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[Guidelines for Tariff Based Competitive Bidding Process for Procurement Power from Grid Connected Wind Power Projects](#)

On July 26, 2023 Ministry of Power (“**MoP**”) issued Guidelines for Tariff Based Competitive Bidding Process for Procurement Power from Grid Connected Wind Power Projects to provide a fair, standardized and transparent framework based on open competitive bidding with appropriate risk sharing between various stakeholders to enable procurement of power at competitive prices in consumer interest, improve bankability of projects and ensure reasonable returns to investors and to provide a framework for the interstate/ intra state, sale purchase of power as a further measure to de-risk the sector.

Applicability of these guidelines

These Guidelines are issued under provisions of section 63 of the Electricity Act 2003 for procurement of electricity by the distribution licensee(s), or their Authorized Representative, or an Intermediary Procurer (“**Procurer**”) from grid connected power projects having bid capacity of 10 MW and above for projects connected to intra state transmission system and for wind power projects having capacity of 50 MW and above for projects connected to inter-state transmission system.

Bid Structure

The Procurer shall invite the bids in Power Capacity (MW) terms with a minimum bid capacity. The Procurer may specify maximum capacity that can be allotted to single bidder including its affiliates.

Parameters for Bidding

For procurement of wind power, tariff quoted by the bidder shall be the bidding parameter. The Procurer may specify a benchmark tariff and the bidder in that case has to quote tariff not more than the benchmark tariff. The capacity allocation shall be on the basis of bucket filling i.e., capacity quoted by least quoted tariff bidder, then the capacity quoted by next lowest bidder bidder at the rates quoted may be allocated. For final selection of bidders Procurers may opt for e-reserve auction which shall be specifically mentioned in notice inviting bids. A maximum of 50 percent of total capacity as specified in the Request for Selection (“**Rfs**”) can be allocated to a single bidder.

Power Purchase Agreement

Draft Power Purchase Agreement (“**PPA**”) proposed to be entered into with successful bidder and draft of Power Sales Agreement (“**PSA**”) shall be issued along with the Rfs. The Draft of PPA shall include the PPA period which shall generally be for a period of 20 years from the scheduled commencement date of supply. PPA may also be for a longer period of



25 years. The duration of the PPA must be mentioned in the Rfs document. The developers who have commissioned wind power plants maybe given the longer period of PPA. PPA shall contain provisions with regards to Force Majure, Exclusions, Applicability and relief on account of Force Majure.

Bidding Process

The Procurer shall call for the bids adopting a single stage, two-part (Technical Bid and Financial Bid) bidding process, to be conducted through electronic mode. The technical bids shall be opened first and the financial bids of only those bidders who qualify in the technical bid shall be opened. The bidding documents including the Rfs, PPA and PSA shall be prepared by the Procurer in consonance with the guidelines and the Standard Bidding Documents (“SBDs”). The Procurer shall publish the Rfs notice in at least two national papers. The procurer shall provide opportunity for pre-bid conference to the prospective bidders and shall provide written interpretation of the bid documents to any bidder which shall be made available to all other bidders.

Bid Submission and Evaluation

Formation of consortium by the bidders shall be permitted, in which case the consortium shall identify a lead member which shall be the contract point for all correspondence during the bidding process. The procurer may specify technical and financial criteria and lock in requirements for the lead member of the consortium. The bidders shall be required to submit separate technical and price bids. Bidders shall also be required to furnish necessary bid-guarantee in the form of an Earnest Money Deposit along with the bids. The minimum number of qualified should be two to ensure competitiveness. The price bid shall be rejected if it contains any deviations from the bid conditions. The detailed procedure for evaluation of the bid and selection of the bidder shall be provided in the Rfs.

Contract award

The PPA shall be signed with the successful Bidder/ Project Company or a Special Purpose Vehicle (“SPV”) formed by the successful bidder. The Evaluation Committee constituted for evaluation of Rfs bids shall critically evaluate the bids and certify as appropriate that the bidding process and evaluation has been conducted in conformity to the provisions of the Rfs document. The evaluation authority should satisfy that the price of the selected offer is reasonable and consistent with the requirement.

