

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 254/AT/2022
along with IA No. 69/2022**

**Coram:
Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri P.K. Singh, Member**

Date of order: 15th February, 2023

In the matter of

Petition under Section 63 of the Electricity Act, 2003 for adoption of tariff discovered through Competitive Bidding Process for procurement of power from the 1200 MW Grid-Connected Solar PV Power Project at Village- Kalijal & Matuon ki dhani, Tehsil- Shiv, District- Barmer and at Village Rawadi Chak, Tehsil- Fatehgarh, District- Jaisalmer in Rajasthan as per the Standard Bidding Guidelines of Ministry of Power, GOI dated 03.08.2017 and its amendments thereof.

And

In the matter of:

NTPC Limited
Through GM (Commercial),
NTPC Bhawan, Core-7,
Scope Complex, 7, Institutional Area,
Lodhi Road, New Delhi – 110 003

..... **Petitioner**

Vs

1) XI Xergi Power Private Limited,
8th Floor, DLF Square, Gurugram,
Haryana - 122 002

2) Grid Corporation of Odisha Limited,
GRIDCO Ltd., Janpath,
Bhoi Nagar, Bhubaneswar,
Odisha - 751 022

... **Respondents**

The following were present:

Ms. Sakie Jakharia, Advocate, NTPC

ORDER

The Petitioner, NTPC has filed the present Petition under Section 63 of the Electricity Act, 2003 (“the Act”) for adoption of tariff discovered through competitive bidding process for procurement of power from 200 MW grid-connected Solar PV Power Project at Village- Kalijal & Matuon ki dhani, Tehsil- Shiv, District- Barmer and at Village Rawadi Chak, Tehsil- Fatehgarh, District- Jaisalmer in the State of Rajasthan as per the Standard Bidding Guidelines of Ministry of Power (“MoP”), Government of India (“GoI”) dated 3.8.2017 (hereinafter referred to as ‘the Guidelines’) and its amendments thereof. The Petitioner has made the following prayers:

“(a) Admit the present Petition;

(b) Adopt the Tariff Rate of Rs. 2.43 per kWh for procurement of Power from 200 MW Solar PV Power Project, discovered through competitive bidding carried out by the Petitioner.

(c) Pass such other order (s) as may be deemed fit and proper in the facts and circumstances of the present case.”

Submissions of the Petitioner

2. The Petitioner, NTPC has submitted that on 18.2.2020, it issued Request for Selection (“RfS”) bearing Ref. No. RE-CS-0000-BOO-6 along with draft Power Purchase Agreement (“PPA”) and draft Power Sale Agreement (“PSA”) documents on ISN Electronic Tender System (ETS) e-bidding portal for the purpose of selection of Solar Power Developer (“SPD”) for setting up grid-connected Solar PV Power Projects, on “Build, Own and Operate” basis, for an aggregate capacity of 1200 MW anywhere in India. The Petitioner has submitted that in pursuance to the above, five bids were received. It has been further submitted that e-reverse auction of the qualified bidders was conducted on 6.8.2020 on ISN ETS e-bidding portal and the final tariff was arrived

at was Rs.2.43/kWh. Pursuant to the issuance of Letter of Award to the successful bidder, namely, O2 Power SG PTE Ltd. (400 MW) on 19.4.2022, the Petitioner had entered into PPA with its Project Company - XI Xergi Power Private Limited on 14.7.2022 for 200 MW on the basis of it having signed the PSA with Respondent No.2, GRIDCO Limited on 18.4.2022 for such capacity. The Petitioner has submitted that as per the PSA, the Petitioner shall be entitled for a tariff of Rs. 2.50/kWh (inclusive of mutually agreed trading margin of Rs. 0.07/kWh) to be paid to Respondent No. 2, GRIDCO Ltd. In view of the above, the Petitioner has prayed for adoption of tariff of Rs. 2.43/kWh for procurement of 200 MW Solar PV Power Project from the Respondent No.1 as discovered through competitive bidding process carried out by the Petitioner.

Hearing dated 11.10.2022

3. The matter was heard on 11.10.2022 and notice was issued to the Respondents. The Respondents were also given liberty to file their reply to the Petition, if any. However, none of the Respondents have filed any reply. Further, the Petitioner was also directed to submitted the following information/clarification:

- (a) Documents indicating NTPC's compliance with Clause 6.4 of the Standard Solar Guidelines.
- (b) Copy of intimation to the Appropriate Commission about the initiation of bidding process as per Clause 3.1.1(b) of the Standard Solar Guidelines, if any.
- (c) Reason for substantial delay in issuance of Letter of Award (19.4.2022) after the completion of e-reverse auction (6.8.2020).
- (d) Undertaking to the effect that the Bidding Documents including PPA and PSA are in line with the provisions of the Standard Solar Guidelines. In case of any deviation taken by NTPC, the reason for such deviation(s) along with approval of the Appropriate Authority/Commission, if any.
- (e) Reason for only awarding 200 MW @ Rs 2.43/kWh despite the 1070 MW was available @ Rs 2.43/kWh after the e-reverse auction.

