



Therefore, the ratio of the aforementioned judgement cannot be applicable in the instant case.

25. Having considered the events as Change in Law events and also that these events may lead to additional recurring expenditure, the Commission is of the view that that Prudence Check of the actual expenditure is also necessary.

Issue: Prudence Check of the expenditure incurred/to be incurred

26. In the instant case, the O&M Agreements were executed between the Petitioner and APIPL. APIPL is the parent company of the Selected Bidder i.e., Azure Surya Private Ltd., pursuant to the RFP dated 24.04.2013.

27. Not only were the O&M Agreements entered between the Petitioner and the parent company of the Petitioner, but there was also no bidding process involved to award the O&M Agreements. The Petitioner, in its Affidavit dated 06.05.2022 has accepted that the O&M agreements were executed pursuant to bilateral negotiations between the Petitioner and APIPL and the relevant extract of the said Affidavit has been produced below:

"7. It is stated that the O&M Agreement was executed pursuant to bilateral negotiations between the Petitioner company and Azure Power. Pursuant to the O&M Agreement, the entire O&M of the Petitioner's Project was outsourced to Azure Power as a package on a fixed fee, including for providing consumables and spares. This was in line with the practice followed by the group companies of the Petitioner where the O&M arrangements of the Project SPVs located across the country were outsourced to Azure Power in the interest of efficiency and the utilize the expertise of the parent company."

28. It is also the fact that the O&M Agreements entered between the Petitioner and APIPL are unregistered agreements. Therefore, there is no way to establish the date on which the O&M Agreements were executed.

29. Now let us look at some of the provisions of the RFP and PPA:



RFP No. 01/ UPNEDA/Grid CONNECT/RFP/2013 dated 15.03.13, amended 24.4.2013:

The RFP prescribes stringent technical parameters of PV Module to ensure quality during the life of the Project as below:

a. PV Module Qualification

- 1.1 That PV modules used in the grid connected solar PV power projects must qualify to the latest edition of any of the following IEC PV modules qualification test or equivalent BIS standards.

Crystalline Silicon Solar Cell Modules	IEC 61215
Thin Film Modules	IEC 61646
Concentrator PV modules	IEC 62108

- 1.2 In addition, PV modules must qualify to IEC 61730 for safety qualification testing. For the PV modules to be used in a highly corrosive atmosphere throughout their lifetime, they must qualify to IEC 61701.

b. Authorized Test Centres

The PV modules must be tested and approved by one of the IEC authorized test centres. In addition, a PV module qualification test certificate as per IEC standard, issued by ETDC, Bangalore or Solar Energy Centre will also be valid.

c. Warranty

- The mechanical structures, electrical works and overall workmanship of the grid solar power plants must be warranted for a minimum of 5 years.
- PV modules used in grid connected solar power plants must be warranted for output wattage, which should not be less than 90% at the end of 10 years and 80% at the end of 25 years.

30. The PPA dated 27.12.2013, pursuant to the selection of the petitioner as successful bidder after meeting the eligibility requirements, as per RFP dated 24.04.13, mandates the petitioner for construction, operation and maintenance in supply of power for the 10 MW solar project and defines "O&M default" on part of the petitioner for a continuous period of 90 days to operate and maintain.

31. The Petitioner has outsourced the O&M of the 10 MW Project and signed an agreement dated 01.06.2014 with Azure Power India Pvt. Ltd., on a fixed fee



of Rs. 1.16 Cr per annum **increased every 12 months @5.72% per annum including providing consumables and spares.**

32. The petitioner's Plant, as per terms of the RFP and PPA signed thereunder, has PV modules of prescribed standard and warranty; warranty of mechanical structure, electrical works for 5 years and PV modules for output of not less than 90% at the end of 10 years and 80% at end of 25 years. The Petitioner has chosen out of its business decision to outsource its obligation of O&M (including consumable and spares) to its parent company through O&M contract dated 01.06.014 through mutual negotiation.

33. Subsequently, on 1.12.2019, the Petitioner company executed service agreement, in suppression of O&M agreement, pursuant to bilateral negotiations to provide management services of supervision, performance analysis for operation excellence, legal and compliance support services, revenue and cost budgeting and onsite supervision, however, the Petitioner is not required to provide any spares or consumables under service agreement. The contract price of the service agreement is Rs. 1.411 lakh per year per MW and is to remain fixed for the term of the agreement.

34. **The Commission finds that while adjudicating commercial contracts, it is important that the action of parties must be evaluated on the principles of commercial prudence. The Hon'ble Supreme Court in the matter of *Uflex Ltd. v. Government of Tamil Nadu & Ors.* Civil Appeal No. 4862 of 2021 has held that in evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence.**

Commission's View

35. **The Petitioner has chosen to outsource its obligation of O&M including consumable and spares to its parent company through O&M contract dated 01.06.014 through mutual negotiation. The subsequent agreement, again entered through mutual negotiation, dated 01.12.2019, is only a service agreement and not an O&M agreement, for management, performance analysis, legal and compliance support, revenue and cost budgeting and supervision.**

36. **Thus, essentially the Petitioner in the said case has awarded the O&M and Service contract for the Project to its Parent Company through**



mutual negotiation without transparent process of competitive bidding. It is also the fact that the O&M and Service Agreements entered between the Petitioner and APIPL are unregistered agreements. It is also not on record that whether beneficiary of the Project was intimated. Therefore, there is no way to establish the date on which these Agreements were executed.

37. There is no basis of checking of prudence of the principal amount on which service tax/ GST is payable. The manner of awarding contracts to its parent company is violative of the settled principle of law that the related parties involved in commercial transactions in a power Project should be at arm's length in order to ensure transparency and competition.

38. Therefore, in view of there being no basis to check the prudence of the principal amount and date of applicability, the Agreements entered between the Petitioner and APIPL being unregistered ones and agreement dated 01.12.2019 being only a service agreement, the Commission holds that the Petitioner is not entitled to any claim from the procurer for Change in Law.

(Vinod Kumar Srivastava)
Member (Law)

(Raj Pratap Singh)
Chairman

Place: Lucknow

Dated: 02.12.2022



with