

cost of transmission charge (in Rs./unit) for Projects connected to network other than Gujarat STU (after grossing up at normative availability level), based on the prevailing NLDC notified charges (for Inter-State Transmission Network) and Bidders shall be required to quote the same while submitting the bid.

Further, the ISTS losses are applicable on drawal side and Utility shall pre-specify transmission losses (in %) (ISTS network) to be quoted by Bidder while submitting the bid online on DEEP Portal while variation thereafter shall be adjusted in tariff as per the Bid Documents in reference to the rate quoted by the bidders as on bid due date. Transmission losses (in Rs./unit) is to be quoted by Bidder based on ISTS losses (in %) pre-specified by Utility.

Whereas, those projects which are connected to Gujarat STU, no transmission charges & losses would be applicable. Accordingly, cost of transmission charge & transmission loss for Project connected with Gujarat STU shall be considered as NIL for the purpose of bid submission.

In accordance with the modality incorporated under the RFP for Bid Parameters (as stated in detail at Point (e) above), GUVNL has appropriately modified the provision of PSA. Further, clarification has been added that in case, Utility is required to pay the transmission charges (to PGCIL) on behalf of Supplier, the Supplier shall be responsible for reimbursing same to Utility or Utility is authorized to adjust the same from monthly Energy Bills.

Moreover, the Model Bidding Documents does not explicitly provide for sharing of transmission cost in the event the availability declared by Supplier is less than normative availability to Utility. Therefore, the transmission charge burden being sunk cost, in order to ensure that Supplier adopts prudent utility practice and ensures availability of power from project, Petitioner has incorporated a new clause (as 21.13 under PSA) as per which in case the availability of Supplier reduces below Normative Availability during the month, the applicable transmission cost burden for such shortfall would be passed on to the Supplier:



***“21.13. Adjustment of Transmission Charges based on Availability:***

*In the case where the actual availability of the Supplier at Delivery Point is less than the Normative Availability during a month, then Supplier shall be obliged to bear the cost of actual applicable transmission charge for the respective month for shortfall i.e. difference between Normative Availability & Actual Availability.*

**g. The Supply Contract (PSA – Clause 3.1)**

**MBD:** Not earlier than **3 years** and no later than **2 years** prior to completion of the contract period, Utility and Supplier are entitled to issue notice for extending the Contract Period by 5 years.

**Revised:** In view of the Contract Period under the proposed tender being 15 years, the above time period with regard to extension has been reduced to “not earlier than **1 year** and no later than **6 months**”. Further, the fuel being arranged by Petitioner (Utility), the proposal of extension, if any, would be required to be initiated by the Petitioner taking into consideration the power requirement & fuel availability and therefore the provision regarding entitlement of Supplier seeking extension in contract period has been deleted.

**h. Extension of Contract Period (Clause 3.2 – PSA)**

**MBD:** In case the contract is not extended by Utility, it shall pay damages to Supplier on lump sum basis at the rate of fixed charge for the foregone period (i.e. period not extended).

**Revised:** In the bid to be invited by the Petitioner (Utility), the contract period is pre-defined i.e. 15 years and extension in contract period is allowed upto 5 years subject to PSA provisions. Further, as the fuel is arranged by the Utility under SHAKTI Scheme and operational projects are also allowed to participate, any extension would be contingent to coal availability, operational factors relevant at that time and power requirement of the Petitioner. Accordingly, the above clause 3.2 has been deleted in order to avoid cost implication on Utility in the event of non-extension of contract period.



**i. Conditions Precedent (Clause 4.1 – PSA)**

**MBD:** Conditions Precedent required to be satisfied by the Supplier within a period of 180 days from the date of signing Power Supply Agreement (PSA).

**Revised:** It is to mention that Ministry of Environment, Forest and Climate Change (MoEF), Govt. of India vide notification dated 7.12.2015 has notified revised environment norms to be complied by thermal power plants originally by Dec 2021 / March 2022. The emission norms compliance timelines has been extended by MoEF upto 2023 / 2024.