4. The Petitioner vide its affidavit dated 21.11.2022 has submitted the aforesaid information called for. In the said affidavit, the Petitioner has mainly submitted as under:

(a) As per Clause 6.4 of the Standard Solar Guidelines, the procurer is required to publish RfS notice in at least two national newspapers and its own website. In this regard, NTPC had come up with an internal Policy dated 5.6.2018 regarding publication of notice and as per the said Policy, the Petitioner had decided to discontinue the publication of abridged IFB/ NIT in the newspapers. Instead, the detailed IFB/ NIT along with salient technical features, after 5.6.2018, is to be published on the website of NTPC, Central Public Procurement Portal and Government E-Marketplace portal of Govt. of India. The said Policy regarding dis-continuation of publication NIT/IFB in newspapers in future tender had been published in the leading newspapers. Similar dispensation has already been allowed by the Commission to NTPC and Other CPSUs, inviting the tenders in the capacity of intermediary procurer, in relation to publishing RfS notice in two national newspapers as per Clause 6.4 of the Guidelines.

(b) NTPC did not separately intimate this Commission regarding initiation of the bid process. It is submitted that the publication of the RfS notice ought to be considered as prior intimation about the initiation of the bid process including to this Commission.

(c) There was no beneficiary at the time of tendering and after completion of e-reverse auction on 6.8.2020, identifying beneficiary took some time although NTPC took prompt steps in this regard. The Covid-19 pandemic prevailing across the country during that time has also been a contributory factor. However, subsequent to identifying and finalising the beneficiary/ GRIDCO Ltd. and immediately after the PSA was approved by Orissa State Electricity Regulatory Commission by its order dated 30.3.2022 in Case No.1 of 2022, the PSA was executed with GRIDCO on 18.4.2022 to tie up power sale and thereafter, LoA was issued in favour of Respondent No.1 on 19.4.2022.

(d) Regarding deviation of Bidding Documents, NTPC has formulated and issued the Bidding Documents including PPA and PSA in line with the provisions of the Standard Solar Guidelines and amendments thereof.

(e) Since there was no other beneficiary besides GRIDCO Ltd., LoA only for 200 MW was awarded on 19.4.2022 subsequent to the identification/ finalisation of the beneficiary for 200 MW and signing of the PSA thereof. However, an additional PSA for a capacity of 200 MW has also been executed between the Petitioner and GRIDCO Limited on 30.9.2022, after the OERC's approval, the Petitioner has also issued LoA to the Respondent for additional 200 MW on 11.10.2022 and is now in the process of signing the PPA.

IA No. 69/2022

5. On 27.11.2022, NTPC moved IA No. 69/2022 to place on record the additional PPA dated 24.11.2022 signed between NTPC and XI Xergi Power Private Limited and PSA dated 30.9.2022 executed between NTPC and GRIDCO for an additional 200 MW and seeking adoption of tariff of Rs. 2.43/kWh for this additional 200 MW capacity. NTPC has submitted that during the pendency of the present proceedings, OERC vide its order dated 13.9.2022 in Case No. 37 of 2022 granted approval to Respondent No.2, GRIDCO Ltd. for execution of PSA for additional 200 MW and accordingly, the Petitioner and Respondent No.2 signed the additional PSA for 200 MW capacity on 30.9.2022. The Petitioner has submitted that pursuant to this, NTPC issued LoA for additional 200 MW to the Respondent No. 1 on 11.10.2022 and thereafter, entered into additional PPA with Respondent No.1 for this 200 MW capacity on 24.11.2022.

Hearing dated 29.11.2022

6. During the course of hearing on 29.11.2022, learned counsel for the Petitioner briefly stated the subsequent events requiring NTPC to file IA No. 69/2022 and prayed

to issue notice in the said IA. Further, in response to the specific query of the Commission with regard to the deviations taken by the Petitioner in the bid documents from the provisions of the Guidelines, if any, learned counsel replied in negative. In response to another query of the Commission with regard to the validity of the bids submitted by the bidders, learned counsel submitted that the bids were valid till 15.10.2022 and the total tied up capacity now stood at 400 MW as the Petitioner could not identify the buyers/distribution licensees beyond this capacity. After hearing the learned counsel for the Petitioner, the notice was issued in IA No. 69/2021 and the parties were directed to complete the pleadings in the IA, if any. However, none of the Respondents have filed any response to the said IA.

Hearing dated 22.12.2022

7. During the course of hearing on 22.12.2022, learned counsel for the Petitioner reiterated the submissions made in the pleadings and accordingly, prayed for adoption of tariff of Rs.2.43/kWh for procurement of power from total 400 MW Solar PV Power Projects discovered through the competitive bidding process carried out by the Petitioner. Further, in response to the specific query of the Commission regarding Article 12.1.1(f) of the PPA, which in departure from the Clause 5.7 of the Guidelines, provides for a pre-determined quantum of relief in case of certain Change in Law events and basis for such incorporation, learned counsel sought liberty to take necessary instructions and file a short response on this aspect. The learned counsel, however, clarified that such provision was already incorporated at RfS stage and not at a later stage. Accordingly, the Petitioner was directed to file its response on affidavit within a week on the following aspects:

(a) Basis for incorporation of Article 12.1.1(f) in the PPA which provides for pre-determined quantum of relief in respect of Change in Law events (i.e. changes in the rates of Anti-Dumping Duty, Safeguard Duty and Custom Duty etc. on Solar PV modules); and

(b) Whether above incorporation in Article 12.1.1(f) of the PPA has been pursuant to the approval of any competent authority including Appropriate Commission under Clause 18 of the Guidelines which provides that 'in case there is any deviation from these Guidelines and/or the SBDs, the same shall be subject to approval by the Appropriate Commission'.

8. The Petitioner vide its affidavit dated 13.1.2023 has filed its response on the above aspects, which has been noted and discussed in the subsequent part of this order.

