

4.7. The relevant provisions of the Guidelines dated 03.08.2017 are reproduced below:

“2.1.2. Unless explicitly specified in these Guidelines, the provisions of these Guidelines shall be binding on the Procurer/Intermediary Procurer/End Procurer and the Authorised Representative of the Procurer. The process to be adopted in event of any deviation proposed from these Guidelines is specified in Clause 18 of these Guidelines.”

According to the above Clause, the provisions of Guidelines are binding to the Procurer and if any deviations from these Guidelines is to be proposed then the process specified in Clause 18 of the Guidelines is to be followed.

4.8. It is also necessary to refer Clause 3.1.1 of the Competitive Bidding Guidelines dated 03.08.2017.

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3.1.1 Bid Documentation

a) “Prepare the bid documents in accordance with these Guidelines and Standard Bidding Documents (SBDs) [consisting of Model Request for Selection (RfS) Document, Model Power Purchase Agreement and Model Power Sale Agreement], notified by the Central Government, except as provided in sub clause (c) below.

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

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

i. However, till the time the SBDs are notified by the Central Government, for purpose of clarity, if the Procurer while preparing the draft RfS, draft PPA, draft PSA and other Project agreements provides detailed provisions that are consistent

with the Guidelines, such detailing will not be considered as deviations from these Guidelines even though such details are not provided in the Guidelines.

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

According to the above Clause, the Procurer is mandated to prepare the bid documents in accordance with the Guidelines and Standard Bid Documents notified by the Central Government. It is also necessary to inform the Appropriate Commission regarding initiation of the bidding process. Further, it is also provided that in case of deviation in the draft RfS, draft PPA or draft PSA from the Guidelines and/or SBDs, an approval as provided in Clause 18 of the Guidelines is required to be obtained by the Procurer.

Also, till the SBDs are notified by the Central Government, the Procurer may prepare the draft RfS, draft PPA and draft PSA and other agreements providing detailed provisions consistent with the Guidelines and such detailing will not be considered as deviation from the Guidelines.

4.9. It is also necessary to refer Clause 18 of the Guidelines is reproduced below:

“Clause 18: Deviation from process defined in the Guidelines

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

The aforesaid Clause provides that the if there is any deviation from the Guidelines and/or SBDs, the same shall be subject to the approval of the

Appropriate Commission and the Appropriate Commission shall either approve or require modification to the Bid Documents within 90 days.

4.10. Now, coming to the approval of deviations sought by the Petitioner, in para 19 of the Petition, we note that the Petitioner has sought two deviations from the Guidelines i.e. (i) Clause 5.7 pertaining to Change in Law and (ii) to incorporate Clause on Greenshoe option at Clause 3.3.5 of the RfS. Thus, it is pertinent to refer the relevant Clauses of the Guidelines as well as the deviations proposed by the Petitioner in Bid documents along with the justification/rationale given for it.

4.11. Now, we deal the first deviation proposed by the Petitioner in respect of 'Change in Law'. In this regard, it is necessary to refer Clause 5.7 of the Guidelines issued by the Ministry of Power, Govt. of India. We note that the Petitioner had earlier approached the Commission for deviation in aforesaid Clause and sought approval in the Clause 9.1.1 of the PPA and the same was approved by the Commission vide its Order dated 15.03.2018 in Petition No. 1706 of 2018. The Petitioner in the present Petition has sought approval for deviation in Clause 9.1.1 specifically. Hence, it is necessary to refer the Clause 5.7 of the guidelines issued by Ministry of Power pertaining to Change in Law provision as well as the deviations sought by the Petitioner in Clause 9.1.1 of the PPA , which are reproduced below:

"Clause 5.7 Change In Law –

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

5.7.2 In these Guidelines, the term 'Change in Law' shall refer to the occurrence of the following events, after the last date of bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining a consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any taxes which have a direct effect on the Project. However, Change in Law shall not include any change in taxes on corporate income or any change in any withholding tax on income or dividends.

Clause Proposed by the Petitioner:

“any Changes in Law that result in additional tax, duty, cess etc on generation of electricity (leviable on the final output in the form of energy) or sale of electricity shall only be allowed as pass through under Change In Law provisions”.

- a) *the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulations, notice, circular, code, rule or direction by Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties charges, levies etc. that results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on the generation of electricity (leviable on the final output in the form of energy) or sale of electricity.*
- b) *Introduction / modification / changes in rates of Safeguard Duty and/or Anti-dumping Duty and/or Custom Duty and/or Goods & Services Tax including surcharge thereon which has direct effect on the Project cost.”*

4.12. The Clause 5.7.1 of the Guidelines provides that in case of any Change in Law which results in any adverse effect the financial loss or gain to the solar generator/procurer, they would be entitled to get compensation from the other party subject to the condition that the quantum and mechanism of

compensation payment and effective date for this shall be decided by the Commission.

