KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM

PRESENT: Sri.T.M. Manoharan, Chairman

OP No. 13/2015

In the matter of Procurement of 865 MW power for long term by KSEB Ltd. on DBFOO basis– adoption of Tariff under Section 63 of the Electricity Act, 2003.

Kerala State Electricity Board Limited : **Petitioner**
Vydyuthi Bhavanam, Pattom,
Thiruvananthapuram.

Order dated 30.8.2016

T.M. Manoharan, Chairman

Introduction

1. Kerala State Electricity Board Limited (hereinafter referred to as KSEB Ltd or the licensee) had, on 21.04.2015, filed a petition before the Kerala State Electricity Regulatory Commission (hereinafter referred to as the Commission) for the adoption of tariff determined under Section 63 of the Electricity Act, 2003 (hereinafter referred to as the Act) for the 865 MW of power procured by it on 'Design, Build, Finance, Own and Operate (DBFOO)' basis in the open bid process claimed to be in accordance with the Bidding Guidelines and the documents notified by the Government of India. The Commission had, after careful examination of the proposal submitted by KSEB Ltd, found that it had not submitted, the necessary and sufficient data and documents required for taking appropriate decision in the matter. Hence the Commission as per its letter dated 07.12.2015 directed KSEB Ltd to submit various details required for examining the proposal and for taking appropriate decision thereon. KSEB Ltd, there upon submitted further details as per its letter dated 27.01.2016. The data and documents made available by the licensee have been examined in the light of the relevant statutory provisions in the Act, the regulations made thereunder and the guidelines issued by Government of India under Section 63 of the Act.
2. Section 63 of the Act provides for determination of tariff by bidding process and it stipulates that 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. Clause (b) under sub-section (1) of Section 86 of the Act empowers the Commission to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or

from other sources through agreements for purchase of power for distribution and supply within the State. From the above statutory provisions it can easily be found that,

(i) The Commission has the duty and function to regulate the quantum of purchase of electricity, the process of procurement of electricity and the price at which electricity is procured.

(ii) The Commission has to adopt the tariff discovered in a tender provided the process of tender is transparent and in accordance with the guidelines issued by the Government of India under Section 63 of the Act.

As per Section 60 of the Act the Commission can issue appropriate directions to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes adverse effect on competition in electricity industry. In view of the preamble to the Act, the Commission has also a duty to take measures conducive to the development of electricity industry, to promote competition therein and to protect the interests of consumers. The present purchase of electricity is to the tune of 865 MW (200 MW at the rate of Rs.3.60 / kWh, 115 MW at the rate of Rs.4.15 / kWh and 550 MW at the rate of Rs.4.29 / kWh). The normative plant load factor (PLF) for recovery of full fixed charges is 85%. At the normative PLF of 85%, the quantum of electricity to be purchased per annum by KSEB Ltd as per the impugned power purchase agreements, is about 6440 MU. At a weighted average of Rs.4.11 per unit, the cost of annual purchase of 6440 MU would be approximately Rs.2650 crore. For 25 years the amount involved in the purchase of 865 MW of power as per the impugned power purchase agreements would be to the tune of Rs.66225 crore. As per the terms of the PPAs submitted for approval, the fixed cost payable would vary with respect to the station heat rate initially and thereafter it would vary with respect to increase in wholesale price index (WPI). The fuel charges payable by the licensee would also vary with respect to various factors mentioned in Articles 21 and 22 of the PPA which provide for absorbing the impact of changes in the landed cost of coal including the cost of transportation, during the course of the contract period. Hence the amounts projected above are likely to increase further.

3. Any authority which takes decision relating to purchase of power, especially on long term basis, has to devote special attention to the following factors and facts. The main stakeholders in power sector are the consumers, the utilities, the Commission and the State Government. None of the stakeholders in power sector would prefer to have load shedding or power cut or increase in tariff. The interest of the consumer is to get uninterrupted good quality power at the least possible tariff. As per Section 6 of the Act, it is the joint responsibility of the Central and State Governments to provide access to electricity to every household in all the villages and hamlets in the country. Electricity has now been recognized as a right of every citizen in the country. The tariff structure of various consumer categories in the State has been designed with a view to meeting the

requirements of socio-economic development in the society. The agricultural consumers and the domestic consumers in the lower and middle income groups are being given electricity at subsidized rates. For this purpose electricity charges at higher rates are realized from commercial consumers and certain other categories of consumers. This process of cross subsidy is adopted in the power sector as a part of engineering the socio economic development in the society. The Tariff Policy issued by Government of India stipulates that the tariff of cross-subsidizing categories shall not be more than 20% over the cost of supply. Clause (g) of Section 61 of the Act stipulates that cross subsidy shall be progressively minimized. Every consumer with a contract demand above 1 MW has a right to avail mandatory open access for the purchase and transmission of power from any source of his choice. The Commission has issued Kerala State Electricity Regulatory Commission (Connectivity and Intra-State Open Access) Regulations, 2013, which stipulates the terms and conditions for availing open access. As per clause (14) of regulation 3 of the said regulations embedded open access consumer has been defined as a consumer who has a supply agreement with the distribution licensee in whose area of supply the consumer is located and avails the option of drawing part or full of its demand from any other person by availing open access, in any one or more time slots during a day or more, in any month or more during the year, without ceasing to be a consumer of the said distribution licensee and continues to pay monthly demand charges and other charges as per rate schedule applicable to relevant category. Therefore, any embedded consumer can avail power from cheaper sources. It would not be in the interest of the licensee if the consumers in cross-subsidizing category start availing power from cheaper sources other than KSEB Ltd, utilizing the facility for open access. In order to protect the interests of the consumers who avail the benefit of cross-subsidy, the consumers who provide cross-subsidy and the licensee, the tariff has to be kept at optimum level. Therefore any decision on power purchase has to be taken with extreme care and caution. In view of the gravity of the issue the Commission has to carefully examine all the aspects of the impugned purchase of power with a view to protecting the interests of the consumers and of the licensee.

4. The facts of the case are briefly stated hereunder. KSEB Ltd. has, vide its petition dated 21.04.2015, submitted the following,-

(1) The present average annual energy requirement of the State of Kerala is about 60 Million units per day (23500 Million units annually) and unrestricted peak demand is about 4000 MW. The electricity demand of the State has been increasing at the rate of 7 to 8% annually. By the end of 2017-18, KSEB Ltd. is expecting an energy shortage of 5664 MU and a peak deficit of 1322 MW.

(2) At present the electricity demand of the State has been met through:
   (a) Generation from State's own hydel projects
   (b) Allocation from the Central Generating Stations (CGS) including allocation from National Thermal Power Corporation Ltd (NTPC Ltd), Neyveli Lignite Corporation (NLC) and Nuclear Power Corporation of India Ltd (NPCIL).
   (c) Procurement of power from outside the State on short-term basis and / medium term basis.

(3) Due to difficulty in getting environmental clearance, the possibility of constructing more hydel power stations is very poor.

(4) The chances of getting additional allocation from the new Central Generating Stations are very remote.

(5) The energy demand based on 18th Electric Power Survey (EPS) conducted by the Central Electricity Authority (CEA) and the energy availability from existing and ongoing hydel stations, Central Generating Stations, Maithon Thermal Power Station and Damodar Valley Corporation (DVC) upto the year 2026-27 are submitted in the Table-1 and Table -2 below.

Table-1
Energy demand and availability

Year	*Energy Demand (18th EPS)*	*Hydel*	*CGS*	*TATA MAITHON*	*DVC*	*Case-1 (3/14 to 2/17)*	*Total Availability*	*Energy Shortage*
	(MU)	*(MU)*	*(MU)*	*(MU)*	*(MU)*	*(MU)*	*(MU)*	*(MU)*
As on 31.03.2014		*7065*	*8900*				*15965*	
2014-15	*23554*	*7088*	*8900*			*2700*	*18688*	*4866*
2015-16	*24915*	*7131*	*10262*			*2700*	*20093*	*4822*
2016-17	*26584*	*7273*	*11473*	*980*	*1750*	*2700*	*24176*	*2408*
2017-18	*28080*	*7427*	*12260*	*980*	*1750*		*22417*	*5663*
2018-19	*29595*	*7586*	*12260*	*980*	*1750*		*22576*	*7019*
2019-20	*31198*	*7586*	*12260*	*980*	*1750*		*22576*	*8622*
2020-21	*32895*	*7609*	*13310*	*980*	*1750*		*23649*	*9246*
2021-22	*34691*	*7609*	*15025*	*980*	*1750*		*25364*	*9327*
2022-23	*36583*	*7609*	*15690*	*980*	*1750*		*26029*	*10554*
2023-24	*38577*	*7609*	*15690*	*980*	*1750*		*26029*	*12548*
2024-25	*40677*	*7609*	*15690*	*980*	*1750*		*26029*	*14648*
2025-26	*42890*	*7609*	*15690*	*980*	*1750*		*26029*	*16861*
2026-27	*45221*	*7609*	*15690*	*980*	*1750*		*26029*	*19192*

Table-2
Peak demand and availability

Year	*Peak Demand (18th EPS)*	*Hydel*	*CGS*	*TATA MAITHON*	*DVC*	*Case-1 (3/14 to 2/17)*	*Total Availability*	*Peak Shortage*
As on 31.03.2014		*1650*	*1100*				*2750*	
2014-15	*4137*	*1657.5*	*1100*			*340*	*3098*	*1040*
2015-16	*4386*	*1675*	*1265*			*340*	*3280*	*1106*
2016-17	*4669*	*1691.1*	*1412*	*127.5*	*212.5*	*340*	*3783*	*886*
2017-18	*4931*	*1751.1*	*1508*	*127.5*	*212.5*		*3599*	*1332*
2018-19	*5198*	*1821.1*	*1508*	*127.5*	*212.5*		*3669*	*1529*
2019-20	*5479*	*1821.1*	*1508*	*127.5*	*212.5*		*3669*	*1810*
2020-21	*5777*	*1830.1*	*1636*	*127.5*	*212.5*		*3806*	*1971*
2021-22	*6093*	*1830.1*	*1844*	*127.5*	*212.5*		*4014*	*2079*
2022-23	*6426*	*1830.1*	*1925*	*127.5*	*212.5*		*4095*	*2331*
2023-24	*6777*	*1830.1*	*1925*	*127.5*	*212.5*		*4095*	*2682*
2024-25	*7147*	*1830.1*	*1925*	*127.5*	*212.5*		*4095*	*3052*
2025-26	*7536*	*1830.1*	*1925*	*127.5*	*212.5*		*4095*	*3441*
2026-27	*7946*	*1830.1*	*1925*	*127.5*	*212.5*		*4095*	*3851*

(6) KSEB Ltd expects to have an energy shortage of about 5664 MU by the year 2017-18. Further, the peak demand shortage will be about 1332 MW by the end of the year 2017-18. The energy shortages may increase to 10555 MU and peak shortage may increase to 2331 MW by the year 2022-23 (within a short span of 7 years from now).

