities available to the Utility, and the Bank shall not be released from its liability under these presents by any exercise by the Utility of the liberty with reference to the matters aforesaid or by reason of time being given to the said Bidder or any other forbearance, act or omission on the part of the Utility or any indulgence by the Utility to the said Bidder or by any change in the constitution of the Utility or its absorption, merger or amalgamation with any other person or any other matter or thing whatsoever which under the law relating to sureties would but for this provision have the effect of releasing the Bank from its such liability.

8. Any notice by way of request, demand or otherwise hereunder shall be sufficiently given or made if addressed to the Bank and sent by courier or by registered mail to the Bank at the address set forth herein.
9. We undertake to make the payment on receipt of your notice of claim on us addressed to ..... [Name of Bank along with branch address] and delivered at our above branch which shall be deemed to have been duly authorised to receive the said notice of claim.
10. It shall not be necessary for the Utility to proceed against the said Bidder before proceeding against the Bank and the guarantee herein contained shall be enforceable against the Bank, notwithstanding any other security which the Utility may have obtained from the said Bidder or any other person and which shall, at the time when proceedings are taken against the Bank hereunder, be outstanding or unrealised.
11. We, the Bank, further undertake not to revoke this Guarantee during its currency except with the previous express consent of the Utility in writing.
12. The Bank declares that it has power to issue this Guarantee and discharge the obligations contemplated herein, the undersigned is duly authorised and has full power to execute this Guarantee for and on behalf of the Bank.
13. For the avoidance of doubt, the Bank's liability under this Guarantee shall be restricted to Rs. .... crore (Rupees ..... crore only). The Bank shall be liable to pay the said amount or any part thereof only if the Utility serves a written claim on the Bank in accordance with paragraph 9 hereof, on or before ..... (indicate date falling 180 days after the Bid Due Date).

Signed and Delivered by .....Bank

By the hand of Mr./Ms. ...., its ..... and authorized official.

(Signature of the Authorised Signatory)

(Official Seal)

## APPENDIX – III

**Power of Attorney for signing of Bid***(Refer Clause 2.1.9)*

Know all men by these presents, we, ..... (name of the firm and address of the registered office) do hereby irrevocably constitute, nominate, appoint and authorise Mr. / Ms. .... (Name), son/daughter/wife of ..... and presently residing at ....., who is presently employed with us/ the Lead Member of our Consortium and holding the position of ....., as our true and lawful attorney (hereinafter referred to as the "Attorney") to do in our name and on our behalf, all such acts, deeds and things as are necessary or required in connection with or incidental to submission of our bid for the "Procurement of Electricity on DBFOO basis" proposed by the Kerala State Electricity Board Limited (the "Utility") and being developed by us, including but not limited to signing and submission of all applications, bids and other documents and writings, participate in bidders' and other conferences and providing information / responses to the Utility, representing us in all matters before the Utility, signing and execution of all contracts including the Power Supply Agreement and undertakings consequent to acceptance of our bid, and generally dealing with the Utility in all matters in connection with or relating to or arising out of our bid for the said Project and/or upon award thereof to us and/or till the entering into of the Power Supply Agreement with the Utility.

AND we hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this Power of Attorney and that all acts, deeds and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us.

IN WITNESS WHEREOF WE, ....., THE ABOVE NAMED PRINCIPAL HAVE EXECUTED THIS POWER OF ATTORNEY ON THIS ..... DAY OF ....., 20.....

For

.....

(Signature, name, designation and address)

Witnesses:

1.

2.

Accepted

.....

(Signature)

(Name, Title and Address of the Attorney)

Solemnly affirmed and signed before me in this the ..... day of ..... 2014  
in my office at ..... (Place).

Advocate and Notary

Notes:

- *The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.*
- *Wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders resolution/ power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.*
- *For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Bidders from countries that have signed the Hague Legislation Convention 1961 are not required to be legalised by the Indian Embassy if it carries a conforming Appostille certificate.*

## APPENDIX - IV

**Power of Attorney for Lead Member of Consortium***(Refer Clause 2.1.10)*

Whereas the Kerala State Electricity Board Limited (the "Utility") has invited bids from pre-qualified and short-listed parties for the "Procurement of Electricity on DBFOO basis" (the "Project").

Whereas, ....., ..... and .....(collectively the Consortium") being Members of the Consortium are interested in bidding for the Project in accordance with the terms and conditions of the Request for Proposal and other connected documents in respect of the Project, and

Whereas, it is necessary for the Members of the Consortium to designate one of them as the Lead Member with all necessary power and authority to do for and on behalf of the Consortium, all acts, deeds and things as may be necessary in connection with the Consortium's bid for the Project and its execution.

NOW THEREFORE KNOW ALL MEN BY THESE PRESENTS

We, .....having our registered office at ....., M/s. .... having our registered office at ....., and M/s. .... having our registered office at ....., (hereinafter collectively referred to as the "Principals") do hereby irrevocably designate, nominate, constitute, appoint and authorise M/s. .... having its registered office at ....., being one of the Members of the Consortium, as the Lead Member and true and lawful attorney of the Consortium (hereinafter referred to as the "Attorney") and hereby irrevocably authorise the Attorney (with power to sub-delegate) to conduct all business for and on behalf of the Consortium and any one of us during the bidding process and, in the event the Consortium is awarded the contract, during the execution of the Project and in this regard, to do on our behalf and on behalf of the Consortium, all or any of such acts, deeds or things as are necessary or required or incidental to the submission of its bid for the Project, including but not limited to signing and submission of all applications, bids and other documents and writings, accept the Letter of Award, participate in bidders' and other conferences, respond to queries, submit information/ documents, sign and execute contracts and undertakings consequent to acceptance of the bid of the Consortium and generally to represent the Consortium in all its dealings with the Utility, and/ or any other Government Agency or any person, in all matters in connection with or relating to or arising out of the Consortium's bid for the Project and/ or upon award thereof till the Power Supply Agreement is entered into with the Utility.

