

concluded. As indicated above, the contents of the LOI and its subsequent developments taken place in pursuance of the LOI would clearly show that contract had already been concluded and whatever else was required to be done thereafter was a mere signing of the PPA which is only a ministerial and formal act.

2. Essar Power Ltd (Mumbai) v Uttar Pradesh Electricity Regulatory Commission (2012 ELR (APTEL) 182).

The short facts are as follows:

(a) Essar Power Limited, the Appellant is a generating Company having generation capacity of 1600 MWs. The Uttar Pradesh Electricity Regulatory Commission (State Commission) is the Respondent-1. The 2nd Respondent is Noida Power Company Limited(Noida Power). Noida Power, a Distribution Licensee is carrying out the business of distribution of power in the area of Greater Noida in Western Uttar Pradesh.

(g) In the process, the Appellant emerged as the lowest bidder offering evaluated tariff of Rs.4.0868 Paise per unit for 240 MW of power. Ultimately Evaluation Committee, set up by Noida Power (R-2) in accordance with Central Government's Guidelines, approved the bid of the Appellant as the successful bidder.

(h) In pursuance of the same, the Noida Power Company (R-2) filed a Petition on 7.4.2011 in Petition No. 741 of 2011 before the State Commission under Section 63 of the Electricity Act, 2003 for adoption of the tariff quoted by Essar Power, the Appellant, being the successful bidder.

(i) While the above petition was pending before the State Commission for adoption of tariff quoted by the Appellant, Noida Power (R-2) filed an interim application before the State Commission on 27.4.2011 stating that subsequent to the filing of the petition in case No. 741 of 2011 for adoption of the tariff quoted by the Appellant, the Noida Power (R-2) received a letter from another Company (3rd party) proposing to supply power to Noida Power (R-2) on Long Term Basis at a levelised tariff of Rs.3.667 per unit which is less than the tariff quoted by the Appellant and praying that appropriate Orders be passed after taking note of this fresh development.

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76. The whole case of Noida Power (R-2) is relied upon the phrase "consumer's interest" stating that after filing the main application in Petition No. 741 of 2011 they received a letter from the Athena Power offering to supply power at a price lower by over 10% by which the financial gains for consumers for over 25 years would be from Rs.1,800

Crores to Rs.2,224 Crores. This contention is totally misconceived because the consumer's interest alone cannot be the sole criteria for competitive bidding under Section 63 of the Act. If that was so, there was no need for Government of India guidelines. In fact, these guidelines framed by the Central Government are so detailed and elaborate so as to take care and interest of all the stake holders of the Sectors. In other words, if the consumer's interest alone is taken as the criteria, then the guidelines framed by the Central Government would become redundant.

77. As indicated above, the bid process under Section 63 of the Act is entirely different from normal procurement of goods through competitive bidding process which is not governed by specific statutory scheme and guidelines. The bidding process under Section 63 is wholly based upon the objective of section 61 of the Act as well as the objectives of the Government of India guidelines. The Government of India guidelines have been framed to comply with the principles specified under Section 61 of the Act. The Government of India guidelines contained the mandate to safeguard the consumer's interest as well as to encourage competition, efficiency and economical use of the resources.. Let us quote Section 63 of the Act for better understanding.

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.

78. Thus the competitive bidding process as contemplated under Section 63 of the Act must meet the following mandatory statutory requirements:

(a) Competitive bidding process under Section 63 must be consistent with the Government of India guidelines and Request for Proposal (RFP) including the finalized PPA approved by the State Commission

(b) The process must discover competitive tariff in accordance with market conditions from the successful bid - consistent with the guiding principles under Section 61 of the Act as well as the Government of India guidelines which strike a balance between the transparency, fairness, consumer interest and viability.

79. At the risk of repetition, it has to be stated that if these requirements have not been followed and if the process has failed to safeguard the consumer interest as well as to promote competition and efficiency by permitting the deviations, it would not only destroy the basic structure of the guidelines but also would frustrate the objectives of the Government guidelines.

From the above facts it is clear that once the due process has been fulfilled, the Petitioner cannot negotiate the parties for a better price. This is a statutory scheme, with the guidelines, framed by Government as required under section 63 of the Act. Once these requirements have been fulfilled under Section 63 of the Electricity Act, 2003, the Commission's Order becomes final. The Petitioner invited the attention of the Commission to Para 119 of the which is given below:

119. Under Section 63 there are only two options for the State Commission:

(a) Either to reject the petition if it finds that the bidding was not as per the statutory frame work;

Or

(b) to adopt the tariff if it is discovered through transparent process conducted as per the bidding guidelines.