Shareholding by the Promoter

The successful bidder, if being a single company shall ensure that its shareholding in the SPV/ project company executing the PPA shall not fall below 51% at any time prior to 1 year from the Scheduled Commencement-of-Supply Date (“SCSD”) except with prior approval of the Procurer. In the event the successful bidder is a consortium, then the combined shareholding of the consortium members in the SPV project company executing the PPA shall not fall below 51% at any time prior to 1 year from the SCSD, except with prior approval of the procurer. However, in case the successful bidder is itself executing the PPA, then in such case it shall ensure that promoter does not ceases control till one year from the SCSD except in cases where prior approval has been received by the procurer and the successful bidder shall also provide information about its promoters and their shareholding to the procurer before signing of the PPA with Procurer. Any change in the shareholding after the expiry of 1 year from SCSD shall be undertaken only after intimating to the Procurer. In cases where Wind Power Generator (“WPG”) is in default to the lenders, lenders shall be entitled to undertake ‘Substitution of Promoter’ in concurrence with the Procurers.



Power Supply Commencement

The projects shall commence supply of power within 24 months from the date of execution of PPA for project size below or equal to 1,000 MW and for project size more than 1,000 MW supply of power shall commence within 30 months from the date of execution.

Part commencement of supply of power from the project shall be accepted by Procurer subject to a condition that the minimum capacity for acceptance of first part shall be 50 % of project capacity or 50 MW, whichever is lower. However, in case of inter-state project, first part for acceptance of commencement of supply of power shall be at least 50 MW. The projects can further commence supply of power in parts of at least 10 MW capacity with last part as the balance capacity. The WPG shall be permitted for commencement of supply from full as well as part capacity of the project even prior to the SCSD subject to availability of transmission connectivity and long-term access. In cases where there has been delay in commencement of supply of power beyond the SCSD penalties may be levied on WPG.

Transmission Connectivity

The responsibility of getting transmission connectivity to ISTS network under ISTS network under GNA regulation will lie with the Generator and shall be at the cost of Generator. The metering points which are the points at which energy is supplied to the procurer shall be measured, shall be the low voltage side of the CTU/STU substitution. The metering point is the ISTS pooling station with which the internal transmission from all the pooling substations is connected. All expenses including wheeling charges and losses between the project and losses in relation transmission and distribution beyond the metering point shall be borne by the procurers as per the regulation notified by the Commission from time to time.

Role of State Nodal Agencies

The state nodal agency appointed by respective state government will provide necessary support to facilitate supply of power from the projects within the time bound manner. The Agency will coordinate among various state and central agencies for speedy implementation of projects and will provide support during commencement of supply of power from the projects.

Performance Monitoring

WPG shall install necessary equipment to continuously measure wind resource data and other wind parameters and electrical parameters from each wind turbine. They are required to submit this data through an online portal to National Institute of Wind Energy for monitoring the performance for the entire life of wind turbine.

Deviation from process defined in the guidelines

In case the Procurer deviates from these guidelines the deviation shall be subject to approval by the Appropriate Government before the initiation of bidding process itself. The appropriate Government may order the required amendment within a reasonable time not exceeding 60 days.

Clarification and Modification to Guidelines

In case there is a hinderance in execution or interpretation of provision of these guidelines, The Ministry of Power is empowered to do the same in consultation with Ministry of New and Renewable energy.



ISTS Charges and losses

ISTS charges and losses on transmission of power, including waiver for wind power, shall be as per extant rules and regulations.

CASE SUMMARY

Case Name : Paschimachal Vidyut Vitran Nigam Ltd. v. Raman Ispat Private Limited & Ors. 2023 SCC OnLine SC 842

Court Name : Supreme Court of India

Judgment Dated : July 17, 2023

FACTS OF THE CASE

1. Paschimachal Vidyut Vitran Nigam Ltd. (“**PVVNL**”) entered into an agreement with Raman Ispat Private Limited (“**RIPL**”) in 2010 to supply electricity. As per the terms of the Agreement, if the dues with respect to electricity supplied are not paid by RIPL, the same would constitute charge on the assets of RIPL.
2. In 2016, some of the electricity bills raised on RIPL by PVVNL remain unpaid. PVVNL attached the properties of RIPL. In furtherance to it, the Tehsildar, Muzaffarnagar restrained transfer of said property by sale, donation or any other mode.
3. In 2017, a Corporate Insolvency Resolution Process (“**CIRP**”) was initiated against RIPL as per the provisions of Insolvency and Bankruptcy Law, 2016 (“**IBC**”). In 2018, a liquidation order was passed by the National Company Law Tribunal (“**NCLT**”) and RIPL went into liquidation.
4. Upon the order of liquidation by NCLT, the District Collector issued notice for auction of movable and immovable properties of RIPL in order to recover the outstanding dues from RIPL to PVVNL.
5. The liquidator, before the NCLT, claimed that until NCLT overturns the attachment and auction orders issued by the Tehsildar of Muzaffarnagar and the District Collector, the liquidation of RIPL could not proceed. The liquidator further argued that PVVNL shall be considered as operational creditor for the purpose of settlement of its claim against RIPL and that the property so attached shall be sold and distributed as per the provisions of the IBC.
6. The NCLT directed the release of the attached property and held that the PVVNL shall be operation creditor for the purpose of liquidation proceeding as per the provision of IBC.