(7) There is only a very remote possibility of getting clearance from Ministry of Environment and Forests (MoEF), Government of India for establishing major hydel projects in the State. Further, the State is not having any reserves of fossil fuels (coal or lignite or natural gas) and hence there is a very remote possibility for establishing major thermal projects in a cost efficient manner.

(8) Hence, KSEB Ltd. resorted to procurement of power through competitive bidding processes as per Section 63 of the Electricity Act, 2003, read with the Tariff Policy, 2006, notified by the Central Government. Considering the legal provisions in the Electricity Act-2003, National Tariff Policy and the directions of the Commission, KSEB Ltd has decided to procure a substantial part of the future electricity requirement of the State through competitive bidding route.

(9) Ministry of Power (MoP), Government of India has, vide the resolution No. 23/17/2011/R&/ Vol-V dated 9th November 2013, notified the Guidelines for Procurement of Electricity from Thermal Power Stations set up on DBFOO basis and also issued model documents comprising of the Model Request for Qualification (MRFQ), the Model Request for Proposal (MRFP) and the Model Power Supply Agreement (MPSA), collectively called the Model Standard Bidding Documents (MSBD) to be adopted by distribution licensees for procurement of electricity from power producers through a

process of open and transparent competitive bidding based on the offer of the lowest tariff. KSEB Ltd had decided to adopt this procedure prescribed by Government of India.

(10) As per the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in Inter-State Transmission and Related Matters) Regulations, 2009, the power tied up through long term basis has priority over MTOA and short-term basis. Further, in the case of Long Term Access applications, it is mandatory for the Central Transmission Utility (CTU) to build and provide long term access within the maximum time limit of 3 years and 9 months from the date of receipt of the application by the CTU. Considering the emerging electricity demand and also considering the priority of getting open access etc., KSEB Ltd has decided to procure power on long term basis rather than medium term basis or short-term basis.

(11) Further, the life of a thermal plant is about '25 years'. Hence, if the power is tied up for the entire life of a project, then the rates discovered through tender process are likely to be more competitive than the power tied up for short durations.

(12) As per the provisions of the draft power sale agreement (PSA) issued by the Ministry of Power, the utility is bound to pay 50% of the fixed charges for the period in the case of non-availability of transmission system. The available inter-state transmission corridor to Kerala and the transmission network available inside Kerala would prove insufficient, if all the contracted power and additional CGS allocation materialize in future. The works of Edamon-Kochi and Areekode-Mysore lines are expected to be completed before 2017. The works relating to the Koodamkulam Power Station of NPCIL are expected to be completed and the power station is expected to be made fully operational without much delay. KSEB Ltd reasonably expects that, the present inter-regional and S1-S2 transmission constraints may be eased out by the year 2017-18.

(13) KSEB Ltd has submitted that it had, considering the energy shortage anticipated from the year 2016-17 and also considering the risk of bearing the 50% of fixed charges in the event of non-availability of transmission system, decided to invite two separate bids, on DBFOO basis as detailed below.

(i) For procuring 450MW power from December-2016 onwards for 25 years, and ,

(ii) For procuring 400MW power from October-2017 onwards for 25 years,

Accordingly the first bid was invited on 05.03.2014 (hereinafter referred to as Bid 1) and the second bid was invited on 25.04.2014 (hereinafter referred to as Bid 2). Bid 1 was opened on 31.10.2014 and Bid 2 was opened on 14.11.2014.

(14) After completing all the procedural formalities as per the bidding guidelines, the financial bid of the Bid-1 was opened on 31.10.2014. Ten bidders participated in the final bidding process and the details of the offers received from the qualified bidders are as given in Table-3 below.

Table-3
Details of bids received through Bid-1 opened on 31.10.2014

Name of Bidder		*Quantum, MW*	*Quoted Tariff, Rs.*			*Location of Power Station*	*Rank*
		Offered	*Fixed charge*	*Variable charge*	*Tariff*		
1	*Jindal Power Limited, New Delhi.*	*200*	*2.74*	*0.86*	*3.60*	*Chhattisgarh*	*L1*
2	*Jhabua Power Limited, Gurgaon.*	*115*	*2.39*	*1.76*	*4.15*	*Seoni, MP*	*L2*
3	*Bharat Aluminium Co. Ltd., Chattisgarh.*	*115*	*3.25*	*1.04*	*4.29*	*Chhattisgarh*	*L3*
4	*Jindal India Thermal Power Limited, New Delhi.*	*200*	*3.64*	*0.75*	*4.39*	*Angul, Odisha*	*L4*
5	*R. K. M. Power gen Pvt. Ltd., Chennai.*	*150*	*3.24*	*1.96*	*5.20*	*Chhattisgarh*	*L5*
6	*Adani Power Ltd., Gujarat.*	*300*	*3.85*	*1.69*	*5.54*	*Kutchh, Gujarat*	*L6*
7	*Lanco Power Ltd., Gurgaon.*	*450*	*3.43*	*2.19*	*5.62*	*Lanco Vidharbha Thermal Power Ltd*	*L7*
8	*Vandana Vidhyut Ltd., Raipur.*	*114*	*4.70*	*1.48*	*6.18*	*Chhattisgarh*	*L8*
9	*Thermal Powertech Corporation India Ltd., Hyderabad.*	*120*	*4.93*	*2.07*	*7.00*	*Nellore, Andhra Pradesh*	*L9*
10	*Indiabulls Power Limited, Gurgaon.*	*450*	*5.15*	*2.14*	*7.29*	*Nashik Thermal Power Station*	*L10*

(15) The L1 bidder in Bid-1, had offered only 200MW against the requirement of 450 MW. Hence, KSEB Ltd had requested the bidders L2 to L4 to match their tariff to L1. But, none of the bidders was willing to match their rates with that of L1.

(16) The Bid-2 was opened on 14-11-2014. Eleven bidders participated in the bidding process and the rates quoted and other details of the qualified bidders are detailed in Table -4 below.

Table-4

Details of bids received through Bid-2 opened on 14.11.2014

Sl.No	*Name of Bidder*	*Quantum Offered MW*	*Quoted Tariff (Rs.Ps)*			*Rank*
			Fixed charge	*Fuel Charge*	*Tariff*	
1	*Bharat Aluminium Co Ltd, Chhattisgarh 495684*	*100*	*3.25*	*1.04*	*4.29*	*L1*
2	*Jindal India Thermal Power limited,New Delhi 110066.*	*100*	*3.62*	*0.75*	*4.37*	*L2*
3	*Jhabua Power Limited, Gurgaon-122001*	*100*	*2.65*	*1.76*	*4.41*	*L3*
4	*Jindal Power Limited, New Delhi*	*150*	*3.57*	*0.86*	*4.43*	*L4*
5	*East Coast Energy PrivateLimited,AndhraPradesh*	*100*	*2.95*	*1.5*	*4.45*	*L5*
6	*Monnet Power Company Limited, New Delhi*	*100*	*3.61*	*0.88*	*4.49*	*L6*
7	*SKS Power Generation (Chhattisgarh)Ltd.*	*122*	*3.96*	*0.87*	*4.83*	*L7*
8	*Lanco Power Limited, Gurgaon,122016*	*400*	*3.67*	*1.52*	*5.19*	*L8*
9	*Adani Power Limited; Gujarat 380009*	*300*	*3.95*	*1.69*	*5.64*	*L9*
10	*M B Power (Madhya Pradesh) Limited; New Delhi 110020*	*374.15*	*3.50*	*2.43*	*5.93*	*L10*
11	*NCC Power Projects Limited, Andhra Pradesh 500082.*	*100*	*3.88*	*2.07*	*5.95*	*L11*

(17) M/s. BALCO, the lowest bidder in Bid-2, had offered to supply 100 MW only as against 400 MW required by KSEB Ltd. Hence, KSEB Ltd had requested the bidders L2 to L6 to match the quoted tariff with that of the L1 bidder. The bidders L2 to L5 in the Bid-2 had offered their willingness to match their tariffs quoted with the tariff quoted by the L1 bidder. The details of tariff matched by L2 to L5 in Bid-2 are given in Table-5 below

Table-5

Details of the tariff matched by L2 to L5 in the Bid-2 with that of L1

Rank	*Name of Bidder*	*Quantum Offered MW*	*Quoted Tariff(Rs.Ps)/kwh*			*Matched tariff(Rs.Ps)/kwh*		
			Fixed charge	*Fuel Charge*	*Tariff*	*Fixed charge*	*Fuel Charge*	*Tariff*
L2	*Jindal India Thermal Power limited, New Delhi 110066.*	*100*	*3.62*	*0.75*	*4.37*	*3.54*	*0.75*	*4.29*
L3	*Jhabua Power Limited, Gurgaon-122001*	*100*	*2.65*	*1.76*	*4.41*	*2.97*	*1.32*	*4.29*
L4	*Jindal Power Limited, New Delhi*	*150*	*3.57*	*0.86*	*4.43*	*3.43*	*0.86*	*4.29*
L5	*East Coast Energy Private Limited, Andhra Pradesh*	*100*	*2.95*	*1.5*	*4.45*	*3.14*	*1.15*	*4.29*
	Total	*450*						*4.29*

(18) From the quanta and the rates derived in the Bid-1 and Bid-2, KSEB Ltd had in principle decided as follows.

(a) The rate offered by the L1 bidder in the Bid-1 is @ Rs 3.60 per unit for supplying 200 MW from December-2016 onwards for 25 years. Since the rate seems to be very competitive, KSEB Ltd issued LoA with the 'L1' bidder, M/s.Jindal Power Limited, New Delhi for procuring 200 MW from December-2016 onwards for '25' years.

(b) The rate offered by L2 bidder in the Bid-1 is @ Rs 4.15 per unit for supplying 115 MW from December-2016 onwards for 25 years. Since the rate offered is less than the rate quoted by L1 bidder in the Bid-2 and the rate seems to be competitive when compared to the cost plus tariff of recently commissioned NTPC projects, KSEB Ltd issued LoA to the 'L2' bidder of the Bid-1, M/s Jhabua Power Limited Guargon for procuring 115 MW from December-2016 onwards for '25' years @ Rs 4.15 per unit.

(c) Since the rates quoted by the remaining bidders (Other than L1 and L2) in the Bid-1 is equal to or more than the rate derived in the Bid-2, KSEB Ltd has not considered the remaining other offers from the Bid-1.