163. The contention of the Noida Power that under Section 63 of the Act it can negotiate with the 3rd party with the approval of the State Commission even after the bidding process is completed is contrary to the provisions of the Act as well as the bidding guidelines. Even assuming that negotiations are permitted under competitive bidding process, the said negotiation can take place at any time only prior to Noida Power declaring the Essar Power as successful bidder by filing the petition under Section 63 of the Act for adoption of the tariff. Once the petition has been filed on the recommendation of the Evaluation Committee seeking for the adoption of tariff after it is discovered, it is not open for the Noida Power to enter into negotiation to reduce the tariff.

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212. Summary of our Findings

(A) The first question relates to the scope of power to be exercised and the method of procedure to be followed by the State Commission under section 63 of the Act.

The powers of the State Commission are limited under Section 63 of the Act. The State Commission while dealing with the petition under Section 63 for adoption of tariff could either reject the petition if it finds that the bidding was not as per the statutory framework or adopt the tariff if it is discovered by a transparent process conducted as per Government of India guidelines. Section 63 starts with non-obstante clause and excludes the tariff determination powers of the State Commission under Section 62 of the Act. The entire focus of the competitive bidding process under Section 63 is to discover the competitive tariff in accordance with the market conditions and to finalize the competitive bidding process in accordance Central government's guidelines, standard document of

Request for Proposal and the PPA. Under Section 62 of the Act, the State Commission is required to collect various relevant data and carryout prudence check on the data furnished by the licensee/generating company for the purpose of fixing tariff. Hence determination of tariff under Section 62 is totally different from determination of tariff through competitive bidding process under Section 63. Competitive bidding process under Section 63 must be consistent with the Government of India guidelines. Any deviation from the standard Request for Proposal (RFP) and model PPA notified by the Government of India must be approved by the State Commission. This process must discover competitive tariff in accordance with market conditions from the successful bid- consistent with the guiding principles under section 61 of the Act. If the deviations are permitted by failing to safeguard the consumer interests as well as to promote competition to ensure efficiency, it will destroy the basic structure of the guidelines. In this case the above procedure had not been followed. The contention of the Noida Power that under Section 63 of the Act it can negotiate with the 3rd party with the approval of the State Commission even after the bidding process is completed is contrary to the provisions of the Act as well as the bidding guidelines. Even assuming that negotiations are permitted under competitive bidding process, the said negotiation can take place at any time only prior to Noida Power declaring the Essar Power as successful bidder by filing the petition under Section 63 of the Act for adoption of the tariff. Once the petition has been filed on the recommendation of the Evaluation Committee seeking for the adoption of tariff after it is discovered, it is not open for the Noida Power to enter into negotiation with 3rd party to reduce the tariff.

(B) The next question relates to the admissibility of an interim application seeking for the directions to go for third party negotiation when the main petition was pending seeing for the adoption of tariff quoted by the Appellant.

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Therefore, the interim application is not maintainable.

(C) Third question relates to the right of the Noida Power to seek for initiating negotiation with third party which did not participate in the competitive bidding process and which did not qualify for the technically qualified bidding submissions.

As indicated above, if the Noida Power is permitted to have a negotiation with the third party and go back to the Commission for adoption of the tariff of 3rd party, it would amount to nullifying the sanctity of the bidding

process which will make the proceedings under Section 63 of the Act, 2003 nugatory.