Analysis and Decision

9. In the present case, the Petitioner issued RfS documents and conducted the bid process based on the "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects" dated 3.8.2017 and the amendments thereof ("the Guidelines") issued by the Ministry of Power, Government of India. We now proceed to consider the prayer of the Petitioner as regards adoption of tariff under Section 63 of the Act in respect of the RE power projects as discovered pursuant to the competitive bid process carried out in terms of the above Guidelines.

10. Section 63 of the Act provides as under:

"Section 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."

11. Thus, in terms of Section 63 of the Act, the Commission is required to adopt the tariff, on being satisfied that the transparent process of bidding in accordance with the guidelines issued by the Central Government has been followed in determination of such tariff.

12. Ministry of Power, Government of India has notified the Guidelines under Section 63 of the Act vide Resolution No. 23/27/2017-R&R on 3.8.2017. The said Guidelines have been subsequently amended by the Resolutions dated 14.6.2018, 3.1.2019, 9.7.2019, 22.10.2019 and 25.9.2020. The salient features of the Guidelines are as under:

(a) The Guidelines are applicable for procurement of power from grid connected solar PV power projects having size of 5 MW and above through tariff based competitive bidding to be conducted by procurers which includes distribution licensees, or the Authorized Representative(s), or Intermediary procurers.

(b) The procurer shall prepare the bid documents in accordance with the Guidelines and the Standard Bid Documents notified by the Ministry of Power, Government of India. If any deviation is proposed to be made in the Guidelines and Standard Bid Documents, approval of the Appropriate Commission would be necessary. Intimation about initiation of the bid process shall be sent by the procurer to the Appropriate Commission.

(c) Bids shall be designed in terms of a package. The minimum size of a package should be 50 MW in order to have economies of scale. Bidders shall quote for entire package.

(d) The procurer has option to choose to invite the two bids, namely, (i) power capacity (MW) terms, or (ii) energy quantity (kWh or million units i.e. MU) terms.

For procurement of power, the procurer may opt for either tariff or viability gap funding as bidding parameter.

(e) Draft PPA proposed to be entered into with the successful bidder and draft PSA, if applicable, shall be issued along with the RfS. Standard provisions to be incorporated as part of the PPA shall include, inter-alia, PPA period, quantum of power/ energy to be procured, payment security, generation compensation of offtake constraint, event of default and consequences thereof and Change in Law and shall be provided for, on back-to-back basis, in the PSA.

(f) Procurer and Intermediary procurer shall provide payment security to the solar power developer through revolving Letter of Credit of an amount not less than one month average billing and Payment Security Fund for at least three months" billing of all the projects tied up with such fund. In addition, the procurer may also choose to provide State Government Guarantee.

(g) End procurer shall provide payment security to the intermediary procurer through revolving Letter of Credit of an amount not less than one month`s average billing from the project under consideration and State Government Guarantee. In addition, end procurer may also choose to provide Payment Security Fund with at least three months" billing of all the projects tied up with such fund.

(h) The procurer shall call the bids adopting a single stage bidding process to be conducted through electronic mode (e-bidding). The procurers may adopt e-reverse auction, if it so desires. For this purpose, e-procurement platforms with a successful track record and with adequate safety, security and confidentiality features will be used. In case of solar park specific project, procurer shall provide intimation to the solar power park developer about the initiation of the bidding process and arrange the access of the bidders to the drafts of Implementation Support Agreement and land related agreement.

(i) RfS notice shall be issued in at least two national newspapers and on the websites of the procurer to provide wide publicity. Standard documentation to

be provided in the RfS stage shall include technical criteria, financial criteria, quantum of earnest money deposit and lock-in requirements for the lead members of the consortium.

(j) The procurer shall constitute committee for evaluation of the bids (Evaluation Committee), with at least three members, including at least one member with expertise in financial matters/ bid evaluation.

(k) Bidder shall submit non-refundable processing fee and/or project development fee as specified in the RfS, separate technical and price bids and bid guarantee. To ensure competitiveness, the minimum number of qualified bidders shall be two. If the number of qualified bidders is less than two even after three attempts of bidding, and the procurer still wants to continue with the bidding process, the same may be done with the consent of the Appropriate Commission.

(l) The PPA shall be signed with the successful bidder or an SPV formed by the successful bidder. After conclusion of bidding process, Evaluation Committee shall critically evaluate the bids and certify that the bidding process and the evaluation have been conducted in conformity with the provisions of RfS. After execution of the PPA, procurers shall disclose the name(s) of the successful bidder(s) and the tariff quoted by them in its website. Accordingly, the distribution licensee or the intermediary procurer shall approach the Appropriate Commission for adoption of tariff in terms of Section 63 of the Act.

13. In terms of the provisions of the Section 63 of the Act, we have to examine whether the process as per provisions of the Guidelines has been followed in the present case for arriving at the lowest tariff and for selection of the successful bidder.

14. The Guidelines provide for procurement of solar power at a tariff to be determined through transparent process of bidding by the procurer(s) from grid connected solar power projects having size of 5 MW and above.