4.13. Clause 5.7.2 states about the definition of Change in Law. According to aforesaid definition, the five conditions as specified in the aforesaid Clause qualify as Change in Law and also lists the exclusions under the Change in Law. Whereas the definition proposed by the Petitioner includes any Changes in Law that result in additional tax, duty, cess etc. on generation of electricity (leviable on the final output in the form of energy) or sale of electricity. Any other post-bidding increase in costs should be risk factored by the Solar generator and the same shall not be allowed as pass through and unnecessarily increasing the uncertainty and burden on end consumers.

4.14. We also note that the Change in Law as defined in the aforesaid Clause may occur during construction period (after the bid submission date) as well as operation period of the project. In case the Change in Law occurs during the construction period, the tariff discovered under the competitive bidding process might be affected due to incremental capital cost or decrease in the Capital Cost of the project. In such case the impact/effect of Change in Law requires to be carried out with detailed scrutiny of the reason(s) for incremental or reduction/decrease in capital cost of the project and different parameters/criteria considered for the project on the bid submission date by the project developers with consideration of parameters qualifying as Change in Law defined. Similarly, during the operation of the plant, the impact of Change in Law affects the energy charge / electricity supplied rate by the generator. In such case the impact of Change in Law on generation of the plant needs to verify with consideration of the parameters of Change in Law affecting the increase or decrease of energy rates supplied by the generator as per the discovered tariff in the competitive bidding process. Any enactment, change in law, repeal of existing law, change in rate of any taxes, rates, which have direct effect on project are qualified as Change in Law. However, Change

in Law shall not include any change in taxes on corporate income or any change in withholding tax or income or dividends qualify as Change in Law.

- 4.15. Earlier the Petitioner has approached the Commission by filling Petition No. 1706 of 2018 and sought deviation/modification in the bid documents with regards to Change in Law provisions, wherein; the Petitioner has proposed to approve the following clause as Change in Law provision.

“any Changes in Law that result in additional tax, duty, cess etc on generation of electricity (leviable on the final output in the form of energy) or sale of electricity shall only be allowed as pass through under Change In Law provisions”.

- 4.16. The Commission vide its Order dated 15.03.2018 in aforesaid Petition has approved deviations regarding ‘Change in Law’.

- 4.17. Thereafter, the Petitioner has filed the present Petition seeking the deviations in Change in Law clause by incorporating GST recovered under the provision of Article 9 of the PPA and allow incorporate the same in the tender documents of upcoming tender.

- 4.18. As the Petitioner has requested to approve for incorporation of the provision of GST as part of Change in Law, it is necessary to refer the same which is reproduced below:

“9.1.1 "Change in Law" shall refer to the occurrence of any of the following events after the Bid Deadline.

a) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulations, notice, circular, code, rule or direction by Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties

charges, levies etc. that results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on the generation of electricity (leviable on the final output in the form of energy) or sale of electricity.

b) *Introduction / modification / changes in rates of Safeguard Duty and/or Anti-dumping Duty and/or Custom Duty and/or Goods & Services Tax including surcharge thereon which has direct effect on the Project cost.”*

4.19. The deviation proposed by the Petitioner to incorporate in the bidding documents is with regard to incorporation of the “introduction/modification/changes in rates of safeguard duty and/or antidumping duty and/or custom duty and/or Goods and Service Tax including surcharge thereon which have directly effect on the project cost.

4.20. The aforesaid provisions proposed by the Petitioner are part of the law pertaining to tax/duty affecting the cost of the project. The provisions of Competitive Bidding Guidelines dated 03.08.2017 notified by Ministry of Power, Government of India consist of Clause 5.7 which also states that the occurrence of events after the last date of bid submission date with regard to enactment of law, modification, amendment or repeal of existing law as well as the change in rates of taxes which have direct impact on the project are qualify as Change in Law. The Petitioner has earlier approached the Commission for deviation in bid documents by incorporating the “Change in Law” provision and approve the same by the Commission and incorporated by the Petitioner in its earlier bid documents. Now, the Petitioner by way of filing of present Petition further requested to allow the deviations from earlier approved deviations. We find that the relief sought by the Petitioner for deviation in aforesaid Clause is in line with the bidding guidelines dated 03.08.2017 issued by Ministry of Power, GoI. Hence, the deviation requested

to incorporate in the tender documents for upcoming bids invited by the Petitioner are valid, hence, we decide to approve the same.

4.21. Now, we deal with the deviations on incorporation of Greenshoe option proposed by the Petitioner. The proposed deviation is reproduced below:

“3.3.5 Eligibility for Project Capacity Allocation

Following conditions shall be applicable to Bidders for submission of bids against the RfS:

.....