25. The petitioner concluded his arguments with the prayer to allow the petition by directing the respondent to implement the Order issued by the Commission for the procurement of 90 MW Solar Power @ Rs. 2.97/unit.
Then the Commission directed the respondent to respond to the contentions raised by the petitioner.
26. Shri.C.S. Sasankan Nair, Chief Engineer (Commercial & Tariff) has attended the hearing on behalf of the KSEB Ltd. KSEB Ltd sought adjournment of the case granting twenty days' time to present their version.
The Commission allowed the request subject to the condition that the respondent shall not do anything which is detrimental/contrary or against whatever has been done till now, which is agreed by the respondent.
27. Based on the deliberations during the first hearing and also considering the request made by the respondent KSEB Ltd for an adjournment of the hearing, the Commission adjourned the petition vide Daily Order dated 17.03.2022 with direction to the respondent KSEB Ltd that the respondent shall not do anything which is detrimental/contrary to the present position or against whatever has been done till now.
- 28. The respondent KSEB Ltd filed a Counter Affidavit vide Letter No. KSEB/TRAC/G/SOLAR/2021-22 dated 18.04.2022. In the said Affidavit the respondent KSEB Ltd submitted as follows:**
29. In their affidavit KSEB Ltd submitted before this Commission that there is no dispute between the KSEB Ltd. and the petitioner, M/s. NTPC Ltd., the largest public sector undertaking in the country in power sector. The respondent KSEB Ltd. has made a fervent appeal to the successful bidders to reduce adopted tariff (Rs.2.97/kWh) under section 63 of the Act, in conformity with the prevalent rate in the market, for the procurement of 200 MW solar power for a period of 25 years.
30. M/s. TP Saurya Limited, one of the successful bidders has considered their request favourably and agreed to supply the 110 MW solar power at a reduced tariff of Rs. 2.44 and this Commission has adopted this rate as per Order dated 28.01.2022 in O.P. No.3/2022 filed by KSEB Ltd. Also, KSEB Ltd. has submitted the Power Purchase Agreement executed with M/s. TP Sourya Limited, in line with the initialled PPA which was approved by this Commission.

31. The respondent KSEB Ltd being a public sector undertaking, is supplying 37.66 % of the energy purchase from outside the State and also KSEB Ltd being a prompt payer the cost associated with power purchase, (Rs.182 Cr / month on an average), the petitioner NTPC could have considered the request favourably without any hesitation. KSEB Ltd has adhered all the directions issued by this Commission throughout the procurement process. KSEB Ltd. The respondent KSEB Ltd further submitted their version on the contention of the petitioner regarding the **Investment made by the petitioner the KSEB Ltd submitted as follows:**

a) As part of URJA Kerala policy for the procurement of 1000 MW Solar Power from within the State of Kerala, KSEB Limited had invited bid for the procurement of 200 MW Solar Power with preference to plants within the state of Kerala with the approval of this Commission. Kerala State Electricity Board Limited (KSEB Ltd), on 17.08.2018, filed a petition before the Commission for the approval for inviting bids on reverse e-bidding route with e-reverse auction for procuring 200 MW solar power from solar PV. KSEB Ltd has also sought approval the Commission for the deviations in the Standard Bid Documents (SBD) from the guidelines of MoP, GoI dated 03.08.2017 and its amendment dated 14.06.2018, vide the above said petition. Among deviations proposed, three clauses are relevant as far as this case is concerned and the order in (O.P. No. 56/18 dated 19.11.2018) of the Commission in this regard is reproduced below:

i) ***Clause 3.2.3 of the amended guidelines: Period of Land acquisition to be revised to within 12 months of date of PPA to 12 months of LoA.***

As per the amendment dated 14.06.2018 to the clause 3.2.3 of the standard bidding guidelines, within 12 months from the execution of the PPA, the developer has to submit the documents of the land acquisition/ lease agreements to establish the possession/ right to use 100% of the required land in the name of the Solar Power Generator or its affiliate. However, KSEB Ltd proposed to count the 12 months period from the Letter of Acceptance instead of the execution of the PPA. According to KSEB Ltd, the proposed deviation is for avoiding the delay in commencement of the project activities.

*The Commission noted that, the letter of award (LOA) cannot be treated as a legally valid contract. Hence, the date of LOA cannot be considered instead of the date of execution of the PPA as specified in the bidding guidelines notified by the Central Government. Since the model PPA also uploaded as part of the bidding documents along with the notice inviting tenders, the Solar Power Generators, who participated in the bidding process also aware of these facts. **KSEB Ltd can specify the time limit for execution of the PPA in the LOA.***

Decision of the Commission

The Commission decline the proposal of KSEB Ltd due to the reasons given in the preceding paragraph and the clause 3.2.3 of the standard bidding guidelines shall be followed as such in the bidding documents.

ii) *Clause 12: Financial closure.*

As per the amendment dated 14.06.2018 to the clause 12 of bidding guidelines, the time period for financial closure shall be 12 months from the date of signing the PPA.