AND hereby agree to ratify and confirm and do hereby ratify and confirm all acts,

deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this Power of Attorney and that all acts, deeds and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us/ Consortium.

IN WITNESS WHEREOF WE THE PRINCIPALS ABOVE NAMED HAVE EXECUTED THIS POWER OF ATTORNEY ON THIS ..... DAY OF .....2.....

For .....

(Signature)

.....

(Name & Title)

For .....

(Signature)

.....

(Name & Title)

For .....

(Signature)

.....

(Name & Title)

(Executants)

(To be executed by all the Members of the Consortium)

Witnesses:

1.

2.

## Notes:

- *The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant (s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.*
- *Wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders' resolution/ power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.*
- *For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Applicants from countries that have signed the Hague Legislation Convention 1961 are not required to be legalised by the Indian Embassy if it carries a conforming Appostille certificate.*

## APPENDIX – V

**Guidelines of the Department of  
Disinvestment**

*(Refer Clause 1.2.1)*

No. 6/4/2001-DD-II  
Government of India  
Department of Disinvestment

Block 14, CGO Complex  
New Delhi.  
Dated 13<sup>th</sup> July 2001.

**OFFICE MEMORANDUM**

Sub: Guidelines for qualification of Bidders seeking to acquire stakes in Public Sector Enterprises through the process of disinvestment

Government has examined the issue of framing comprehensive and transparent guidelines defining the criteria for bidders interested in PSE-disinvestment so that the parties selected through competitive bidding could inspire public confidence. Earlier, criteria like net worth, experience etc. used to be prescribed. Based on experience and in consultation with concerned departments, Government has decided to prescribe the following additional criteria for the qualification/ disqualification of the parties seeking to acquire stakes in public sector enterprises through disinvestment:

- (a) In regard to matters other than the security and integrity of the country, any conviction by a Court of Law or indictment/ adverse order by a regulatory authority that casts a doubt on the ability of the bidder to manage the public sector unit when it is disinvested, or which relates to a grave offence would constitute disqualification. Grave offence is defined to be of such a nature that it outrages the moral sense of the community. The decision in regard to the nature of the offence would be taken on case to case basis after considering the facts of the case and relevant legal principles, by the Government of India.
- (b) In regard to matters relating to the security and integrity of the country, any charge-sheet by an agency of the Government/ conviction by a Court of Law for an offence committed by the bidding party or by any sister concern of the bidding party would result in disqualification. The decision in regard to the relationship between the sister concerns would be taken, based on the relevant facts and after examining whether the two concerns are substantially controlled by the same person/ persons.
- (c) In both (a) and (b), disqualification shall continue for a period that Government deems appropriate.
- (d) Any entity, which is disqualified from participating in the disinvestment

process, would not be allowed to remain associated with it or get associated merely because it has preferred an appeal against the order based on which it has been disqualified. The mere pendency of appeal will have no effect on the disqualification.

- (e) The disqualification criteria would come into effect immediately and would apply to all bidders for various disinvestment transactions, which have not been completed as yet.
- (f) Before disqualifying a concern, a Show Cause Notice why it should not be disqualified would be issued to it and it would be given an opportunity to explain its position.
- (g) Henceforth, these criteria will be prescribed in the advertisements seeking Expression of Interest (EOI) from the interested parties. The interested parties would be required to provide the information on the above criteria, along with their Expressions of Interest (EOI). The bidders shall be required to provide with their EOI an undertaking to the effect that no investigation by a regulatory authority is pending against them. In case any investigation is pending against the concern or its sister concern or against its CEO or any of its Directors/ Managers/ employees, full details of such investigation including the name of the investigating agency, the charge/ offence for which the investigation has been launched, name and designation of persons against whom the investigation has been launched and other relevant information should be disclosed, to the satisfaction of the Government. For other criteria also, a similar undertaking shall be obtained along with EOI.

Sd/-

(A.K. Tewari)

Under Secretary to the Government of India



## APPENDIX- VI

**LIST OF BID-SPECIFIC CLAUSES<sup>\$</sup>****A. Clauses and appendices with non-numerical footnotes**

1. Clause 2.9.3 : Amendment of RFP
2. Clause 3.5.2 (d) : Bid Parameter
3. Appendix-I : Letter comprising the Bid (Para 1, 6, 13 and 32)
4. Appendix-II : Bank Guarantee for Bid Security
5. Appendix VI : List of Bid-specific clauses

**B. Clauses and appendices with curly brackets**

1. Appendix-I : Letter Comprising the Bid (Para 28)

**C. Clauses and appendices with blank spaces**

1. Letter of invitation
2. Appendix-I : Letter comprising the Bid (Para 32)
3. Appendix-II : Bank Guarantee for Bid Security (Para 1 and signatures)
4. Appendix-III : Power of Attorney for signing of Bid
5. Appendix-IV : Power Of Attorney For Lead Member Of Consortium

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<sup>\$</sup> This Appendix-VI contains a list of clauses and appendices that would need to be suitably modified for reflecting Bidder-specific provisions. This Appendix-VI may, therefore, be included in the RFP document to be issued to prospective Bidders. The blank spaces in Appendices may be filled up by the Bidder and the footnotes may be deleted when it submits its proposal.

TRUE COPY