(d) Thus, out of the requirement of 450 MW through Bid-1, only 315 MW (200 MW with M/s Jindal power limited and 115 MW with M/s

Jhabua Power Limited) could be tied up leaving a shortage of 135 MW power from the required quantum.

(e) However, through the Bid-2, a total capacity of 550 MW was procured @4.29 per unit for 25 years from October-2017 onwards as against the requirement of 400 MW. The rate offered appeared to be competitive compared to the present cost plus tariff of the recently commissioned stations of NTPC Ltd. Considering the competitive rate of Rs 4.29 per unit derived through the Bid-2, and also duly considering the likely power shortages in the forthcoming years, KSEB Ltd has decided to procure 550MW through Bid-2, (bid quantum of 400 MW intended to be procured through Bid-2 plus 150 MW for meeting the short fall out of the bid quantum of 450 MW from Bid-1) @4.29 per unit for twenty five years from October-2017 onwards as detailed below.

i) 100 MW from Bharat Aluminum Company limited (BALCO (L1 bidder)@ Rs 4.29 per unit, comprising a fixed charge of Rs. 3.25/ kWh and a fuel charge of Rs. 1.04/ kWh.

ii) Jindal India Thermal Power limited (L2) for 100MW at a tariff of Rs. 4.29/ kWh comprising a fixed charge of Rs. 3.54/ kWh and a fuel charge of Rs. 0.75/ kW.

iii) Jhabua Power Limited (L3) for 100MW at a tariff of Rs. 4.29/ kWh comprising a fixed charge of Rs. 2.97/ kWh and a fuel charge of Rs. 1.32/ kWh

iv) Jindal Power Limited (L4) for 150MW at a tariff of Rs. 4.29/ kWh comprising a fixed charge of Rs. 3.43/ kWh and a fuel charge of Rs. 0.86/ kWh.

v) East Coast Energy Private Limited, (L5) for 100MW at a tariff of Rs. 4.29/ kWh, comprising a fixed charge of Rs. 3.14/ kWh and a fuel charge of Rs. 1.15/ kWh

(19) KSEB Ltd has also submitted that Government of Kerala has accorded sanction for procuring 865 MW on DBFOO basis vide G.O(MS)No.45/2014/PD dated 20.12.2014.

(20) KSEB Ltd has further submitted that, the grant of Long Term Open Access (LTOA) on interstate transmission lines is on 'first come, first served' basis. In order to ensure priority, KSEB Ltd had filed the application for long term open access before the Central Transmission Utility (PGCIL), in December-2014. Letter of Awards (LoA) for procuring power to the tune of 315 MW from Bid-1 and 550MW from Bid-2 were issued to the successful bidders and power supply agreements (PSA) had been executed with the firms. The details of PSAs executed as per Bid 1 and Bid 2 are submitted in Table 6 and Table 7 below:

Table 6

Details of Power Purchase Agreements executed by KSEB Ltd based on Bid 1

Sl. No.	*Name of Firm*	*Quantum of power in MW*	*Tariff as on Bid Date (Rs./kWh)*	*Date of execution of PSA*
1	*Jindal Power Limited*	*200*	*3.60*	*29-12-2014*
2	*Jhabua Power Limited*	*115*	*4.15*	*31-12-2014*

Table 7

Details of Power Purchase Agreements executed by KSEB Ltd based on Bid 2

Sl. No.	*Name of Firm*	*Quantum of power in MW*	*Tariff (Rs./kWh)*	*Date of execution of PSA*
1	*Bharat Aluminium Company Limited*	*100*	*4.29*	*26-12-2014*
2	*Jindal India Thermal Power Limited*	*150*	*4.29*	*29-12-2014*
3	*Jhabua Power Limited*	*100*	*4.29*	*26-12-2014*
4	*Jindal Power Limited*	*100*	*4.29*	*29-12-2014*
5	*East coast Energy Private Limited*	*100*	*4.29*	*02-02-2015*

(21) Based on the above, KSEB Ltd. has prayed to adopt as per Section 63 of the Electricity Act, 2003, the tariff discovered through Bid 1 and Bid 2 for the procurement of 865 MW of power from the generators.

5. The Commission, after preliminary scrutiny of the application dated 21.04.2015, found that KSEB Ltd. had not submitted the necessary and sufficient details and documents for taking decision in such an important matter of adoption of tariff for the purchase of 865 MW of electricity with serious long term financial implications as explained in paragraph 2 of this order. Therefore, the Commission had, vide letter dated 07.12.2015 directed KSEB Ltd. to submit the following details for further processing of the application for the approval of the tariffs discovered in Bid 1 and Bid 2.

(1) Documents relating to Bid 1 and Bid 2, namely,-

(i) Tender notification inviting RFQ and RFP including tender conditions.

(ii) Deviation from the guidelines issued by Government of India, made if any by KSEB Ltd in its tender conditions in Bid 1&2.

(iii) If there is any deviation, please justify such deviation with reasons.

(iv) RFQ and RFP submitted by the bidders in Bid 1&2.

(v) Deviation from tender conditions, made if any by the bidders.

(vi) If any such deviation has been fully or partially accepted, please justify with reasons.

(vii) The certified copy of the report of the bid evaluation committee and their recommendations.

(2) Conditions in the MoP guidelines for accepting bids other than L1 in both bid 1 and bid 2.
(3) A report on the progress of follow-up action of the High Power Committee constituted by the Government of Kerala vide the order GO(Rt) No. 110/2015/PD dated 22.05.2015.
(4) The possible variations in the rate of power due to variables like price of coal, freight charges on transportation of coal etc with reference to the guidelines.
(5) While matching with the rate of the lowest bidder, two bidders namely, Jhabua Power Limited, Gurgaon and East Coast Energy Pvt. Ltd, Andhra Pradesh have increased the fixed charges above their original quoted rates and reduced the fuel charges to match with the rate of L1. Any adverse effect or risk on KSEB Ltd resulting in payment of full or part of the fixed charges without availing power due to increased fixed charges has to be explained with reference to the guidelines and tender conditions.
(6) The reasons for entering into power purchase agreements with generating companies without obtaining prior approval of the power purchase agreements under clause (b) of subsection (1) of Section 86 of the Electricity Act, 2003.
(7) Clarifications on the conditions if any in PPA which may ultimately result in payment of electricity charges at enhanced rates

6. KSEB Ltd. has, vide their letter dated 27.01.2016, submitted a detailed report on the issues raised by the Commission. The relevant portions of the submission of KSEB Ltd are extracted below,-

(1) Commission, as part of the order approving ARR&ERC of the KSEB Limited for the year 2014-15 also had issued the following directives:

i) Purchase of power from the traders and exchanges over and above the contracted power for meeting the demand including the compensatory purchase on account of shortfall in hydro/CGS/other sources shall be limited to a price not more than Rs.5/kWh at the Kerala periphery.
ii) KSEB Ltd shall immediately assess the long term deficit in availability of power and contract for long term power purchase through case-1 bidding process.

(2) KSEB Ltd, vide the letter No KSEB/TRAC/Gen&PP/DBFOO/2014-15/1450 dated 18.12.2014 has reported before the Commission regarding the competitive bidding process initiated by KSEB Ltd for procuring power on long term basis through two different bids.
(3) KSEB Ltd. reported that as per article 4.1.2.(c) of the power supply agreement (PSA), it shall have to get the approval of the Hon'ble Commission for the tariff, which is a condition precedent to the contract and has to be satisfied within a maximum period of 180 days upon

serving a notice by the supplier on submission of contract performance guarantee, which has to be submitted within a maximum period of 60 days of signing the PSA.

(4) The detailed remarks of KSEB Ltd. on the issues raised by the Commission in the letter dated 7.12.2015 are as follows:

(i) KSEB Ltd. has submitted the copies of the bid documents of both Bid 1 and Bid 2 and submitted that:

Ministry of Power (MoP), Government of India vide the resolution No. 23/17/2011/R&R/ Vol-V notified on 8th November 2013 issued the Guidelines for procurement of Electricity from Thermal Power Stations set up on DBFOO basis. Government of Kerala, vide letter dated 17.12.2013 directed KSEB Limited to adopt the guidelines notified by the Government of India on 08.11.2013. Accordingly, KSEB Limited has adopted the guidelines notified on 08.11.2013 for the procurement process for the both bids ie.for Bid 1 & Bid 2.

(ii) KSEB Limited has reported that no deviation was made in the tender conditions. The standard bidding documents has some provisions which require customizing based on project-specific conditions which are enclosed in square parenthesis in the Standard bidding documents which has to be customized as necessary, before issuing the RFQ for the bid. Thus, only the matter within the square parenthesis were appropriately finalised while issuing the Standard bidding documents. Also, no deviation from Bid conditions were allowed to any of the bidders.

(iii) The requisitioned quantity for the 1st bid was 450 MW and that for bid-2 was 400 MW. The lowest bidder in both bids didn't quote for the required quantity. The RFP issued by MoP had not addressed a situation in the event that a lowest bidder offers a quantum which is lower than that required by the Utility. KSEB Limited, vide letter No. CE (C&T) / DBFOO/ LT/ 2013-14/211/dated 23.08.2014, had approached MoP to issue clarifications regarding this procedural gap in the bidding documents, for tying up the required quantum of power by the Utility. During bidding process, when such a situation came up, KSEB Limited followed the procedure specified under clause 3.5.2 to 3.5.4 of the RFP of the Case 1 bidding guidelines issued by MoP on 22.7.2010 along with the provision in the guidelines dated 08.11.2013 that allows the utility to seek lower rates from bidders other than 'L1'.

(iv) KSEB Ltd further reported that as per the frame work of PSA, both fixed charge and fuel charge are expected to vary, but variation shall be based on pre-determined parameters which

shall be equally applicable to all bidders. Such variables can be summarized as:

(1) Wholesale Price Index(WPI)
(2) Station Heat Rate.
(3) Coal price as notified by the Coal India Limited and GCV of coal
(4) Rail freight Charges.

The effect of these variables in the tariff is roughly summarized below:
The fixed charge payable during each accounting year of the contract period is to be modified from the quoted fixed charge by reducing the fixed charge by 2% from that applicable for the previous year (Quoted charges will be applicable for the first year from CoD). The fixed charge so arrived for that accounting year shall be enhanced to the extent of 30% of the rise in WPI during the previous year. Thus, if the annual increase in WPI is less than 6.67%, then the FC will come down in each passing year. Alternatively if the rise in WPI is more than 6.67% annually, then the FC will increase accordingly. The quoted fixed charges is also liable to be reduced, in the event the Station heat rate is higher than the specified level. Conversely the quoted FC will be enhanced at a predetermined percentage if the Station heat rate is below than the specified level.
Similarly the variable charges payable during the contract period is modified based on
i) Changes in CIL notified price of the Coal
ii) Changes in rail freight charges
iii) Changes in GCV of coal, if any
iv) Changes allowed in Station Heat Rate.