Under the bid to be floated by the Petitioner, various operational projects are anticipated to participate. As the level of compliance met by various projects could be different based on technology and CAPEX incurred, the tariff component to be quoted by any bidder would be contingent to cost incurred, if any.

In order to remove anomaly towards the same, Petitioner has incorporated an additional clarification as Point (J) under Clause 4.1.3 (Conditions subsequent to be satisfied by Supplier within 180 days from date of signing PSA) regarding Undertaking to be submitted by Bidders for compliance to norms, permits and guidelines as notified by Govt. of India as on Bid Due Date including revised norms specified by Ministry of Environmental and Forest, Govt. of India vide notification dated 7.12.2015 & subsequent amendments thereof. Further, it has been clarified that Petitioner (Utility) shall not be liable for any cost implication towards thereof. The draft of Undertaking would be shared by the Petitioner to maintain uniformity inter-se amongst bidders while submission of such Undertaking.

**New Clause 5.10 – PSA: Impact of additional expenditure due towards compliance to revised Environmental norms**

*“It is to clarify that any impact on Tariff on account of compliance to environmental norms as applicable / notified as on Bid Due Date shall be on account of the Supplier at all times during the contract period and the same shall not qualify for adjustment in Tariff under Change in Law provisions.”*



**j. Fixed Charge for supply prior to COD (PSA – Clause 14.1.2)**

**MBD:** In the event COD is achieved prior to the Scheduled Completion Date, the Supplier shall be payable 70% of Base Fixed Charge for such period (for maximum 365 days)

**Revised:** In this regard, the fuel arrangement under the agreement is based on the coal allocation from CIL / subsidiaries. Accordingly, the date of commencement of supply would be as indicated by Petitioner prior to the Bid Due Date, based on commencement of coal supply under linkage. Accordingly, the above provision with regard to payment of fixed charge for supply prior to COD has been deleted.

**k. Open Capacity (PSA – Clause 18.4):**

**MBD:** 20% of Contracted Capacity & Committed Capacity shall be Open Capacity under this Agreement i.e. available to the Supplier for production and supply of electricity to any person.

**Revised:** Under the above bid, the concessional fuel from Coal India / Subsidiaries is being arranged & allocated by the Petitioner with allocation from SHAKTI Scheme. Accordingly, concept of Open Capacity from Power Plant at the disposal of Supplier has been deleted in order to ensure availability of contracted capacity with the Petitioner (Utility) and prudent use of concessional fuel.

**l. Substitute Supply (PSA – Clause 18.6):**

**MBD:** When Availability of Power Station is reduced due to Scheduled / Unscheduled Maintenance or Force Majeure, Supplier with prior consent of Utility, which consent the Utility may deny or accept with conditions, supply electricity from any alternative source, including Merchant Capacity, if any, and such supply shall, for payment of Fixed Charge and Fuel Charge be deemed to be supply under the Agreement.

**Revised:** The Petitioner under Clause 2.7 of RFQ has incorporated additional condition regarding the ineligibility for certain Projects/ Bidder with whom litigations of the Petitioner are pending.

In line with the same, under above Clause 18.6, the Petitioner has added clarification that it may deny to accept supply from such



alternative source which is ineligible in accordance with Clause 2.7 of RFQ and therefore the same shall not be considered as compliance for the purpose of determination of availability and payment of Fixed Charge.

**m. Termination due to failure to achieve Financial Close (PSA – Clause 20.2):**

**MBD:** In the event Financial closure does not occur within the provided timeline (180 days from signing of PSA), Agreement shall be deemed to have been terminated by mutual agreement. Further, Utility shall be entitled to encash the Bid Security.

**Revised:** In this regard, it is to mention that Bid Security (Rs 5 Lakh / MW) submitted by Bidder shall remain valid for period of 180 days (inclusive 60 days claim period). Further, successful bidders shall be required to submit Performance Security (Rs 30 Lakh / MW) upon which Bid Security submitted will be released by Utility. Accordingly, considering the timelines of events, in the above clause regarding encashment of Bid security upon failure to achieve financial close, the term “**Bid Security**” has been modified to “**Bid Security / Performance Security, as the case may be**” to safeguard the interest of the Petitioner (Utility).