15. The key milestones in the bidding process, as stated in the Petition, were as under:

Sr.	Event	Date
1	Issuance of RfS documents	18.2.2020
2	Last date for receipt of queries on RfS from the prospective bidders and Prebid Conference Date and time-venue of Pre-bid conference	On 6.3.2020 at 10:30 Hrs (IST)
3	Last date and Time for a) online submission of bid and b) All documents as per Clause 3.15 physically at NTPC office, Noida	On 19.3.2020 at 14:00 Hrs (IST)
4	Technical Bid Opening Date & Time	On 19.3.2020 at 14:30 Hrs (IST) onwards (Actual Opening Date – 20.7.2020)
5	Financial Bid Opening	Prior to start of Reverse Auction
6	Date and time for start of Reverse Auction	6.8.2020

16. On 18.2.2020, NTPC issued Request for Selection document, along with draft PPA and PSA documents for setting up of 1200 MW ISTS-connected solar PV power project. It is stated that pursuant to an internal policy issued vide Circular bearing No.763 dated 5.6.2018, NTPC discontinued the publication of IFB/NIT in newspapers and instead, the detailed IFB/NIT along with salient technical features, after 5.6.2018, is to be published on the website of NTPC viz. website www.ntpctender.com, Central Public Procurement Portal ('CPPP') viz. www.eprocure.gov.in and Government E-Marketplace ('GeM') portal of Government of India. Accordingly, NTPC had published the invitation for bids for selection of solar developers on 19.2.2020 on the websites of NTPC, Central Public Procurement Portal (CPPP) and Government E-Marketplace (GeM) portal of Government of India.

17. As per Clause 6.4 of the Guidelines, RfS notice is required to be published in at least two national newspapers and on the website of the Procurer to provide wide publicity. The Petitioner has submitted that the notice for invitation for bid for aforesaid tender was published on its website. We observed that the aforesaid aspect of issuing the public notice in the website of the Petitioner company in lieu of national newspapers as provided in the Guidelines has already been considered by the Commission vide its order dated 8.9.2021 in Petition No. 126/AT/2021, whereby the Commission, after considering the explanation furnished by the Petitioner, had observed as under:

“...16. On 10.8.2019, NTPC issued the RfS document, along with draft PPA and PSA documents for setting up of 1200 MW ISTS-connected solar PV power projects. As per Clause 6.4 of the Guidelines, RfS notice is required to be published in at least two national newspapers and on the websites of the procurer to provide wide publicity. As noted above, the Petitioner, vide Record of Proceedings for the hearing dated 23.7.2021 was directed to submit the details of the publication of notice in compliance with requirement of Clause 6.4 of the Guidelines. In response, the Petitioner vide its affidavit dated 3.8.2021 has submitted that as per its Internal Policy dated 5.6.2018, NTPC had decided to discontinue the publication of abridged IFB/NIT in the newspapers and the detailed IFB/NIT along with salient technical feature shall be published on the website of the Petitioner, CPPP and GeM portal of Government of India. Accordingly, the RfS notice for inviting the bids for selection of Solar Power Developers was published on its website.

17. Taking into the consideration submissions of the Petitioner and the similar dispensation already allowed by the Commission to the other CPSUs inviting the tenders in the capacity of intermediary procurer, we exempt the Petitioner from publishing the RfS notice in two national newspapers as per Clause 6.4 of the Guidelines in the present case...”

18. Accordingly, in line with the aforesaid decision of the Commission, we exempt the Petitioner for having not published the RfS notice in two national newspapers as per Clause 6.4 of the Guidelines in the present case.

19. As per Clause 3.1.1(b) of the Guidelines, the procurer (including intermediary procurer) is required to inform the Appropriate Commission about the initiation of the bidding process. NTPC has not separately intimated the Commission regarding initiation of the bid process. However, NTPC has submitted that the publication of the RfS notice ought to be considered as prior intimation about initiation of the bid process including to the Commission. However, we are not at all persuaded by the above justification as provided by NTPC for not complying with the specific clause requiring it to expressly inform the Appropriate Commission about the initiation of the bidding process. Further, vide order dated 21.12.2021 in Petition No. 210/AT/2021 (NTPC Ltd. v. Rising Sun Energy (K) Pvt. Ltd. and Anr.) the Commission had also taken a specific note of NTPC's lackadaisical approach in neither placing any letter on record indicating it had intimated the Appropriate Commission about the initiation of bid process nor having prayed for exemption from complying with the aforesaid requirement. In the said order, the NTPC was directed in future to take into account the requirements under the Guidelines and accordingly, to file the Petition along with the intimation to the Appropriate Commission about initiation of bid process as per Clause 3.1.1(b) of the Guidelines, if any, or to specifically pray for an exemption from complying with the requirement under the said clause. Suffice it note that NTPC is yet to follow the aforesaid direction of the Commission and accordingly, we once again direct NTPC to scrupulously follow the directions issued vide order dated 21.12.2021 in Petition No. 210/AT/2021 failing which it will be treated as non-compliance of the Guidelines issued by the Government of India.

20. Further, for opening and evaluation of bids, the Bid Evaluation Committee comprising of the following was constituted:

Sr. No	Particulars
1.	Sh. Rajiv Gupta (RE-CS)
2.	Sh. V.N Jain (Fin)
3.	Sh. Shyam Kumar, AGM (Corporate Commercial)

21. As per the original schedule, the last date of submission was bid was 6.3.2020 and the technical part of the bid was to be opened on 19.3.2020. However, from the submissions of NTPC, it appears that the bid submission deadline was extended upto 20.7.2020 and the technical part of the bid was opened on the same date. Pursuant to the opening and evaluation of technical and financial bids, 5 bidders, namely, The TATA Power Company Ltd., Azure Power India Pvt. Ltd., Renew Solar Power Pvt. Ltd., O2 Power SG PTE Ltd. and AMP Energy Green Pvt. Ltd. were found eligible for participating in e-reverse auction.