Apart from the above changes, any change in the Inter –State transmission charges and losses from the bid date shall be on account of the buyer.

(5) KSEB Ltd submitted that it does not expect any under scheduling of the power and hence payment of fixed charges without availing power from these suppliers is also not anticipated.
(6) KSEB Ltd has also reported that it filed LTA application before the CTU in good faith to cater the opportunity of corridor allocation.
(7) KSEB Ltd has further, reported that KSEB Ltd had executed the PSAs by strictly following the guidelines laid down by Ministry of Power, and hence the variations in coal price and the consumer price index etc. from time to time will have an impact on variables that determines the tariff for the supply of power under DBFOO basis also.

Analysis and Decisions of the Commission

7. (1) The Commission has carefully examined the averments in the application and the documents filed by KSEB Ltd for the adoption of tariff in its letter dated 27.01.2016, in the light of the provisions of the Electricity Act, 2003, National Tariff Policy 2006, the Regulations issued by the Commission and the guidelines issued by the Central Government under Section 63 of the Act for the procurement of power through the process of bidding. The scheme of law relating to procurement of power through the process of bidding, as provided in the Electricity Act, 2003, in the Tariff Policy, in the relevant Regulations and in the guidelines issued by Government of India under Section 63 of the Act, is briefly stated hereunder.

(2) Section 63 of the Electricity Act, 2003, which enables the Commission to adopt the tariff determined through the process of bidding is quoted below.

> *"63. 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* <u>*the guidelines issued by the Central Government*</u>*."*

As per the Section 63 of the Electricity Act, 2003, the Commission is, before adopting the tariff, duty bound to examine and ascertain,-

(i) whether or not the process of competitive bidding to discover tariff is transparent, and

(ii) whether or not the process of bidding is strictly in accordance with the guidelines issued by the Central Government under Section 63 of the Act.

(3) The Commission has been empowered to regulate the power purchase of the distribution licensees as per clause (b) of sub section (1) of section 86 of the Electricity Act, 2003, which is quoted hereunder,-

> "Section 86
>
> *(1) The State Commission shall discharge the following functions, namely: -*
>
> *…..*
>
> *(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;".*

The said clause (b) of subsection (1) of section 86 of the Electricity Act-2003, empowers the State Commission to regulate the electricity purchase and the procurement process of electricity by the distribution licensees. This power of the Commission is applicable to all power purchases by any distribution licensee and there is no exemption for the purchase and procurement process even if the same are as per the guidelines issued by the Central Government under section-63 of the Electricity Act. However, if the bidding process is transparent in accordance with the guidelines issued by the Central Government, the tariff discovered through such process has to be adopted by the Commission.

(4) The Central Government vide letter No. 23/23/05-R&R dated 28th August-2006, has also clarified that, the concerned SERC has the jurisdiction to regulate electricity purchase and procurement process of a distribution licensee under section 86 (1) (b) of the Act. Considering the above legal provisions, every distribution licensee including KSEB Ltd should obtain prior approval of the Commission before awarding the power supply contract in accordance with the bid process and before signing the power supply agreement with the power supplier / generator irrespective of whether the bidding process is as per the guidelines issued by the Central Government or not.

(5) KSEB Ltd did not obtain prior approval of the Commission before awarding the power supply contracts to the selected bidders in the first Bid dated 30.10.2014 and the second Bid dated 14.11.2014.

8. The cost of power purchase, the ARR, the cash expenditure and the percentage of cost of power purchase for the period from 2009-10 to 2014-15 are tabulated hereunder.

Table 8

Percentage of cost of power purchase over the ARR - (Rs. crore)

Sl. No.	Financial Year	Cost of power purchase	ARR	Cash Expenditure	Percentage over	
					ARR	Cash exp.
1	2009-10	3089.53	5316.30	4620.98	58.11	66.35
2	2010-11	3702.13	5931.85	5341.32	62.40	69.32
3	2011-12	3925.25	6512.73	5864.36	60.27	66.93
4	2012-13	5201.64	7936.39	7354.35	65.13	70.73
5	2013-14	6588.51	9546.20	8957.33	69.01	73.55
6	2014-15	6481.44	10219.19	9314.53	63.42	69.58

Note : Cash expenditure is ARR minus the sum of Depreciation and Return on Equity

From the above data it can be found that cost of power purchase constitutes about 65% of the ARR and about 70% of the annual cash expenditure of the licensee. In order to optimize the cost of generation and power purchase in the State, the Commission has been issuing directions to the KSEB Ltd to initiate power procurement process on long term basis as per Section 63 of the Electricity Act, 2003, adopting the bidding guidelines issued by the Central Government from time to time. Few such directions given by the Commission vide its orders in the applications for approval of ARR& ERC of the KSEB Ltd during the past are extracted below.

(i) Order dated 1st June 2011 on ARR&ERC of KSEB for the year 2010-11

> *"10. The Board shall explore the possibility of trading the generation from liquid fuel stations so as to recover the fixed Cost.. The top management should also closely monitor the progress of Case 1 bidding under way, commercial exploitation of the coal block allotted for the State at Baitharani and the proposed Cheemeni project where KSEB is the primary stakeholder for meeting the medium and long term power requirements of the State. A quarterly report on the action taken shall be furnished to the Commission*.".

(ii) Order dated 28th April-2012 on ARR&ERC for the year 2012-13.

> *"4. The Board should finalise long term contracts for power purchase, including the Case-I bidding immediately. The Board should take advance action for booking corridors so that power restrictions are reduced to the minimum levels in the ensuing months."*

(iii) Order dated 30-04-2013 on ARR&ERC for the year 2013-14

> *"10.7 The Board shall streamline the power purchase functions in a professional manner and take advantage of the market fluctuations effectively. The Board should finalize long term contracts for power purchase, including the Case-1 bidding immediately. The Board should take timely advance action for booking corridors so that power restrictions are reduced to the minimum levels in the ensuing months."*

(iv) Order dated 14th August 2014 on ARR&ERC for the year 2014-15.

> ***"6. Power purchase***
> *a) Purchase of power from the traders and exchanges over and above the contracted power for meeting the demand including the compensatory purchase on account of short fall in hydro /CGS/other sources shall be limited to a price not more than Rs5/kWh at the Kerala periphery.*
>
> *b) KSEB Ltd shall immediately assess the long term deficit in availability of power and contract for long term power purchase through case -1 bidding process.".*

It can be seen from the above directions that, the Commission has been, in the best interest of the consumers of the State and of the licensee, issuing directions to procure power through competitive bidding process as per the guidelines issued by the Central Government under Section 63 of the Electricity Act-2003. However, such directions given in the interest of consumers and of the licensee to optimize the cost of power purchase cannot be misinterpreted or misconstrued as a blanket approval for the purchase of any quantum of power at any rate without adhering to the guidelines issued by Government of India or without getting the approval from the Commission in accordance with the statutory provisions.

9. From the records and explanations submitted by KSEB Ltd it appears that KSEB Ltd is under a mistaken notion that the average rate of Rs.5 / kWh fixed by the Commission as per its order dated 14.08.2014, for the short term or day ahead purchases of power to meet its unforeseen and immediate requirements for the financial year 2014-15 can be adopted as a ceiling for long term power purchase also. This notion is not at all correct as can be seen from the following facts.

(1) It is true that the Commission had, in its order dated 14.08.2014 in OP No.9/2014 fixed a limit of average price at Rs.5 / kWh for the purchase of power on short term basis from the traders and power exchanges in order to meet the urgent and unforeseen day-to-day variations in demand for power in the State. The said rate cannot be misinterpreted as a bench mark or ceiling for long term power purchase and as a blanket approval for purchase of power at any rate below Rs.5/ kWh. The said price limit of Rs. 5 / kWh for the purchase of short term power was fixed considering the availability and demand of power at the time of issuance of the order dated 14.08.2014. The generation capacity in the entire nation is increasing at a rapid pace and today the total generation capacity of the nation is about 3.0 lakh MW whereas the peak demand is only about 1.5 lakh MW. The generation of power has surpassed the demand and therefore the power is in buyers' market at present. The total generation capacity of the solar power plants in the country is also increasing fast and the solar PV technology has become more and more cost effective. Consequently the rate of solar power has also come down below Rs.4.50 / kWh. The only constraint at present is the availability of transmission corridor to the State. KSEB Ltd, in its capacity as the State Transmission Utility, is taking steps to resolve the problems relating to transmission constraints by strengthening its intra-state transmission network and by facilitating construction of inter-state transmission lines. At present there are four inter-state 400 kV transmission lines to Kerala namely Udumalpet-Madakkathara, Madurai-Thiruvananthapuram, Udumalpet-Elappulli and Mysore-Areacode, which have been constructed and operated by the Central Transmission Utility namely Power Grid Corporation of India Ltd

(PGCIL). The construction of Edamon-Pallikara 400 kV line by PGCIL is in progress. When all these inter-state transmission lines become fully operational there will be little or no transmission constraints. Further the national grid integrating the NEW grid with the Southern Grid would also be made fully operational shortly. Koodamkulam Nuclear Power Station (1000 MW) has come into commercial operation. Several other generating stations would also come into commercial operation within a short period in Southern Region. Therefore the present problems relating to transmission constraints can be only temporary in nature. The general trend of decrease in the price of power in the market should also be considered while taking decisions in the matters relating to procurement of power, including the procurement on long term basis.

(2) The KSEB Ltd has a morning peak demand and a evening peak demand. The base load, the average morning peak demand and the average evening peak demand of KSEB Ltd are tabulated hereunder

Table No. 9
Average Morning Peak and Evening Peak Demands of KSEB Ltd.