7. Aggrieved by the order of NCLT, PVVNL approached National Company Law Appellate Tribunal (“NCLAT”), which did not find any merit in the appeal and therefore dismissed it. Hence, the PVVNL approached Hon’ble Supreme Court of India for the adjudication of the various issues involved.

ISSUES BEFORE THE COURT

- A. What shall be the appropriate place of secured creditors who choose or not choose the relinquishment of their security interest in the waterfall mechanism provided in Section 53 of the IBC?
- B. Whether the dues payable by RIPL to PVVNL constitutes ‘government dues’ as spelt in Section 53(1)(e) of the IBC?
- C. Whether the IBC overrides the Electricity Act, 2003?

HELD BY THE HON’BLE SUPREME COURT OF INDIA

1. The Hon’ble Supreme Court while explaining the waterfall mechanism enumerated in Section 53 of the IBC have stated that in order of priority, the provision places government debts and operational debts at a lower priority than the dues owed to unsecured financial creditors. The Hon’ble Supreme Court emphasized on Section 52 of IBC which gives secured creditors the options of relinquishing their rights or enforcing their rights. If the secured creditor chooses the latter, they must first state their choice within the allotted window of time to the liquidator under Section 52(2) of IBC. In accordance with Section 52(3) of the IBC, the liquidator may then allow the secured creditor to realise any debts that exist as security debts. The secured creditor may seek to enforce its claim under Section 52(4) of the IBC after receiving approval from the liquidator.
2. The Hon’ble Supreme Court stated that the procedure provided in the framework of IBC has a different approach to secured creditors who choose amongst the two options of relinquishment and enforcement. The secured creditors who choose relinquishment is ranked higher in priority and the secured creditors who choose enforcement are ranked lower in the priority list. The relevant extract of the judgment is reproduced below:

“those opting to ‘stand out’ and enforce security interest, are permitted to do so; in the event of excess recovery,

they have to intimate and hand over such excess for distribution in liquidation proceeding; in case they are unable to recover their dues, for such of the dues as are outstanding, such secured creditors are ranked low.”

3. There was a contention before the Hon’ble Supreme Court that the dues owned to PVVNL were technically owned to ‘government’ and thus should occupy a lower position in the order of priority as compared to class of creditors categorized in clause (a) to (d) of Section 53(1) of IBC. The Hon’ble Supreme Court explained that the expression “government dues” has not been defined in IBC but has been spelt in Section 53 (1)(e) as “Any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of the State.” The Hon’ble Supreme Court observed that such dues rank lower in priority to the different class of creditors in the waterfall mechanism.
4. Further, the Hon’ble Supreme Court noted that there exists a separate category even if any dues if owned to the government. Any dues owned to statutory corporation would not automatically fall under the category of ‘government dues’ for the purpose of waterfall mechanism in IBC. If such dues to statutory corporations do not constitute dues payable into the respective consolidated funds of government, such corporations may be secured or unsecured creditors depending on the nature of the transaction.
5. In so far as PVVNL was concerned, the Hon’ble Supreme Court stated PVVNL unquestionably involves the government, but that does not make it a government or a instrumentality of the government. The Hon’ble Supreme Court noted that the electricity generation, transmission and distribution have all been liberalized and resultantly the licenses for the same can be held by private entities as well with some exceptions. The functions of PVVNL can be duplicated by other organizations, both public and private. Hence, it was held that the payments made to PVVNL do not meet the criteria set forth in Section 53(1)(e) of the IBC and PVVNL shall be categorized as secured creditor who have option to relinquish or enforce its security interest in the assets of RIPL.



6. In the given circumstances, the Hon'ble Supreme Court categorically held that the IBC shall override the provisions of the Electricity Act, 2003 even if there exists a non-obstacle clause in it i.e., Sections 173 and 174 of the Electricity Act, 2003.
7. The Hon'ble Supreme Court directed the liquidator to decide the claim of PVVNL in the manner required by law.

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Warm Regards,

Dipali Sarvaiya Sheth

Founder



D-226, Neelkanth Business Park,

Vidyavihar (West), Mumbai– 400086

Email: contact@eternitylegal.com Tel no.: +91 22 2515-9001

Website: www.eternitylegal.com