22. The e-reverse auction was carried out on 6.8.2020. After completion of e-reverse Auction, the following were declared as successful bidders:

S. No.	Bidder	Tariff (INR/Kwh)	Allocated capacity (MW)
1.	O2 Power SG PTE Ltd.	2.43	400
2.	Azure Power India Pvt. Ltd.	2.43	300
3.	The TATA Power Company Ltd.	2.43	370
4.	AMP Energy Green Pvt. Ltd	2.44	100
	Total		1170

23. On 19.4.2022, NTPC issued Letter of Award to the selected bidder, namely, O2 Power SG Pte Ltd. for 200 MW as under:

Bidder	Project Company	Tariff (INR/kWh)	Awarded Capacity (MW)
O2 Power SG Pte Ltd.	XL Xergi Power Private Ltd.	2.43	200
	Total		200

24. Relevant portion of one of the Letter of Award issued to successful bidder, namely, O2 Power SG Pte Ltd. is extracted as under:

“2.0 NTPC is pleased to accept your Response to RfS mentioned at para 1.0 (C), (E), (H) & (I) above and intend to sign Power Purchase Agreement for development of Grid Connected Solar Photo Voltaic Project of capacity of 200 MW and Supply of Solar Power from this project to NTPC subject to the terms and conditions contained in RfS mentioned at para 1.0 above and briefly brought out hereunder.

3.0 In line with the terms and conditions of RfS, before signing of PPA, you have the option to form Special Purpose Vehicle (hereinafter called “Project Company”) under Indian Companies Act. The company (Bidding Company or Project Company) executing the project (hereinafter called “Solar Power Developer”) shall enter into Power Purchase Agreement (PPA) as per the format given along with RfS within 90 days of issue of this Letter of Award (LOA). All the documents referred to at para 1.0 above shall form integral part of the Power Purchase Agreement to be entered into between Project Company / Solar Power Developer and NTPC so far these are not repugnant to the terms and conditions contained in the RfS referred to in para 1.0 above. The signing of PPA shall constitute the agreement for setting up of the project.

As specified in the RfS, irrespective of the date of signing of PPA, the Effective Date of PPA shall be 90th day from issuance of LOA or the actual date of signing of PPA if signed beyond 90 days of issuance of LOA for delays solely attributable to NTPC.

4.0 As per clause 3.26 of RfS document, you shall ensure that the Shareholding of Bidding Company O2 Power SG PTE LTD in the SPV/ project company executing the PPA shall not fall below 51% (fifty one per cent) at any time prior to 3 (three) years from the Commercial Operation Date (COD), except with the prior approval of NTPC. Further, you shall also ensure that the promoters shall not cede control of O2 Power SG PTE LTD till 3 (three) years from the COD except with the prior approval of NTPC. Any change in the shareholding after the expiry of 3 (three) years from the COD can be undertaken under intimation to NTPC.

5.0 The Tariff for electricity generated from the Solar Power Project to be developed by the Solar Power Developer for the entire period of twenty five (25) years of Power Purchase Agreement (PPA) to be entered into between the Solar Power Developer and NTPC for this project shall be Rs.2.43/kWh (Rupees Two and Forty Three paise only per Kilowatt hour) without any revision in the tariff in case of imposition of BCD and no Change in Law on account of BCD will be claimed by either party.

6.0 You along with your Project Company (if formed by your Company) are required to submit the following documents along with originals for verification within 15 days of issuance of LOA:

- i) Original Response to RfS referred to in para 1.0 (C) above.*
- ii) If Project Company is formed by your company for this project, Board Resolutions from your Company and your Parent and/or Affiliates duly certified*

by the Company Secretary or the Director, as applicable, regarding fulfilment of equity investment obligations of Project Company in the same manner as provided by you and your Affiliates in your favour at the time of submission of RfS.

- iii) Copy of the Certificate of Incorporation along with Memorandum & Article of Association (MOA) of Solar Power Developer highlighting the relevant provision of Power/Energy/Renewable energy/Solar Power Plant development as per clause 3.15 (A10) of RfS duly certified to be True copy by Company Secretary.
- iv) Details of promoters and current shareholding pattern of the Bidding Company and Project Company (if formed) developing the project, duly certified by the Company Secretary in original along with a copy of Return filed with Registrar of Companies (ROC) for registering the shareholding and its terms and conditions which became due for filing during this period.
- v) If Project Company is formed by your company to execute the project, a fresh Integrity Pact between Project Company and NTPC has to be signed. Certificate for Compliance to all Provisions of RfS Document is also to be submitted by Project Company.

7.0 As per your Response to RfS mentioned at para 1.0 (C), you have indicated that you shall develop one (01) project of 200 MW as under:

S. NO.	Capacity of Project	Location of Project
1.	200 MW	Village - Neemta, Tehsil –Fatehgarh, District - Jaisalmer, State - Rajasthan

In line with clause 3.27 of RfS documents, Solar Power Developer shall have option to change the Project location before the Financial Closure.\

9.0 The Solar Power Developer shall report financial closure within 12 months from the Effective date of Power Purchase Agreement and shall submit relevant documents to NTPC as per the terms and conditions of RfS.

10.0 All disputes arising out of and / or in connection with this “Selection of Solar Power Developers for Setting up 1200 MW ISTS Connected Solar PV Power Projects Anywhere in India” and Supply of Solar Power therefrom and execution of PPA thereto shall be governed by laws of India and Courts of Delhi shall have exclusive jurisdiction.