Sl. No.	Financial year	Base load (MW)	Morning peak (MW)	Evening peak (MW)
1	2014-15	2350	2500	3300
2	2015-16	2500	2750	3750

The base load is generally met either by generation of thermal power in the State or by the long term purchase of power from thermal and nuclear sources. Except during the monsoon months, when the hydel stations are run round the clock to avoid spill of water from reservoirs, the hydro power stations are generally run as peaking stations, and are put into operation only during peak hours. If there is shortage of power to meet demand, medium term purchase of peak power is usually resorted to. Even after using the power from the base load stations (thermal and nuclear) and the peaking stations during the peak hours, there may be small deficit which have to be met by short term purchases from the traders or from the power exchanges or by overdrawl from the grid. If any power station, from which power is availed on long term basis, is shut down for routine maintenance or due to any break down there can be consequent temporary shortages of power. Such temporary shortages are also met by short term purchases on daily basis or weekly basis from the power exchanges or the traders. Peak power is generally costlier when compared to the normal or night off peak power. With a view to enforcing strict financial discipline against the overdrawl of power when system frequency is below 50 cycles per second, the charges for such overdrawl has been kept very high. Neither the consumers nor the government do like power cut or load shedding. Hence the licensee may have to resort to short term purchases to tide over the temporary power shortages without imposing power cut or load shedding. As per the available information, the details of short term power purchases made by KSEB Ltd during last 2 years are given below,-

Table 10

Details of short term power purchase

Sl. No.	Financial year	Quantum of short term purchase (MU)	Average rate of short term purchase (Rs. / unit)
1	2014-15	2321.65	5.49
2	2015-16	670.00	4.21

It should also be noted that neither the consumer nor the Government welcome any tariff hike, even if it is consequent to the purchase of power at higher rate to meet their urgent requirements. A judicious use of short term purchases and generation of hydel power on real time basis, depending upon the frequency of the system and rate of power in the market is absolutely necessary to optimize the cost of power purchase. As per the statutory provisions, any power purchase has to be done by the licensee only with the approval of the Commission. It is not practical to obtain prior approval of the Commission for every short term purchase of power on day ahead or week ahead basis. It was under these circumstances the Commission had given a general sanction for the short term purchase of power on day a head or week a head basis, with a ceiling of Rs.5 / kWh on an average. This general permission given to the licensee for short term purchase of power including costlier peak power cannot be construed or misinterpreted as a blanket sanction to purchase of power on long term basis, at any rate below Rs. 5 / kWh. KSEB Ltd, being a distribution licensee with long experience, cannot be ignorant about such facts and relevant legal provisions.

10. The tariff policy issued by the Central Government under Section 3 of the Electricity Act, 2003, does also mandate that, all the future power requirement shall be procured through competitive bidding process. The relevant portion of the Tariff Policy, 2006, is extracted below for ready reference.

(i) 1st proviso to paragraph 5.1 of the Tariff policy.
"All future requirement of power should be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a State controlled/owned company as an identified developer and where regulators will need to resort to tariff

determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity.

Even for the Public Sector projects, tariff of all new generation and transmission projects should be decided on the basis of competitive bidding after a period of five years or when the Regulatory Commission is satisfied that the situation is ripe to introduce such competition.

(ii) The Central Government had, vide the notification No. 23/2/2005/R&R dated 9th December-2010 given the following clarification on paragraph 5.1 of the Tariff Policy, 2006.

"In view of the decision taken in the meeting of the Group of Minister on Power Sector held on 29.10.2010, it is clarified that the following are exempted from the tariff based competitive bidding route.

(A) Generation (excluding hydro) projects of PSUs/CPSU:

i) The expansion of already commissioned projects.

ii) Projects for which the PPA(s) have been signed on or before 5.1.2011.

(B) Transmission Projects of STUs/CTU:

i) The upgradation/strengthening of the existing "transmission lines" and associated sub-stations.

ii) Projects for which BPTA(s)/TSA(s) have been signed on or before 5.1.2011

11. The KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 (hereinafter referred to as the Tariff Regulations, 2014) came into force with effect from 14.11.2014. Regulation 78 of the said regulations is quoted hereunder,-

*"**78. Approval of power purchase agreement /arrangement –** (1) Every agreement for procurement of power by the distribution business / licensee from the generating business/company or licensee or from other source of supply entered into after the date of coming into effect of these regulations shall come into effect only with the approval of the Commission:*

Provided that the approval of the Commission shall be required in accordance with this regulation in respect of any agreement or arrangement for power procurement by the distribution licensee from the generating business / company or licensee or from any other source of supply on a standby basis:

Provided further that the approval of the Commission shall also be required in accordance with this regulation for any change to an existing *agreement or arrangement for power procurement, whether or not such existing agreement or arrangement was approved by the Commission.*

(2) The Commission shall examine an application for approval of power purchase agreement/arrangement having regard to the approved power procurement plan of the distribution business/licensee and the following factors:-

(a) requirement of power under the approved power procurement plan;

(b) adherence to a transparent process of bidding in accordance with guidelines issued by the Central Government under Section 63 of the Act;

(c) adherence to the terms and conditions for determination of tariff specified under chapter VI of these Regulations where the process specified in clause (b) above has not been adopted;

(d) availability (or expected availability) of capacity in the intra-State transmission system for evacuation and supply of power procured under the agreement/arrangement; and

(e) need to promote co-generation and generation of electricity from renewable sources of energy.

(3) Where the terms and conditions specified under chapter VI of these Regulations are proposed to be adopted, the approval of the power purchase agreement/arrangement between the generating business/company and the distribution business/licensee for supply of electricity from a new generating station may comprise of the following two steps, at the discretion of the applicant:-

(a) approval of a provisional tariff, on the basis of an application made to the Commission at any time prior to the application made under clause (b) below; and

(b) approval of the final tariff, on the basis of an application made not later than three months from the cut-off date."

The impugned power purchase agreements with the generating companies were executed by KSEB Ltd between 26.12.2014 and 02.02.2015. It can easily be found that the said PPAs were executed by KSEB Ltd after 14.11.2014, the date of coming into force of the Tariff Regulations, 2014. As per sub-regulation (1) of regulation 78 of the Tariff Regulations, 2014, the PPA shall have effect only with the approval by the Commission. KSEB Ltd is not seen to have included any clause or condition to the above effect in the impugned PPAs. Therefore it can be found that the action of KSEB Ltd in having executed the PPAs without getting approval of the Commission or without including any clause as per sub-regulation (1) of regulation 78 of the Tariff Regulation, 2014, is not in accordance with the provisions of the Tariff Regulations, 2014. It should also be noted that KSEB Ltd has filed application for approval of the impugned PPAs only on 21.04.2015 and submitted the details called for by the Commission only on 27.01.2016. Such delays and latches on the part of KSEB Ltd remain unexplained.

12. Government of India had, vide resolution No. 23/17/2011 – R&R (Vol V) dated 09.11.2013 published in the Gazette of India dated 09.11.2013 notified the guidelines for procurement of electricity from thermal power stations set up on design, build, financed, own and operate (DBFOO) basis (hereinafter referred to as the Guidelines, 2013). The said guidelines are quoted hereunder,-

> ***No. 23/17/2011-R&R(Vol-V).-****Whereas the Central Government is engaged in creating an enabling policy and regulatory environment for the orderly growth of generation of electricity in accordance with the provisions of the Electricity Act, 2003 (the* ***"Act"****);*
>
> *Whereas it is incumbent upon the Central Government, State Governments, Electricity Regulatory Commissions and the distribution licensees to promote competition in the procurement of electricity through competitive and transparent processes;*
>
> *Whereas the Central Government has, after extensive consultations with various stakeholders and experts, evolved a model contractual framework for procurement of electricity by the distribution licensees from power producers who agree to construct and operate thermal power generating stations on a 'Design, Build, Finance, Own and Operate ("DBFOO") basis;*
>
> *Whereas, the Central Government has, vide its letter No. 23/17/2011-R&R(Vol-V) dated 8th November, 2013, issued the model documents comprising the Model Request for Qualification (the* ***"MRFQ"****), the Model Request for Proposals (the* ***"MRFP"****) and the Model Power Supply Agreement (the* ***"MPSA"****) (collectively, the* ***"Standard Bidding Documents"****) to be adopted by distribution licensees for procurement of electricity from the aforesaid power producers through a process of open and transparent competitive bidding based on offer of the lowest tariff from thermal power generating stations constructed and operated on DBFOO basis;*
>
> *Now, therefore, in exercise of the powers conferred under section 63 of the Electricity Act, 2003, the Central Government notifies these guidelines to be known as the 'Guidelines for Procurement of Electricity from Thermal Power Stations set up on DBFOO Basis' (the* ***"Guidelines"****). These Guidelines shall come into effect from the date hereof subject to the following terms and conditions:*
>
> 1. *The terms and conditions specified in the Standard Bidding Documents referred to hereinabove shall, by reference, form part of these Guidelines and shall be treated as such.*
> 2. *The application of these Guidelines shall be restricted to projects constructed and operated in accordance with a Power Supply Agreement signed for a period of about 25 years including construction period with provision of extension of 5 years at the option of either party.*
> 3. *The tariff determined through the bidding process based on these Guidelines comprising the Standard Bidding Documents shall be adopted by the Appropriate Commission in pursuance of the provisions of section 63 of the Act.*
> 4. *Any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government. Provided, however,*

that any project specific modifications expressly permitted in the Standard Bidding Documents shall not be construed as deviations from the Standard Bidding Documents.

5. *The 'Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees' issued on 19th January, 2005, as amended from time to time, including the standard bidding documents issued in 2009 and amended from time to time thereunder, are hereby repealed insofar as they relate to long-term procurement of electricity where the location, technology, or fuel is not specified by the procurer referred to therein as Case 1 projects. Provided, however, that any agreements signed or actions taken prior to the date hereof shall not be affected by such repeal of the said guidelines of 2005 and shall continue to be governed by the guidelines repealed hereunder.*

From the above guidelines it is evident that,-

(i) The bidding shall be open and transparent.

(ii) The bidding shall be based on the lowest tariff.

(iii) The model request for qualification (MRFQ), model request for proposal (MRFP) and model power supply agreement (MPSA) collectively called the standard bidding documents (SBD) issued by Government of India on 08.09.2013 shall form part of these guidelines and shall be adopted by the distribution licensee for procurement of power.

(iv) The power shall be procured from the generators who agree to construct and operate thermal power stations on DBFOO basis.

(v) The period of power supply agreement shall be for about 25 years with a provision for extension for 5 years at the option of either party.

(vi) The lowest tariff discovered through a transparent bidding process in accordance with the guidelines in SBD issued by Government of India, has to be adopted by State Electricity Regulatory Commission.

(vii) Deviation from the SBD, if any, shall be made only with prior approval of Government of India.

(viii) The earlier guidelines for determination of tariff by bidding process for procurement of power by distribution licensees issued on 19th January, 2005, as amended from time to time, including the standard bidding documents issued in 2009 as amended from time to time are repealed insofar as they relate to long-term procurement of electricity where the location, technology, or fuel is not specified by the procurer referred to therein as Case 1 projects.

13. The Commission has to examine the application submitted by the KSEB Ltd for the approval of the impugned PPAs with extreme caution in the light of the scheme of law and guidelines explained above, especially in view of the long term financial consequences of the issue as explained in para 2 of this order and the immense consumer interests involved. It has to be specially noted that the consequences of the impugned PPAs would affect the financial health of the distribution licensee and the tariff payable by the consumers for next 25 years or more. In the preliminary scrutiny itself the Commission has noticed that KSEB Ltd has not submitted necessary and relevant details and records required for

taking appropriate decisions. Therefore the Commission had, as per its letter dated 07.12.2015, directed KSEB Ltd to submit all the necessary and relevant records and the clarifications on certain important issues. The clarifications and records were submitted by KSEB Ltd only on 27.01.2016.