**n. Billing & Payment (Clause 21.10 – PSA) and Discount for early payment (Clause 21.12 – PSA)**

**MBD:** Monthly Invoice to be raised by the Supplier by 5<sup>th</sup> day of the month. Utility entitled to 1% rebate for payment within 5 days of submission of invoice. MBD does not provide clarification with regard to Regional Energy Account & State Energy Account which is essential for energy accounting and settlement. Further, there is no mention of Supplementary Invoice towards Change in Law, other claims etc.

**Revised:** In order to provide clarification with regard to raising of Monthly Invoice / Supplementary Invoice and discount for early payment, following modifications have been carried out by Petitioner.

**(a) Clarification regarding Regional and State Energy Account for raising of Energy Invoices**





- (b) Definition added: Supplementary Invoice - means an Invoice other than a Monthly Invoice raised by any of the Parties in accordance with provisions under this Agreement
- (c) Clarification: The Payment Due Date of 30 days applicable to Monthly Invoice shall also be applicable for the Supplementary Invoice.
- (d) Modification: 2% rebate shall be allowed to the Petitioner towards discount for early payment for payment within 7 working days from the Date of receipt of Invoice (T0+ 7 days)
- (e) Clarification: Discount for early payment (2%) shall not be applicable on the invoices raised on account of Change in Law relating to taxes, duties, cess etc.
- (f) Modification: Supplier may raise invoices via email shall during office hours subject to submission of original invoice to the Petitioner within 5 working days.

**o. Station Heat Rate (Clause 22.1 – PSA)**

**MBD:** Station Heat Rate is to be pre-specified by Utility while inviting the bids based on which the bidders would be required to quote their Tariff. Further, as a part of compliance towards achieving Commercial Operation, projects / units would be required to demonstrate fulfilment of SHR by performing tests which shall be considered successful only in case tests establish that SHR is equal to lower than SHR pre-specified by Utility (upto 2 % variation allowed).

As per MBD, SHR is to be considered after accounting for applicable dedicated transmission losses and Auxiliary consumption.

Prospective bidders have submitted that it would not be feasible to achieve the pre-specified SHR i.e. 2350 kcal/kwh by old/ operational plants as the same is after considering the Auxiliary consumption and dedicated transmission losses. Considering the same, bidders have requested to increase the SHR upto 2500 kcal / kwh to enable participation from sub critical units and provide level playing field.



**Revised:** As per the Petitioner Bid documents, all plants (irrespective of commissioning status) would be required to demonstrate that the actual SHR is equal to or below the SHR pre-specified by the Petitioner while inviting the bid after carrying out the stipulated tests. PSA also provides for adjustment in fixed charge in case of variation in SHR with reference to pre-specified / actual SHR in accordance with the provisions of the PPA.

As per the provision of MBD, the Petitioner is required to pre-specify the Station Heat Rate for the purpose of participation by the prospective bidders. In order to encourage better participation from all categories of units including sub-critical, Petitioner has pre-specified the SHR as 2450 kcal/kwh which shall have to be taken into consideration by the bidders while submitting the bids.

**p. Determination of Gross Calorific Value (Clause 22.3 – PSA)**

**MBD:** Weighted average GCV of fuel received at power station shall be considered as average GCV which would be worked out based on classification provided by CIL under FSA for computation of Fuel Charge for payment.

**Revised:** As per the tender documents, for the purpose of fuel cost working the GCV as well as coal cost as specified under the FSA shall be applicable at all times and any additional burden in this behalf shall have to be borne by Supplier at all times. However, there is no provision under PSA with regard to adjustment GCV towards variation due to storage.