3.3.5 Capacity Allocation under the Greenshoe Option – The modality for allocation of additional upto 500 MW capacity under Greenshoe Option shall be as under:

- a) Upto 500 MW additional capacity through Greenshoe option be offered to the successful bidder(s), who are willing to execute PPA(s) with GUVNL at the lowest tariff (L1 rate) discovered under competitive bidding process (followed by e-reverse auction) to the extent of their respective quoted capacity or higher quantum (in case any of the Successful Bidder does not accept the additional quantum offered under the Greenshoe Option) to the extent of greenshoe capacity.*
- b) Successful Bidder(s) intending to execute PPA for the Greenshoe Capacity shall have to meet the eligibility criteria for the capacity intended to be entered into PPA under Greenshoe Option. Successful Bidder(s) shall have to comply with the same by making submissions required in accordance with Clause 3.4 of the RfS within a period of 10 days from the conclusion of the reverse auction.*
- c) In addition to the foregoing, the Successful Bidders willing to execute PPA with GUVNL at the L1 rate shall have to give confirmation within the period of 10 days from the conclusion of reverse e-auction.*

- d) *Greenshoe capacity shall be allocated in proportion of capacity allotted to the successful bidders in the reverse auction and willing to offer additional capacity under Greenshoe Option.*
- e) *The terms & conditions as well as obligations & rights of Successful Bidder(s) as well as GUVNL shall be identical for additional capacity allocated under the Greenshoe Option as for the base capacity of 500 MW under this RfS.”*

“Greenshoe Option – *In the reverse auction conducted by GUVNL on 16.03.2022 in the recently concluded bidding process vide RFS dated 03.01.2022 (Phase XIII), the tariff of Rs 2.29 / unit has been discovered for which GUVNL shall separately approach Hon’ble Commission for adoption of tariff. In the above reverse auction, out of 2270 MW capacity for which the reverse auction was conducted, the discovered tariff for 500 MW is Rs 2.29 / unit whereas the quoted tariff of unsuccessful bidders to the tune of 270 MW capacity was Rs 2.29 – 2.30 / unit but the same could not be allocated due to bucket size of 500 MW. There was no Greenshoe Option / discretion to allot additional capacity beyond 500 MW in the tender condition. Therefore, in the upcoming tender, GUVNL is contemplating a Greenshoe option of additional 500 MW in order to tie up cheaper capacity beyond bucket size at L1 tariff. The terms of allotment under Greenshoe option are stipulated at Clause 3.3.5 of the RFS. The MoP Guidelines are silent regarding Greenshoe option and therefore the addition of Greenshoe option in the tender may not be considered as a deviation from the Guidelines.”*

- 4.22. The aforesaid provision is a part of eligibility for project capacity allocation. The methodology and conditions specified for allocation of project capacity in the said provisions are for the selected bidders in the bidding process. The provision for additional capacity under Greenshoe option also provide in the aforesaid clause of the RfS. The said provision state that additional capacity be

allocated to the successful bidders under Greenshoe option. It states that the additional capacity is of 500 MW offered to the successful bidders who willing to execute PPA with the Petitioner at lowest tariff (L1) discovered under the e-reverse auction to the extent of their respective quoted capacity or higher quantum (in case any of the successful bidder does not accept the additional quantum offered under the Greenshoe option) to the extent of Greenshoe capacity. In such a case the successful bidder shall comply with the qualifying criteria specified in Article 3.4 of the RfS. Moreover, they have to sign the PPA with the Petitioner (GUVNL) at the L1 tariff and confirmation of the same shall need to give within 10 days period from conclusion of reverse e-auction. Further, the Greenshoe capacity shall be allocated in proportion to capacity allocated to successful bidder in the reverse auction and they willing to offer additional capacity under Greenshoe option. The terms and conditions and obligations and rights are same of successful bidder as well as GUVNL.

4.23. The aforesaid provision provides flexibility to the procurer GUVNL to tie up the additional capacity for procurement of solar power under Greenshoe option, if it is found that the rate discovered under e-reverse auction are quite attractive and beneficial to procurer to purchase the power at cheaper rate of discovered lowest tariff L1. It is beneficial to the licensee as well as the consumer of the State in case of the discovered tariff found attractive and lowest by the procurer GUVNL. The terms and conditions as well as obligations and rights of the seller/successful bidder offered under Greenshoe option as well as GUVNL are same as per the PPA executed between the parties.

4.24. We also note that the guidelines dated 03.08.2017 and subsequent amendments thereto by MoP are silent on the deviation on greenshoe option provisions in the Bidding documents sought by the Petitioner.

4.25. Considering the above, we decide to approve the aforesaid deviations of Greenshoe option proposed by the Petitioner.

5. In view of above, we decide and approve the deviations sought by the Petitioner with regard to (i) Article 9.1.1 pertaining to “Change in Law” as per PPA and (ii) incorporation of Greenshoe option as stated at Clause 3.3.5 of the RfS submitted with the Petition.

ORDER

6. We allow this Petition. We approve the deviations proposed by the Petitioner with regard to (i) Article 9.1.1 pertaining to “Change in Law” in the PPA and (ii) incorporation of Greenshoe option stated in Clause 3.3.5 of the RfS submitted with the Petition.
7. We order accordingly.
8. With this order present Petition stands disposed of.

Sd/-
[S. R. Pandey]
Member

Sd/-
[Mehul M. Gandhi]
Member

Date: 19/05/2022

Place: Gandhinagar.