14. The Commission has noticed that, the KSEB Ltd has not strictly followed the due procedures relating to the approval of the Commission as stipulated in the Electricity Act-2003, the provisions of National Tariff Policy 2006 and the provisions of the Tariff Regulations, 2014, while entering into power supply agreement for procuring 865 MW through DBFOO basis. However, duly considering the importance of meeting the power requirements of the State, the earlier directions issued by the Commission as quoted in para 8 of this order, the provisions of the Tariff Policy and such other relevant facts, the Commission has carefully examined the bidding procedures adopted by the KSEB Ltd and the likely risks and other concerns.

15. The first criterion to be satisfied as per the MRFQ and MRFP of the guidelines 2013 is that the procurement of power shall be from a thermal power station under private public partnership (PPP) scheme. An infrastructure project may be economically viable considering the social benefits in the long run. But such projects need not be commercially viable in a strict benefit cost analysis on commercial term. Hence Government of India has introduced a scheme called 'viability gap funding' (VGF) to promote such projects, which are economically viable in the long run but commercially not viable. As per the VGF scheme the selected PPP projects are given one time capital grant upto a maximum of 20% of the project cost. The PPP companies are selected for VGF through a bidding process. The company which quotes the lower VGF requirement will be selected to implement the infrastructure project. In view of the capital grant availed from the VGF scheme, the capital expenditure of the developer for the project would be correspondingly low. Government of India has insisted on procurement of power on long term basis from PPP projects presumably with a view to optimizing the cost of power purchase by the distribution licensees. It is presumed that the applicant KSEB Ltd must have examined this aspect and ensured that the bidders would work in PPP mode, though KSEB Ltd has not given any confirmed information on this issue.

16. As detailed in Table – 1 and Table -2 in paragraph 4 above, the KSEB Ltd has relied on the electricity demand projections as per the 18th Electric Power Survey (EPS) conducted by Central Electricity Authority. The Commission has noted that, the actual energy demand in the State has been less by 7% to 8% compared to the energy requirement as per the 18th EPS Report and the actual peak demand has been less by about 11-12% compared to the peak power requirement as per the 18th EPS Report. The details are given below.

Table-11
Comparison of Actual Electricity Demand with 18th EPS Report

Year	Comparison on Annual Energy Demand			Comparison on Peak demand		
	Energy demand as per 18th EPS report	Actual energy demand met	Reduction in demand over 18th EPS report	Peak demand as per 18th EPS report	Peak demand met	Reduction in demand over 18th EPS report
	(MU)	(MU)	(%)	(MW)	(MW)	(%)
2012-13	20971	19891	5.15	3683	3268	11.27
2013-14	22233	20524	7.69	3903	3558	8.84
2014-15	23554	21582	8.37	4137	3643	11.94

The Commission has noted that,

(i) Since the procurement of electricity through DBFOO process was tied up based on the demand and supply position as per 18th EPS report, there is a likelihood of energy and capacity surplus, at least during the initial years of contract (2016-17, 2017-18 and 2018-19), especially during the monsoon months when peak demand would be comparatively low. This may lead to a situation in which the licensee would be forced to bear the fixed charges irrespective of scheduling and / or would be forced to surrender cheaper power from the Central Generating Stations.

(ii) The short-term market in the country has been maturing and about 15% of the energy transaction is aimed to be met through short-term purchases including from energy exchanges. Most often, the rates for electricity, except during peak hours in the short-term markets are lower than the round the clock (RTC) power contracted on long term basis. The Commission has, on a number of occasions issued directions to the licensee that, a balanced portfolio of power purchase mix including long-term, medium term and short-term is better than tying up entire power through long term basis. Since the entire power requirement, especially during the initial years of contract is met from long term power purchase contracts, KSEB Ltd is likely to lose the opportunity of judicious and optimal utilization of its hydel power and of the cheaper energy available in the short-term market at competitive rates, as indicated in para 9 above.

17. The Commission reasonably believes that, the KSEB Ltd may have surplus energy and power, at least for 3 or 4 years, once the entire power tied up through DBFOO process starts scheduling by October 2017. Hence, the licensee has to appraise more carefully, the demand and supply position on monthly basis with the power tied up through DBFOO process and evolve appropriate strategy to,-

(i) avail power from the short term market at competitive rates.
(ii) sell the surplus power at reasonable cost, and
(iii) avoid adverse financial consequences to it and to its consumers.

KSEB Ltd is hereby directed that a report on this aspect shall be submitted before the Commission within three months from the date of this order, for scrutiny and appropriate decisions.

18. The Central Government vide its notification No. 23/17/2011-R&R dated 8th November 2013 issued the model documents comprising the Model Request for Qualification (MRFQ), the Model Request for Proposal (MRFP), and the Model Power Supply Agreement (MPSA) to be adopted by the Distribution licensees for procurement of electricity from the power producers who agreed to construct and operate thermal power generating stations in PPP mode on DBFOO basis, through a process of open and transparent competitive bidding based on the offer of lowest tariff from thermal stations, constructed and operate on DBFOO basis. Further, in exercise of the powers conferred under section-63 of the Electricity Act-2003, the Central Government, vide notification No. 23/17/2011-R&R dated 9th November-2013 has notified the 'guidelines for procurement of Electricity from Thermal Power Stations set up on DBFOO basis, which have been quoted earlier.

19. The salient features of the bidding documents, RFQ, RFP, and the PSA notified by the Central Government vide the notification dated 8th November-2013 are summarized below.

(1) Model Request For Qualification (RFQ):

(i) RFQ documents is for 'prequalifying and short listing eligible bidders for participation in the Bid Stage for awarding the Project through an open competitive bidding process.

(ii) In the RFQ, the utility has to specify,
(a) the capacity required,
(b) the period of commencement of supply, and
(c) the minimum quantum to be offered by the applicant etc.

(iii) In the qualification stage, applicants are required to furnish information regarding,
(a) Details of applicant.
(b) Technical capacity of the applicant.
(c) Financial capacity of the applicant
(d) Details of eligible projects proposed in DBFOO mode.

(iv) As per the RFQ, the project specific details specified under 2.2.1 (e) of the Model RFQ, is not mandatory when the power supply is after the third anniversary of the date of RFQ, i.e., if the date of power supply is after December-2016. The relevant paragraph of the RFQ is extracted below for ready reference.

" *Paragraph 2.2.1 (e) of the RFQ.*
[(e) Other eligibility conditions shall include the following:
(i) The Applicant should be in possession of at least one-half of the land required for the Power Station;

(ii) The Applicant should have obtained environmental and forest clearance for the Power Station;
(iii) The Applicant should have commenced construction of the Power Station;
(iv) The Applicant has access to an assured supply of Fuel; and
(v) Only Applicants who agree and undertake to procure the boilers, turbines, and generators of their Projects from manufacturing facilities situate in India and owned and operated in India by an Indian company, a foreign company or a joint venture between an Indian and foreign company shall be eligible hereunder.
15. Other project-specific conditions of eligibility or restrictions, if any, may be stated here, such as a limit on the number of projects that may be awarded to an entity, including its Associates.
16. This Clause will not apply to projects where the required equipment has already been ordered on or before the date of issue of this Model RFQ.
<u>17. The conditions may be specified depending upon the date of commencement of power supply. In case such date is prior to the third anniversary of the date of this RFQ, all the aforesaid conditions should be specified.</u>

(v) It is also mentioned under foot notes to paragraph 1.1.1 of the RFQ documents as follows.
"1 Serially numbered footnotes are for guidance of the Utility and should be omitted prior to issue of RFQ. Footnotes marked in non-numerical characters shall be retained in the RFQ.
2 Wherever asterisk is used, it should be substituted by project-specific details prior to issue of RFQ.
3 All project-specific provisions in this document have been enclosed <u>in square parenthesis and may be modified</u>, as necessary, before issuing the RFQ for the Project. The square parenthesis should be removed after carrying out the required modifications. The curly parenthesis including the provisions contained therein and all the blank spaces may be retained in the RFQ document to be issued to prospective Applicants. They should be suitably modified/ filled up subsequently by the respective Applicants or the Utility, as the case may be, to reflect the particulars relating to the Project or the Applicants.
4 Bidding Documents requiring the Selected Bidder to commence supply of electricity on or before December 31, 2016 may provide for a flexible period for commencing supply in order to enable Power Stations under different stages of construction to participate in the Bidding Process. In such cases, the words in

this column may be substituted by the words "COD must commence before December 31, 2016".

The first bid opened on 31.10.2014 is for supply of power from December 2016 and the second bid opened on 14.11.2014 is for supply of power from October 2017. Therefore the project specific details, as specified under clause 2.2.1 (e) of the model RFQ are not mandatory in the case of the second bid opened on 14.11.2014, since the scheduled date of commencement of supply of power is after three years from the date of issuance of the guidelines by Government of India.

(2) Model document for Request for Proposals (RFP)

(i) Paragraph 3.3 of the RFP document specify the criterion to be adopted for selection of bidder, which is extracted below for ready reference.

"3.3 Selection of Bidder

*3.3.1 Subject to the provisions of Clause 2.16.1, the Bidder whose Bid is adjudged as responsive in terms of Clause 3.2.1 and w<u>ho quotes the lowest Tariff offered to the Utility in conformity with the provisions of Clause 3.5 shall be declared as th</u>e selected Bidder (the "**Selected Bidder**"). In the event that the Utility rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.*

*3.3.2 In the event that two or more Bidders quote the same amount of Tariff (the "**Tie Bidders**"), the Utility shall identify the Selected Bidder by draw of lots, which shall be conducted, with prior notice, in the presence of the Tie Bidders who choose to attend.*

*3.3.3 In the event that the Lowest Bidder withdraws or is not selected for any reason in the first instance (the "**first round of bidding**"), the Utility may invite all the remaining Bidders to revalidate or extend their respective Bid Security, as necessary, and match the Bid of the aforesaid Lowest Bidder (the "**second round of bidding**"). If in the second round of bidding, only one Bidder matches the Lowest Bidder, it shall be the Selected Bidder. If two or more Bidders match the said Lowest Bidder in the second round of bidding, then the Bidder whose Bid was lower as compared to other Bidder(s) in the first round of bidding shall be the Selected Bidder. For example, if the third and fifth lowest Bidders in the first round of bidding offer to match the said Lowest Bidder in the second round of bidding, the said third lowest Bidder shall be the Selected Bidder.*

*3.3.4 In the event that no Bidder offers to match the Lowest Bidder in the second round of bidding as specified in Clause 3.3.3, the Utility may, in its discretion, invite fresh Bids (the "**third round of bidding**") from all Bidders except the Lowest Bidder of the first round of bidding, or annul the Bidding Process, as the case may be. In case the Bidders are invited in the third round of bidding to revalidate or extend their Bid Security, as necessary, and offer fresh Bids, they* *shall be eligible for submission of fresh Bids provided, however, that in such third round of bidding only such Bids shall be eligible for consideration which are lower than the Bid of the second lowest Bidder in the first round of bidding.*

*3.3.5 After selection, a Letter of Award (the "**LOA**") shall be issued, in duplicate, by the Utility to the Selected Bidder and the Selected Bidder shall, within 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgement thereof. In the event the duplicate copy of the LOA duly signed by the Selected Bidder is not received by the stipulated date, the Utility may, unless it consents to extension of time for submission thereof, appropriate the Bid Security of such Bidder as Damages on account of failure of the Selected Bidder to acknowledge the LOA, and the next eligible Bidder may be considered.*

3.3.6 After acknowledgement of the LOA as aforesaid by the Selected Bidder, it shall cause the Supplier to execute the PSA within the period prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation, modification or amendment in the PSA.