As per CERC Tariff Regulations 2019-24, for Energy Charge working, Calorific value of coal is worked out based on Weighted Average GCV of coal as received less 85 Kcal/Kg on account of variation during storage at generating station. Accordingly, Petitioner has proposed to allow the similar adjustment to the tune of 85 kcal/kg towards GCV adjustment in line with CERC Regulation for variation due to storage at generating station.

**q. Additional Fuel Supply Agreement (AFSA) – (PSA – Clause 22.9)**

**MBD:** In the event of Fuel Shortage, Supplier shall make best efforts to tie up additional source of fuel supply and transportation to meet



Fuel Shortage through AFSA. The Supplier shall, with the concurrence of Utility submit the AFSA for review and approval of the Appropriate Commission.

**Revised:** The tie up of additional fuel under AFSA would necessitate analysis and evaluation of landed cost by the Petitioner (Utility) in addition to terms of fuel supply to confirm the prudent practice in coal procurement. Accordingly, the above clause has been modified providing that Supplier shall submit AFSA for review and concurrence of the Petitioner (Utility) and thereafter Petitioner (Utility) shall submit AFSA for review and approval of Hon'ble Gujarat Electricity Regulatory Commission.

**r. PSA – Clause 24.2.2 – Settlement of UI charges:**

**MBD:** Utility shall have the first right to Despatch, in the form of UI, any surplus electricity generated from the entitlement of the Utility in the Contracted Capacity by utilizing the allocated Fuel.

**Revised:** As Unscheduled Interchange (UI) has been replaced with Deviation Settlement Mechanism (DSM) by Hon'ble CERC, the term has been appropriately modified. Further, the above provision regarding first right to dispatch has been deleted as power under UI / DSM cannot be scheduled to Utility as per prevailing norms.

**s. PSA – New Clause 24.5 added – Proportionate Availability:**

In the cases wherein entire installed capacity of any unit(s) are not tied up with Utility under PSA, there is a need to have an appropriate mechanism so as to ensure that the Supplier makes available to the Utility capacity proportionate to the contracted capacity out of installed capacity at all times.

**Revised:** Accordingly, the Petitioner has incorporated a new provision as Clause 24.5 regarding Proportionate Availability which is in line with the existing PPA signed by the Petitioner through competitive bidding. This clause provides for proportionate availability declaration to Utility by Supplier under the agreement and details of penalty applicable in case of failure of Supplier to supply power from the Contracted Capacity.





**t. PPA – Article 28 – Force Majeure**

**i. MBD Clause 28.4 & 28.7**

**Clause 28.4** provides that any event of Change in law for which if consequences cannot be dealt with in accordance with Article 34 (Change in Law) and its effect in financial terms exceeds the sum specified (in Clause 34.1) shall be considered as Political Event under Force Majeure.

**Clause 28.7** provides that upon occurrence of a Political Event, all Force Majeure costs attributable to Political event shall be reimbursed to Supplier by the Utility.

**Revised:** The details of modifications carried out by the Petitioner are as under:

With regard to Clause 28.4, it is to mention that making eligible any such Change in Law event by considering it as a Political Event of Force Majeure would pose risk towards unfettered cost claim and may dilute the sanctity of tariff based competitive bidding. Accordingly, to avoid any interpretational disputes, it is proposed to delete the above provision.

With regard to Clause 28.7, it is to mention that nature of events specified under Political Event (under Force Majeure) are business associated risks and allowing pass through of cost for consequences of such risk to Utility (GUVNL) may affect the interest of consumers. Moreover, it may result into litigations/ demand by Supplier seeking relief. Therefore, GUVNL has taken a deviation and clarified that such costs shall be borne by Supplier only. The modifications in the clause are as under:

*“(b) upon occurrence of a Political Event, all Force Majeure Costs attributable to such Political Event shall be borne by the Supplier.”*

Consequently, clause 28.7.2 linked with the payment liability of Utility has been deleted.

**ii. MBD Clause 28.11 – Relief for Unforeseen Events provides that upon occurrence of an unforeseen event, parties may refer the**



matter to Conciliation Tribunal for appropriate relief / remedy including costs, expense, revenues of Power Station etc.