However, KSEB Ltd to propose to amend the same to date of letter of acceptance (LOA).

Decision of the Commission

The Commission decline the proposal of KSEB Ltd and direct to follow the clause-12 of the standard bidding guidelines as such in the bidding documents.

(iii) *Clause 14.3 Commissioning schedule*

As per the amendment dated 14.06.2018 to the clause 14.3 of the standard bidding guidelines, the projects shall be commissioned within a period of 21 months from the date of execution of the PPA. However, KSEB Ltd proposed to count the date from the date of issuance of LOA instead of date of signing the PPA.

Decision of the Commission

The Commission decline the proposal of KSEB Ltd and it shall follow the clause-13.3 of the standard bidding guidelines as such in the bidding documents.

- 32.** Thus, from the above order, it is evident that the time period for achieving various milestones like financial closure, land acquisition and commissioning of plant etc. are to be fixed from the date of execution of PPA. As per the initialed PPA, all the timelines are specified from the date of execution of PPA and as per the approved initialed PPA, the agreement shall come into effect from the date of execution by both the parties and such date shall be referred as the effective date. (clause 2.1) . Here, in the instant case, no such agreement has been executed (in conformity with initialed PPA duly approved by this Hon'ble Commission) and hence the investment made by the petitioner as pointed out in the petition, based on the LOA, for site mobilization and supply of modules are made at the risk and cost of the petitioner and hence KSEB Ltd. will not be held liable for such untimely action of petitioner. The petitioner also submitted that application for LTOA has been held up due to non-signing of the **final PPA**. It may please be noted that, Central Transmission Utility is considering final PPA for granting LTOA for evacuation purpose.

M/s. NTPC has proposed the Solar power project on their own thermal power station at ANTA, Rajasthan and the proposed Solar project will be interconnected with existing 220 kV NTPC Anta switchyard which is a part of ISTS system. Hence the revelation of the NTPC that they had moved forward in executing the project is not correct and the additional financial expenses claimed in the petition is not true.

Section 63 of Electricity Act:

The petitioner's argument that attempts on the part of this respondent to refix the tariff is in contravention to the principles enshrined under the Electricity Act, 2003 and is unlawful. The KSEB Ltd has not made any attempt to refix the adopted tariff, duly approved this Hon'ble Commission

The Commission, vide Order dated 18.12.2020 in petition OP No. 39/2020 filed by the Respondent, adopted the tariff as per the Section 63 of the Electricity Act, 2003. The relevant portion of the Order is extracted below.

- (i) The Tariff of Rs. 2.97 per unit (kWh) for the procurement of 90 MW of solar power from M/s NTPC Ltd. and 110 MW of solar power from M/s Tata Power Company Ltd.; discovered by KSEB Ltd. through the competitive bidding process as per the bidding guidelines notified by the Central Government is adopted under Section 63 of the Electricity Act, 2003.*
- (ii) KSEB Ltd shall finalize and initial the PPAs with the two successful bidders for their respective quantum of power and file them before this Commission for its formal approval under Section 86 (1) (b) of the Electricity Act, 2003. The formal approval of the PPAs by this Commission is a condition precedent and the PPAs shall come into effect only after this.*

33. The respondent KSEB Ltd further submitted that, KSEB Ltd had approached for adoption of tariff under section 63 of the Act before this Commission after determining the tariff through a transparent process of bidding in accordance with the guidelines issued by the Central Government and the deviations thereon duly approved by this Hon'ble Commission. KSEB Ltd did not make any attempt to reconsider the adopted tariff under section 63 of the Act ie during the tariff determination process. But after initialling the draft PPA, KSEB Ltd has made a request before generators to reduce the tariff, in conformity with the prevalent low rates in the market. It may please be noted that the prime objective of the transparent bidding process is to discover a reasonable rate to provide electricity to the needy consumers and at the same time to ensure the financial reasonability of the DISCOM and Generator/ Trader. Financial reasonability and

the public interest are the sole consideration of the request made by KSEB Limited before the successful bidders.