11.0 This Letter of Award (LOA) is being issued to you in duplicate. You are kindly requested to return the duplicate copy of this LOA including all Annexure, duly signed on each page by your authorized signatory in token of your unequivocal acknowledgement of the same within 7 days from the date of this LOA.”

25. Pursuant to the issuance of Letter of Award, NTPC entered into the PPA with XL Xergi Power Private Limited, Project Company of O2 Power SG Pte Ltd. on 14.7.2022 based on the PSA dated 18.4.2022 as entered into with Respondent No.2 GRIDCO Ltd. for onward sale of power to be generated from the solar power PV projects. Further, as brought on record by IA No. 69/2022 and as already noted above, NTPC, during pendency of the present proceedings, also entered into PSA for additional 200 MW with GRIDCO Limited on 30.9.2022 and on that basis, it issued another LoA dated 11.10.2022 in favour of Respondent No.1 for additional 200 MW and thereafter, signed the additional PPA with Respondent No.1 on 24.11.2022. Thus, after conclusion of the bidding process, the total tied up capacity under the PPA and PSA stood at 400 MW and the balance capacity could not be tied up by NTPC since it could not identify the beneficiaries/distribution licensees for such capacity.

26. As per Clause 10.2 of the Guidelines, Evaluation Committee is required to certify that the bidding process and the evaluation has been conducted in conformity with the provisions of the RfS. NTPC has submitted a conformity certificate dated 10.8.2020 issued by the Bid Evaluation Committee certifying that bidding process as well as techno-commercial and financial bid evaluation conducted by the Petitioner were in conformity to the provisions of the RfS. Relevant portion of the said conformity certificate is extracted as under:

"Ref. No.: RE-CS-0000-BOO-6

We do hereby solemnly certify and state as follows:

With respect to the RfS no. RE-CS-0000-BOO-6 dated 18.02.2020, it is hereby declared as follows:

After the conclusion of bid submission, the Evaluation Committee constituted for evaluation of bids has conducted the bidding process as well as techno-commercial and financial bid evaluation in conformity to the provisions of the RfS.

Rajiv Gupta
CGM (RE-CS)

Shyam Kumar
GM (Comml.)

V N Jain
CGM (Fin.)”

27. Further, NTPC was also asked to clarify as to whether the bidding documents including PPA and PSA were in line with the provisions of the Guidelines and in case of any deviation, the reason for such deviation along with the approval of the Appropriate Commission or any other authority. In this regard, NTPC vide affidavit dated 12.11.2022 has submitted that it formulated and issued the bidding documents including PPA and PSA in line with the provisions of the Guidelines and amendments thereof. However, during the course of hearing on 22.12.2022, it was pointed out to the Petitioner that Article 12.1.1(f) of the PPA, in departure from Clause 5.7 of the Guidelines, provides for pre-determined quantum of relief in case of certain Change in Law events and was accordingly asked to clarify (a) basis for incorporation of such article, and (b) whether such incorporation had been pursuant to approval of any competent authority including the Appropriate Commission under Clause 18 of the Guidelines.

28. In this regard, NTPC vide its affidavit dated 13.1.2023 has mainly submitted as under:

(a) Article 12.1.1(f) in the PPA provides that change in rates of Anti-Dumping Duty and Safeguard Duty, etc. if any, will be considered as Change in Law subject to the provisions that the Appropriate Commission recognizes such provision. Article 12.1.1 (f) specifically provides that the impact shall be affected based on documentary evidence submitted to the “concerned authority”. Further the mechanism of compensation as provided in Article 12.1.1(f) has been provided keeping in mind the restitutionary principle stipulated in Clause 5.7 of

the Guidelines, being subject to approval of this Commission under Clause 12.2 of the PPA. Article 12.1.1(f) of the PPA is not inconsistent or in conflict with the provisions of the Guidelines. As the said Article 12.1.1(f) in the PPA regarding rates of Anti-Dumping Duty and Safeguard Duty, etc. as Change in Law is subject to the approval of this Commission. Further, the parties of the PPA have agreed for the incorporation of Article 12.1.1(f) as provided in the PPA. Such Change in Law provisions were incorporated in the bid documents at the time of issuance of the same. Therefore, bidder(s) participating in the bid were made aware about the bid provisions. It may also be noted that subsequently, the Govt. of India has also notified the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 governing the recovery of costs due to Change in Law events and to provide a process & methodology to be followed.

(b) There has been no approval of any competent authority including Appropriate Commission under Clause 18 of the Guidelines. No approval was sought by the Petitioner in this regard as apparently it did not appear to NTPC to be in conflict with the Guidelines and such incorporation was only to facilitate in determination of relief in line with the restitutionary principle subject to approval of the Commission under Article 12.2. Further, the Petitioner at this stage requests this Commission to exercise its powers under Clause 18 of the Guidelines to approve Article 12.1.1(f) as incorporated in the PPA, the same being in the interest of equitable justice and within the powers of this Commission.