**Revised:** It is to state that Petitioner's Bid documents have various provision(s) to deal with Change in Law, Force Majeure as well as pass through of various costs. Further, as per the Bid documents, any dispute not settled amicably has to be taken up before Hon'ble Gujarat Electricity Regulatory Commission for adjudication. Accordingly, allowing mitigation relief for unforeseen events by referring the matter to Conciliation Tribunal would be in contravention to the provision of the tender documents. Further, such avenues for claims may lead to disputes/litigation with consequential impact including cost on Petitioner and ultimately on end consumers.

Accordingly, the Provision 28.11 – Relief for unforeseen events has been deleted by the Petitioner in its bid documents.

#### **u. PSA – Article 30 – Suspension of Supplier's Rights**

MBD Clause 30.1.2 provides that during the period of Suspension (due to Supplier default), the Utility shall pay to the Supplier 20% of the Fixed Charge for Contracted Capacity.

**Revised:** The above clause is with regard to suspension owing to Supplier default. Upon occurrence of Supplier default, Utility shall be entitled to suspend all rights of Supplier under FSA to produce electricity. As per the provision of PSA, Supplier can revoke the suspension by curing the default within 90 days of suspension by Utility.

In view of the above, the provision with regard to payment of 20% of fixed charge during suspension period has been deleted to avoid cost implication on the Petitioner (Utility).

#### **v. Change in Law (PSA – Article 34)**

**MBD** – provides that if as a result in Change in law, in case Supplier suffers an increase / reduction in costs or reduction / increase in net after-tax return or other financial burden, the aggregate financial effect of which exceeds the higher of Rs. 1 Crore and 0.1% of the



Capacity Charge in any Accounting Year, place the Supplier in the same financial position as it would have enjoyed had there been no such Change in Law.

Further, MBD provides that Parties shall endeavor to establish a NPV of the net cash flow and make necessary adjustments in costs, revenues, compensation or other relevant parameters, as the case may be, so as the NPV of the net cash flow is the same as it would have been if no Change in Law had occurred.

**Revised:** It is to humbly submit state that cost reimbursement as well as adjustment for arriving at Net Present Value may lead to complexity and dispute in methodology for calculation. Further, the bids being invited by Petitioner are having two part tariff wherein Fixed Charges quoted are indexed with Wholesale Price Index (WPI) variation while Fuel price quoted would be subject to variation as per change in domestic coal price and change in railway transportation freight in accordance with conditions specified under PSA. In addition, the bids are also being solicited from operational projects with merchant capacity and therefore arriving at a NPV of the net cash flow for the purpose of adjustment in cost, revenue etc. for operational projects would be complicated and inaccurate.

Accordingly, it would be prudent to have in place a simplified mechanism for taking into consideration the impact on account of change in law in order to avoid any unfettered impact on tariff due to NPV calculation and cost adjustment thereof.

In view of the same, Petitioner has taken a deviation and modified the Change in Law provision in line with the provision being adopted under PPA signed with projects based on competitive bidding in 2006-07.

Further, Petitioner has added clarification that the Supplier shall not in any manner be entitled to claim any amount towards carrying cost till the time Hon'ble Gujarat Electricity Regulatory Commission has determined and approved the impact due to Change in Law qualifying under the PSA. The same will ensure timely filing of petition by Supplier before Hon'ble GERC for approval of change in law and avoid cost implication under claim seeking carrying cost.



#### **w. Dispute Resolution (PSA – Article 36)**

As per the MBD, any dispute, if not settled mutually shall be referred to Conciliation and then Arbitration. While any dispute under applicable laws if required to be adjudicated by Commission, be submitted before Commission. Further, Clause 36.5 provides that in the event of constitution of a statutory tribunal or other forum with powers to adjudicate upon disputes, all disputes shall be referred to adjudication by such tribunal instead of Arbitration or Appropriate Commission.