(ii) Paragraph 3.5 of the RFP specifies the bid parameters, which are extracted below for ready reference.

"3.5 Bid Parameter

3.5.1 The Bid shall comprise the Tariff offered by the Bidder for production and supply of electricity to the Utility in accordance with the provisions of the PSA. The Tariff comprising the Bid shall be offered in accordance with the provisions of Clause 3.5.2.10".

(iii) Further, paragraph 32 of the Appendix-1 to the model documents, states as follows:

*"32. I/ We hereby submit the following Bid and offer, as on the Bid Due Date, in accordance with the provisions of the PSA and Clause 3.5 of this RFP**, -***

*A Tariff of Rs. ………….. (Rupees …..………and paise …………) comprising **a Fixed Charge of Rs. ……….. (Rupees ….………. and paise …………$ per kWh and a Fuel Charge of Rs.…………… (Rupees ………… and paise …………… per kWh cents@ ..... per kWh as on the Bid Due Date*** *on the express understanding that the Lowest Bidder shall be selected on the basis of the lowest Tariff offered.*

As detailed above, the RFP documents mandate to specify the fixed charge and the fuel charge separately, while submitting the bid. Further, the bidder shall be selected on the basis of the lowest tariff, which is the sum of the 'fixed charge' and 'fuel charge'.

(iv) However, the guidelines notified on 8-11-2013 and 9-11-2013 are silent on the strategy and methodology to be adopted when the lowest bidder does not offer sufficient quantum of power.

(3) Model Power Supply Agreement

Article 21 of the MPSA deals with the tariff applicable to the supply of power. Clause 21.1.1 specifies that the purchaser licensee shall pay to the supplier of electricity, the tariff comprising of the sum of fixed charge for availability of the power station and fuel charge for the supply of electricity. In clause 21.1.2 it has been specified that the purchaser licensee shall pay to the supplier an amount, determined in accordance with the provisions of Article 21 as the fixed charges for availability of power station to the extent of normative availability thereof. The salient features of Article 21 are summarized below,-

Article 21. Fixed Charge:- Article 21 mainly deals with the fixed charge payable by the purchaser licensee to the supplier of electricity.

(i) The clause 21.2.1 of the PSA specifies the base fixed charge.

(ii) The base station heat rate (as per Schedule-C) shall be 2350 kCal/kWh for the bids received prior to 31st December-2016 and 2300 kCal/kWh for others.

(iii) Clauses 21.2.2 and 21.2.3 of the PSA specify that, the initial fixed charges shall be based on the decrease/increase in station heat rate at the time of completion certificate. If the actual station heat rate certified on completion of the project is lower than the station heat rate indicated above, the fixed charge will be increased as specified therein. Similarly, if the actual station heat rate certified on completion of the project is higher than the station heat rate indicated above, the fixed charge will be decreased as specified therein.

(iv) Clause 21.2.3 specifies that, for arriving the fixed charge payable for the subsequent years, the base fixed charges shall be decreased by 2% and that it shall be revised annually to reflect 30% of the variation in wholesale price index (WPI).

(v) Clause 21.4.2 stipulates that, in the event of non-availability arising out of genuine fuel shortage, the availability has to be considered as 70% for the purpose of making payment of fixed charges, thereby indicating that in the case of non-availability of fuel due to genuine reasons, 70% of the fixed charge shall be paid by the purchaser licensee.

(vi) Clause 21.4.3 stipulates that, in the case of shortfall in supply on account of transmission constraints, the deemed availability shall be considered as ‘50%’ for making payment of fixed charges thereby indicating that in the case of transmission constraints the purchaser licensee shall have to pay 50% of the fixed charges.

(vii) Clause 21.4.4 specifies that, the supplier shall not get fixed charges for the generation in excess of 90% of the availability.

(viii) Clause 21.4.5 stipulates that, the supplier is eligible to get incentive for the excess generation above 90% availability as per clause 21.6.1.

(ix) As per clause 21.6.1, the incentive rate shall be 50% of the fixed charge, but the incentive is limited to the actual desptach and not for the generation corresponding to the availability.

(x) Clause 21.6.2 stipulates for dis-incentive when the actual availability falls below 85%.

(xi) Clause 21.9 stipulates that, all the taxes, duties etc shall be reimbursed by the distribution utilities.

As detailed above, the fixed charge payable by the utility during the entire period of contract is generally linked to the base fixed charge and the station heat rate quoted by the supplier. On declaration of commercial operation, the fixed charge has to be determined based on the actual station heat rate of the generating station and the quoted station heat rate. Further the fixed charge payable has to be revised every year with respect to the variations in WPI. If the WPI varies by more than 6.6% in a particular year, the fixed charge is likely to increase from that of previous year. Further in the case of fuel shortage the purchaser licensee has to give 70% of the fixed charge and in the case of transmission constraints the purchaser licensee has to give 50% of the fixed charges. There is also provision to increase the fixed charge by way of incentive for availability above 90%.

Article 22. Fuel Charge:- Article 22 mainly deals with the fuel charge payable by the purchaser licensee to the supplier of electricity.

(i) As per clause 22.2.1, the fuel charge comprises of
   (a) Cost of fuel
   (b) Cost of transportation
   (c) Cost on account of washing.

(ii) Further, foot note to clause 22.2 of the Model PSA stipulates that, the bidder need to specify the split up details of fuel cost as specified in the Model RFP before signing the PSA.

(iii) Further, clause 22.2.2 stipulates that,
   (a) the fuel cost shall be the product of station heat rate (SHR) expressed in k.Cal / kWh, and landed fuel cost per kilogram of fuel expressed in Rs. / kg of coal, divided gross calorific value (GCV) expressed as k.Cal / kg of coal.
   (b) Clause 2.2.2. further stipulates that, the landed fuel cost include cost of transportation also.
   (c) It is further stipulated that, the landed fuel cost in no case shall exceed the actual fuel cost incurred by the supplier.

(iv) Clause 22.2.3 stipulates a ceiling on cost of fuel forming part of the landed cost of fuel as detailed below.

For the linkage coal, the price of fuel shall be deemed to be the lower of,-

(a) the indicative of fuel which shall be computed from the fuel charge, as specified in the bid, and
(b) 101% of the price payable by the supplier to Coal India Ltd. (CIL).

It is also noted that, as per the provisions of the MPSA,
(a) the supplier cannot lower or reduce the cost of fuel arbitrarily to get the supply contract.
(b) Further, there is ceiling on the cost of fuel linked to the coal price notified by the Coal India from time to time.

(v) The clause 22.2.4 of the PPA stipulates the ceiling on transportation of domestic coal as detailed below. The total cost of transportation of domestic coal, forming part of the landed fuel cost, shall be the lower of :
(a) 110% of the freight payable to the Indian Railways for transportation by rail, and
(b) the actual cost of transportation.
(vi) As per the clause 22.4.1 and clause 4.1.3 (c), the supplier shall execute the fuel supply agreement within a period of 180 days from the date of the PSA.
(vii) In the event of fuel shortage, the supplier shall make best efforts to identify, additional sources of fuel supply and transportation to meet such fuel shortages, with the concurrence of the purchaser licensee and approval of the Commission.
(viii) The inter-state transmission charges and transmission loss as on the bid date (as approved by the Central Commission) shall be borne by the supplier. (clauses 5.5 & 5.6).

20. KSEB Ltd has submitted that, considering the energy shortage anticipated from the year 2016-17 and also considering the risk of bearing 50% of the fixed charges in the event of non-availability of transmission system, two separate bids have been invited for procuring power, with fuel as linkage coal / captive mine, as per the guidelines and the model bidding documents issued by the Central Government vide the notifications dated 08.11.2013 and 09.11.2013. The details are given below.

(i) The first bid was invited on 5/3/2014 for procuring 450MW of power with commencement of supply by December-2016.
(ii) The second bid was invited on 25/04/2014 for procuring 400 MW of power with commencement of supply by October-2017.
It is noticed that, since the commencement of supply for the 2nd bid is beyond December-2016, KSEB Ltd has not insisted for project specific parameters from the prospective bidders as per provisions in the model RFQ documents discussed earlier in paragraph 19 above.

(iii) Subsequently, based on the clarification from Ministry of Power GoI as per letters dated 23.09.2014 / 06.08.2014 that, the bid invited with two fuel options (linkage coal /captive coal) under same contract is not in line with the model bid documents notified by the Central Government. Accordingly, KSEB Limited has changed the fuel option for the 1st bid to linkage coal and the same for 2nd bid was changed to captive coal. In the meanwhile, the Hon'ble Supreme Court vide the judgment dated 24-09-2014 cancelled all the coal blocks allotted from 1993 to 2010. Considering the judgment of the Hon'ble Supreme Court, KSEB Ltd has changed the fuel option for 2nd bid also with fuel as linkage coal.

21. M/s ESAAR (Power) Ltd has filed a Writ Petition before the Hon'ble High Court against the above bid process initiated by KSEB Ltd for procuring power under DBFOO basis. The petitioner has contended that the act of KSEB Ltd in varying the eligibility conditions after processing RFQ is arbitrary and illegal and is opposed to the mandates prescribed by the Central Government for setting up of the process of procurement of power; that the act of KSEB Ltd is opposed to the guidelines dated 19.01.2005 issued by Government of India and that the amendment to the eligibility conditions without prior approval of the Regulatory Commission is not enforceable. It was further contended that GoI had brought specific ordinance addressing the exigent situation emerging out of the orders passed by the Hon'ble Supreme Court and that KSEB Ltd had processed the bid documents in undue haste without waiting for the follow up action under the ordinance, though the requirement of power by KSEB Ltd was only from December, 2016 and October, 2017. The petitioner had also submitted various other grounds and prayed to,-

(A) Issue a Writ of Certiorari or such other Writ, order or direction quashing Exhibit P5 and P7 notices which restricts the participation in the bids to eligible bidders having coal linkage and avoiding the petitioner who has been included in the list of prequalified applicants Exhibit P4 and P6.