29. We have considered the submissions made by NTPC. Firstly, we find it appropriate to address the submission of NTPC that incorporation of Article 12.1.1(f) of the PPA providing for pre-determined quantum of compensation for certain Change in Law events is not inconsistent or in conflict with the provisions of the Guidelines. The relevant extract of Article 12.1.1(f) as incorporated in the PPA is as under:

“....12.1.1(f) In case of change in law on account of Anti-Dumping Duty and/or Safe-Guard Duty and/or Custom Duty etc. on Solar PV Modules, the Solar Power Developer

shall be entitled for increase/decrease in tariff. This increase/decrease in tariff shall be for an amount equivalent to INR 0.005/KWh (0.5 Paisa/KWH) for every increase/decrease of INR 01 (One) lakh/MW of impact on cost of Solar PV modules, which shall be effected based on the documentary evidence submitted to the concerned authority, which shall inter alia includes Bill of Lading (BL), Bill of Entry (BOE) at the Port of arrival, duty paid at the port of arrival, Lorry receipt (LR), Goods Receipt (GR), Insurance papers etc. upto project site. This increase/decrease in tariff due to this change in cost of PV modules shall be limited upto 150% (One hundred & fifty percent) of the solar project capacity allocated to the project developer.”

30. Whereas, Clause 5.7 of the Guidelines provides as under:

“5.7 Change in Law

5.7.1. In the event of 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.....”

Perusal of Article 12.1.1(f) of the PPA reveals that the parties, on their own, have determined and agreed upon the pre-determined quantum of compensation for Change in Law events such as Anti-dumping Duty, Safeguard Duty and Customs Duty, etc. which is clearly at variance with the Clause 5.7 of the Guidelines which provides that quantum and mechanism of compensation payment shall be determined by the Appropriate Commission. Hence, the submission of NTPC that such clause is in line with or consistent with the provisions of Guidelines cannot sustain. While the procurer (including intermediary procurer) is at liberty to take deviations from the provisions of the Guidelines, it has to be in terms of the provisions of the Guidelines which provide as under:

“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

.....
(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.

.....
18. Deviation from the process defined in the Guidelines

In case there is any deviation from these 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....”

31. In terms of Clause 3.1.1(a) and Clause 3.1.1(c) of the Guidelines, the procurer (including intermediary procurer) is required to prepare the bid documents in accordance with the Guidelines and in case of any deviation in the bid documents, it is required to seek approval of the Appropriate Commission in accordance with the process specified in Clause 18 of the Guidelines. Admittedly, NTPC did not take any approval of the Appropriate Commission under Clause 18 of the Guidelines since as per NTPC, the said article did not appear to be in conflict with the Guidelines was only to facilitate in determination of relief in line with restitutionary principles. However, we have already negated the said submission of NTPC and since the workings of the pre-determined quantum of relief i.e. increase/decrease in tariff for an amount of Rs. 0.005/kWh for every increase/ decrease of Rs. 1 lakh/MW has not been furnished by NTPC, we do not find it proper to comment upon its submission that such mechanism of compensation has been provided keeping in mind the restitutionary principles.

32. Further, NTPC, at the same time, has also invoked the provisions of the Clause 18 of the Guidelines praying the Commission to exercise its powers under the said clause to approve the Article 12.1.1(f) as incorporated in the PPA as the same being in

the interest of equitable justice and within the powers of this Commission. The Petitioner has also pointed out that the parties to the PPA have agreed for the incorporation of Article 12.1.1(f) as provided in the PPA and that such provision was incorporated in the bid documents at the time of their issuance itself and therefore, the bidder(s) participating in the bid were made aware about the said provision.

33. It is pertinent to mention that the selection of the successful bidder has been done and the tariff of the solar power projects has been discovered by the Petitioner, NTPC through a transparent process of competitive bidding in accordance with the Guidelines issued by Ministry of Power, Government of India under Section 63 of the Act, the PPAs and PSAs having been signed; procurement of power and PSAs in respect of GRIDCO Ltd. having already been approved by OERC, in terms of Section 63 of the Act, the Commission adopts the following tariff for the solar power project as agreed to by the successful bidder subject to approval of deviation in the bid documents in accordance with the provisions specified in the Guidelines, which shall remain valid throughout the period covered in the PPAs and PSAs:

Bidder	Project Company	Tariff (INR/kWh)	Awarded capacity (MW)
O2 Power SG Pte Ltd.	XI Xergi Power Pvt. Ltd.	2.43	400
Total			400

34. Article 10.3 of the PPAs provides as under:

“10.3 Payment of Monthly Bills

10.3.1 NTPC shall pay the amount payable under the Monthly Bill By the 45th (Forty Fifth) day from the date of presentation of bill i.e. the Due Date to such amount of the SPD, as shall be previously notified by the SPD in accordance with Article 10.3.2 below.

10.3.2 All payments required to be made under this Agreement shall also include any deduction or set off for:

- i) deductions required by the Law; and
- ii) amount claimed by NTPC, if any, from the SPD, through an invoice to be payable by the SPD, and not disputed by the SPD within fifteen (15) days of receipt of the said Invoice and such deduction or set-off shall be made to the extent of the amounts not disputed. It is clarified that NTPC shall be entitled to claim any set off or deduction
- iii) The SPD shall open a bank account at New Delhi (the "SPD's Designated Account") for all Tariff Payments to be made by NTPC to the SPD, and notify NTPC of the details of such account at least ninety (90) Days before the dispatch of the first Monthly Bill. NTPC shall also designate a bank account at New Delhi ("NTPC's Designated Account") for payments to be made by the SPD to NTPC, if any, and notify the SPD of the details of such account ninety (90) Days before the SCD. NTPC and the SPD shall instruct their respective bankers to make all payments under this Agreement to the SPD's Designated Account or NTPC's Designated Account, as the case may be, and shall notify either Party of such instructions on the same day."

35. Further, Article 10.4 of the PPAs provides as under:

"10.4 Payment Security Mechanism

Letter of Credit (LC) and payment security fund

10.4.1 NTPC shall extend to the SPD, in respect of payment of its Monthly Bills, a monthly unconditional, revolving and irrevocable LC, which may be drawn upon by the SPD in accordance with this Article.