Execution of final PPA:

The petitioner's request before this Commission to issue a direction to KSEB Ltd to sign the final PPA as per Order dated 21.06.2021 in OP No. 11/2021 (Part-1). The Commission vide order dated OP No.11/2021 dated had ordered the following:

- (1) *Approve the initialled Power Purchase Agreement (PPA) between KSEB Ltd and NTPC Ltd for the procurement of 90 MW Solar Power at the rate of Rs.2.97/unit.*
- (2) *KSEB Ltd shall submit a copy **final PPA** signed with NTPC Ltd before the Commission for information and record.*

Para 10 of the above order which is reproduced below:

*In compliance of the direction of the Commission, KSEB Ltd initialled the **draft PPA** with NTPC Ltd on 5th February 2021 for procurement of 90MW Solar Power @Rs 2.97/unit. KSEB Ltd. vide the petition dated 08.02.2021 submitted the copy of the initialled PPA before Commission to **grant formal approval** for the initialled PPA with NTPC Ltd.*

The Commission examined in detail the initialled PPA with NTPC Ltd with the model PPA approved the along with bidding documents vide Order dated 25.08.2020, in petition OP No. 09/2020, and noted that, the articles, clauses and other conditions in the initialled between KSEB Ltd and NTPC Ltd is as per the model PPA approved by the Commission along with the bidding documents dated 25.08.2020 in petition OP No. 09/2020. Hence the Commission decided to grant approval for the initialled Power Purchase Agreement (PPA) dated 05.02.2021 with NTPC Ltd.

34. Thus, it is clear that, draft initialled PPA submitted before the Commission is to ensure whether the clauses /articles incorporated in the initialled PPA is in conformity with the Standard bidding documents/ deviations from bidding guidelines /adopted tariff duly approved by the Commission. The respondent KSEB Ltd So further requested before the Commission to decline the request of the petitioner as the conditions are detrimental to the interest of the KSEB Ltd. and consumers under the utility. KSEB ltd. is ready to execute the final PPA with the petitioner @ Rs.2.44/unit with the approval of the Commission.

35. The respondent also invited the attention of the Commission's Order dated 15.03.2021 in petition (O.P. No.02/2021) in respect of the PPA of Rajiv Gandhi Combined Cycle Power Project (RGCCPP), Kayamkulam, for the years from

2019-20 till the end of the current PPA period (i.e. till 28-2-2025) under Section 86 of the Electricity Act 2003.

In the order the Commission has observed that *the role of the Commission is to approve the PPA under Section 86(1)(b). While doing so, the Commission has to examine the reasonableness of continuation of PPA and the conditions attached to it.*

In the order, the Commission had approved the annual fixed charge of Rs.100 crore per annum as agreed to by the parties for the PPA period, though there is specific CERC determined tariff for the project. The Commission's appropriate and prudent intervention in the matter is turned out be financially beneficial to the public and the utility. A similar approach may please be taken in the matter also.

36. Request for rate revision

The KSEB Ltd filed the petition before the Commission on 17.08.2018, for the approval for inviting bids on reverse e-bidding route with e-reverse auction for procuring 200 MW solar power from **solar PV power plants to be established in Kerala** on IPP mode. The Commission vide Order dated 19.11.2018 (O.P.No. 56/18) has approved benchmark tariff @ Rs 3.50/unit for the proposed procurement. KSEB Ltd had proposed this benchmark parameter before the Commission mainly based on the tariff offered by NTPC to KSEB Ltd, for supplying power from the proposed solar plant to be established by NTPC at RGCCPP Kayamkulam. The offer of the petitioner at that time was Rs.3.00/unit under MoU route. Due consideration has been given to the rate proposed by the petitioner in fixing the bench mark tariff for the procurement process. The high ceiling rate proposed at that time is due to high cost of land in Kerala and due to non-availability of large extent of suitable barren land for the development of solar PV projects. Only one bid was received at that time. In order to materialize the project, **KSEB Ltd. has decided to invite bid from ground mounted solar power plants situated anywhere in India** with preference to Kerala bidders (upto 10% of the requisitioned capacity) who prefer to match the quoted rates at the end of e-reverse auction process, with the approval of the Bidders too. It was also decided to modify the ceiling rate as Rs. 3/unit for ensuring participation of Kerala bidders. The Order of the Commission to execute the PPA with the generators was placed before the Full Time Directors of KSEB Ltd., and the Board observed that the rate discovered through bidding route for the procurement of 200 MW solar power is relatively high in comparison with various offers of SECI, and hence issued direction to reconsider the power procurement process. The rate offered by SECI from Tranche IX ISTS