**Revised:** In order to ensure that any dispute if not resolved amicably through Conciliation, be taken up before Appropriate Commission i.e. Hon'ble Gujarat Electricity Regulatory Commission for adjudication, Petitioner has taken the deviation and deleted the provision with regard to arbitration. Further, the clause 36.5 regarding adjudication by statutory tribunal has also been deleted in view of prevailing norms of Electricity Act 2003 regarding adjudication of disputes by Appropriate Commission.

#### **x. PSA – Article 38 – Miscellaneous – Delayed Payments**

Ministry of Power has notified Electricity Late Payment Surcharge Rules 2021 on 22.02.2021. As per the Rules, all such PPA executed after the date of notification rules shall incorporate provisions with regard to rate of interest for late payment surcharge.

Accordingly, Petitioner has appropriately modified the Clause 38.4 of the PSA – Delayed Payments as per the above Rules notified by Ministry of Power.

#### **y. PPA – Schedule J – Default Escrow Agreement & Schedule K – Deed of Hypothecation**

Petitioner has signed Default Escrow Agreement & Deed of Hypothecation with various Private Projects Developers with whom PPA has been signed pursuant to competitive bidding in 2007 & 2010.



In order to have uniformity with regard to the modality of creation of charge over revenues and operation of escrow account for discharge the liabilities arising out of secured obligation inter-se various projects, it is proposed that earlier Petitioner's format of Escrow Agreement & Hypothecation Deed may be adopted and incorporated in the present Bid documents with required modifications. Further, the provision 23.1.1 of the PSA has been appropriately modified as per the terms of Escrow Agreement and Deed of Hypothecation.

**z. Other project specific modifications:**

In addition to above deviations / modifications, the Petitioner has carried out minor project specific modifications in the bid documents for ensuring clarity in operational aspects, the details of which is as under:

- (i) Obligation of Open Access, Supply of contracted capacity at Delivery Point
- (ii) Lowest Landed Tariff after including cost towards transmission cost to be considered for the purpose of bid evaluation & selection
- (iii) Definition to Scheduled Supply Commencement Date has been incorporated – as Petitioner would be requiring power from a particular date which would be as per confirmation from Coal India regarding commencement of coal supply
- (iv) Compliance / activities to be carried out by projects which are already operational as on Bid Due Date
- (v) Clarification with regard to applicability of provisions under the tender documents for both category of projects i.e. Type 1 (units that are commercial operationalized on or after 1.1.2013) and Type 2 (New Projects that are yet to be commercially operationalized)

The list of all the deviations & modifications along with the detailed reasons / rationale for modifications is attached herewith at Annexure-H.





The draft bid documents (RFQ, RFP & PPA) incorporating the above deviations is attached herewith at Annexure-I.

18) In accordance with the Ministry of Power Guidelines, the Petitioner has filed the present petition for approval of bidding documents and the deviations to the Guidelines for initiating the tender process.

19) It is humbly submitted that Hon'ble Commission may accord approval to the Draft Bidding Documents along with the proposed deviations as well as modifications in order to enable the Petitioner to initiate the process of inviting tender.

### **PRAYER**

The Petitioner most respectfully prays to the Hon'ble Commission;

- a) To admit this Petition.
- b) To approve the deviations from Guidelines dated 06.03.2019 including modifications as proposed by Petitioner as per details stated in the present petition
- c) To approve the Draft Bidding Document (RFQ, RFP & PSA) annexed with the Petition.
- d) To condone any inadvertent omissions / errors / shortcomings and permit the petitioner to make minor addition / change / modification / alter this filing and make further submissions as may be required at a future date
- e) To crave relief for filing any further submissions
- f) Pass any other Order as the Hon'ble Commission may deem fit and appropriate under the circumstances of the case, to avoid further delay and in the interest of justice.

**Date:** 08.2.2022

**Place:** Vadodara



## DECLARATION

Declaration that subject matter of the Petition has not been raised by the Petitioner before any other competent forum and that no other competent forum is currently seized of the matter or has passed any order in relation thereto.



**Gujarat Urja Vikas Nigam Limited**  
**PETITIONER**

**Date:** 08.2.2022

**Place:** Vadodara