10.4.2 Subject to Article 10.4.1, not later than one (1) Month before the start of supply, NTPC through a scheduled bank shall extend a LC in favour of the SPD, to be made operative from a date prior to the Due Date of its first Monthly Bill under this Agreement. The LC shall have a term of twelve (12) Months and shall be renewed annually, for an amount equal to:

- i) for the first Contract Year, equal to the estimated average monthly billing;
- ii) for each subsequent Contract Year, equal to the 110% of the average monthly billing of the previous Contract Year.

10.4.3 The SPD shall not draw upon such LC prior to the Due Date of the relevant Monthly Bill, and shall not make more than one drawal in a Month.

10.4.4 If at any time, such LC amount falls short of the amount specified in Article 10.4.2 due to any reason whatsoever, NTPC shall restore such shortfall within seven (7) days,

10.4.5 NTPC shall cause the scheduled bank issuing the Letter of Credit to intimate the SPD, in writing regarding establishing of such irrevocable LC.

10.4.6 NTPC shall ensure that the LC shall be renewed not later than ten (10) days prior to its expiry.

10.4.7 All costs relating to opening and maintenance of the Letter of Credit shall be borne by NTPC.

10.4.8 If NTPC fails to pay undisputed Monthly Bill or part thereof within and including the Due Date, then the SPD may draw upon the LC, and accordingly the bank shall pay without any reference or instructions from NTPC, an amount equal to such Monthly Bill or part thereof, by presenting to the scheduled bank issuing the LC, the following documents:

i) a copy of the Monthly Bill which has remained unpaid to SPD and;

ii) a certificate from the SPD to the effect that the bill at item (i) above, or specified part thereof, is in accordance with the Agreement and has remained unpaid beyond the Due Date;

10.4.9 Prior to declaration of commissioning of first part capacity of the Project, the SPD shall furnish a Payment Security Deposit (PSD) @ Rs. 5.00 lakh/MW/Project, to NTPC through DD/NEFT/ RTGS. This fund shall form part of the Payment Security Fund maintained by NTPC for the Projects. Modalities of operationalization of the Payment Security Deposit will be notified by MNRE at appropriate stage, through necessary guidelines/orders. The above amount shall be credited to NTPC pro-rata to the part capacity being commissioned at that stage. In case the SPD is unable to furnish the above amount prior to commissioning of the corresponding part-capacity, NTPC reserves the right to recover the same from the monthly energy payments made to the SPD, along with interest @ SBI 1-year MCLR to be levied from the date of commissioning of the said part-capacity to the date of recovery/due date of payment of invoices within one year of declaration of COD of the project...”

36. Clause (10) of Regulation 9 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2020 (hereinafter referred to as “the Trading Licence Regulations”) provides as under:

“9.(10) The Trading Licensee shall make payment of dues by the agreed due date to the seller for purchase of the agreed quantum of electricity through an escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller. Such escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller shall be equivalent to:

(a) one point one (1.1) times the average monthly bill amount (estimated average of monthly billing amounts for three months or actual monthly billing amount for preceding three months as the case may be) with a validity of one year for long term contracts;

(b) one point zero five (1.05) times of contract value for short term contracts.”

37. The above provisions provide for payment security mechanism to be complied with by the parties to the present Petition. Accordingly, the provisions of Articles 10.3 and 10.4 of the PPAs and Clause (10) of Regulation 9 of the Trading Licence Regulations shall be abided by all the concerned parties to the present Petition.

38. The Petitioner, NTPC has submitted that in addition to tariff, there will be trading margin of Rs.0.07/kWh to be recovered from the distribution licensees in terms of PSA. In this regard, Clause (1)(d) of Regulation 8 of the Trading Licence Regulations provides as under:

“For transactions under long term contracts, the trading margin shall be as mutually decided between the Trading licensee and the seller:...”

39. The above provision gives choice to the contracting parties to mutually agree on trading margin for long-term transaction.

40. However, proviso to Regulation 8(1)(d) of the Trading Licence Regulations provides as under:

*“8(1)(d) ******

Provided that in contracts where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh.”

41. Regulation 8(1)(f) of the Trading Licence Regulations provides as under:

“For transactions under Back to Back contracts, where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh.”

42. The above two provisions are exceptions to the main provision as regards trading margin. Distribution licensee has agreed to a trading margin of Rs. 0.07/kWh as agreed in the PSA, which is in consonance with Regulation 8(1)(d) of the Trading Licence Regulations. Therefore, in case of failure by NTPC to provide escrow arrangement or irrevocable, unconditional and revolving letter of credit to the wind generators, the trading margin shall be limited to Rs. 0.02/kWh as specified in the Regulation 8(1)(d) and Regulation 8(1)(f) of the Trading Licence Regulations.

43. In summary, in terms of Section 63 of the Act, the Commission adopts the tariff (as at paragraph 33 of this order) for the solar project as the same has been discovered through transparent competitive bidding process in terms of the Guidelines subject to approval of deviation in the bid documents in accordance with the provisions specified in the Guidelines and shall remain valid throughout the period covered in the PSAs and PPAs.

44. The Petition No. 254/AT/2022 along with IA No. 69/2022 is disposed of in terms of the above.

**Sd.-
(P.K. Singh)
Member**

**sd/-
(Arun Goyal)
Member**

**sd/-
(I.S. Jha)
Member**