(B) Issue a Writ of Certiorari or such other Writ, order or direction, directing respondent No.1 to disregard the bids received under RFQs and suspend and / or defer the tender process until coal block allocation /linkages are made pursuant to the Ordinance No. 5 of 2014 dated 21.10.2014 and / or coal linkage are issued by the Central Government.

Or in the alternative to Relief B

(C) Issue a Writ of Mandamus or such other Writ, order or direction directing Respondent No.1 to continue the bid process in accordance with the list of pre-qualified applicants under Exhibit P4 and P6 list.

The petition was admitted as WP (C) No. 33100 of 2014. The Hon'ble Court vide its interim order dated 20th December 2014 has issued the following orders.

"The Board is permitted to execute Power Sale Agreement subject to the outcome of the Writ petition with the following directions.

(i) The Board shall apply for long-term access with or without Power Sale Agreement on or before 31.12.2014.

(ii) If the Power Sale Agreement is executed, the Board shall clearly indicate to the bidders in the agreement or otherwise that this will be subject to the outcome of the present writ petition and that in the event of the writ petition being allowed, the petitioner will also be entitled for supply of any allocation of power under long term access and that the petitioner shall not be denied for want of execution of Power Sale Agreement before 31-12-2014".

The Hon'ble High Court in para 4 of the said order has found that the power sale agreement need not be accompanied along with application for allocation as rightly pointed out by the learned senior counsel for the petitioner. The only requirement is to set out details of target area and quantum of power. Therefore it is open for the Board to apply even without power sale agreement accompanied with the application. However the fact remains that the bid process is complete, except execution of power sale agreement. In such situation, balance of convenience and to keep the relief sought for in the Writ Petition in tact is the concern of the court while deciding on an interim application. No harm would be caused to the petitioner if power sale agreement is permitted to be executed subject to result of the Writ Petition. The above order was issued by the Hon'ble High Court in view of the findings quoted above. As per the above order of the Hon'ble High Court, the signing of the Power Supply Agreement for procuring 865 MW power under DBFOO basis is subject to the final order of the High Court in the Writ Petition WP (C) No. 33100 of 2014.

22. KSEB Ltd has clarified in its letter No. KSEB/TRAC/GEN&PP/DBFOO/ 2014-15 dated 27.01.2016 that no deviation from the guidelines is allowed in the RFP and RFQ documents other than not insisting for project specific parameters from the prospective bidders as per provisions in the model RFQ documents discussed in paragraph 19 above.

23. KSEB Ltd has also submitted in its letter No. KSEB/TRAC/GEN&PP/ DBFOO/2014-15 dated 21.04.2016 that, the 1st bid was opened on 31st October-2014. Ten bidders had participated in the final bidding process and the offers were received from the successful bidders, the details of which are given as Table-3 in the paragraph 4 above. KSEB Ltd has also submitted that, the 1st bid was invited for 450 MW and that the L1 bidder had offered only 200 MW out of 450 MW. Hence KSEB Ltd had requested the bidders L2 to L4 to match the rates quoted by them to the rate quoted by L1. But none of the bidders had matched their rates to the rate quoted by L1.

24. KSEB Ltd further submitted that, before finalizing the 1st bid, KSEB Ltd had opened the second bid on 14-11-2014. Eleven bidders had participated in the second bid

and the rates offered by them are given as Table-4 in paragraph 4 above. The lowest rate discovered through the second bid was Rs 4.29/unit for 100 MW as against the bid quantum of 400 MW. Hence KSEB Ltd had requested the bidders L2 to L6 to match the rates quoted by them with that of L1 bidder. The bidders L2 to L5 in the second bid had offered their willingness to match their quoted rates with the rates quoted by the L1 bidder. The details of the rates matched by L2 to L5 in the second bid with that of L1 are given below.

Table- 12
Details of the tariff matched by L2 to L5 in the 2nd bid with that of L1

Rank	Name of Bidder	Quantum Offered MW	Quoted Tariff (Rs.Ps)/kwh			Matched tariff (Rs.Ps)/kwh		
			Fixed charge	Fuel Charge	Tariff	Fixed charge	Fuel Charge	Tariff
L2	Jindal India Thermal Power limited, New Delhi 110066.	100	3.62	0.75	4.37	3.54	0.75	4.29
L3	Jhabua Power Limited, Gurgaon-122001	100	2.65	1.76	4.41	2.97	1.32	4.29
L4	Jindal Power Limited, New Delhi	150	3.57	0.86	4.43	3.43	0.86	4.29
L5	East Coast Energy Private Limited, Andhra Pradesh	100	2.95	1.5	4.45	3.14	1.15	4.29
	Total	450						4.29

25. KSEB Ltd has, in its letter No. KSEB/TRAC/GEN&PP/DBFOO/2014-15 dated 21.04.2015, further submitted the following on the appraising the rates quoted by the bidders in the 1st bid and 2nd bid.

(i) The tariffs quoted by the L1 and L2 bidders in the 1st bid were less than the tariff quoted by the L1 bidder of the 2nd bid. Hence KSEB Ltd had issued letter of acceptance (LoA) to both the bidders, namely, to L1 bidder of the 1st bid for 200 MW at the rate of Rs 3.60/unit and to L2 bidder of the 1st bid for 115 MW at the rate of Rs 4.15/unit, for further processing.

(ii) According to the KSEB Ltd, the rate quoted by the L1 bidder in the second bid is Rs 4.29/unit (including transmission charges and losses) at the State periphery. The rate quoted was very much competitive comparing with the cost plus tariff of recently commissioned NTPC projects.

(iii) L2 to L5 bidders from the second bid, matched the tariff with the rate quoted by the L1 bidder of the second bid.

(iv) Further, out of the total bid quantum of 400MW in the 1st bid, only 315 MW was available from the L1 & L2 bidders of the 1st bid.

(v) Considering the above, KSEB Ltd decided to issue LoA to the bidders 'L1' to 'L5' of second bid at the rate of Rs 4.29/unit, for total quantum of 550 MW, for further processing.

(vi) Thus the total quantum considered from 1st and 2nd bid together is 865 MW (315 MW from the 1st bid and 550MW from the 2nd bid) as against 850 MW proposed (450 MW from the 1st bid and 400 MW from the 2nd bid) for procurement through bid route.

(vii) The State Government vide the G.O (MS) No. 45/2014/PD dated 20.12.2014 has given sanction for procuring the 865 MW on DBFOO basis.

(viii) KSEB Ltd had further submitted that, the grant of long term access (LTA) is based on 'first come first serve' basis and reported that, Andhra Pradesh and Telangana had invited long term tenders for 4400 MW on DBFOO basis. Hence in order to ensure priority for getting open access and also as per the guidelines stipulated by MoP, KSEB Ltd had filed the application for long term access before the Central Transmission Utility, namely the PGCIL, in December-2014.

(ix) Accordingly, KSEB Ltd had executed the power supply agreement with the successful bidders, the details of which are given at Table-6 and Table-7 in the paragraph 4 above.

26. The Commission vide its letter dated 7-12-2015 had directed the KSEB Ltd to state specifically the conditions in the guidelines which enabled KSEB Ltd to accept the bids other than L1 and explain whether or not conditions in the guidelines issued by GoI, have been complied with by KSEB Ltd. On this issue, KSEB Ltd has, vide its letter dated 27-01-2016, submitted as follows.

'The requisitioned quantity for the 1st bid was 450 MW and that for bid-2 was 400 MW. For bid-1, lowest bidder (LI), M/s.Jindal Power Limited has offered 200 MW only and M/s. Jhabua Power Limited' (L2) has not reduced their rate to match with 'L1' as per the request of KSEB Limited. In the case of 2nd bid, the lowest bidder offered 100 MW only. But, four bidders (L2 to L5) matched their rate with L1 and offered to supply 450 MW of power in total.

The RFP issued by MoP had not addressed a situation in the event that a lowest bidder offers a quantum which is lower than that required by the Utility. KSEB Limited, vide letter No. CE (C&T) / DBFOO/ LT/ 2013-14/211/dated 23.08.2014 (copy enclosed annexure 3), had approached MoP to issue clarifications regarding this procedural gap in the bidding documents, for tying up the required quantum of power by the Utility.

During bidding process, when such a situation came up, KSEB Limited followed the procedure specified under clause 3.5.2 to 3.5.4 of the RFP of the Case 1 bidding guidelines issued by MoP on 22.7.2010 along with the provision in the guidelines dated 08.11.2013 that allows the utility to seek *lower rates from bidders other than 'L1'. The provision under case-1 bidding process is reproduced under:*

3.5.2. The levelized tariff calculated as per Clause 3.4.7 for all financial bids of qualified bidders shall be ranked from the lowest to the highest.

3.5.3. The bidder with the lowest levelized tariff shall be declared as the successful bidder for the quantum of power (in MW) offered by such bidder in its financial bid.

3.5.4 The selection process of the successful bidder as mentioned above in Clause 3.5.3shall be repeated for all the remaining financial bids of qualified bidders until the entire requisitioned capacity is met or until the time when the balance of the requisitioned capacity is less than the minimum bid capacity.

The procedure that allows the utility to seek lower rates from bidders other than 'L1' (Second round of bidding) under the DBFOO frame work is as quoted under:

'Clause 3.3.3 of RFP

In the event that the lowest bidder withdraws or is not selected for any reason in the first instance (the "first round of bidding"), the utility may invite all the remaining bidders to revalidate or extend their respective bid security, as necessary, and match the bid of the aforesaid lowest bidder (the "second round of bidding"). If in the second round of bidding, only one bidder matches the lowest bidder, it shall be the selected bidder. If two or more bidders match the said lowest bidder in the second round of bidding, then the bidder whose bid was lower as compared to other bidder(s) in the first round of bidding shall be the selected bidder. For example, if the third and fifth lowest bidders in the first round of bidding offer to match the said lowest bidder in the second round of bidding, the said third lowest bidder shall be the selected bidder.'

KSEB Ltd has submitted that it had appropriately followed the clause under case-1 bidding along with that under DBFOO frame work for contracting required power when the 'L1' bidder has quoted only a fraction of the required power. KSEB Ltd has also submitted that the procedure adopted by it under the above situation had been intimated to MoP vide its letter No. CE (C&T)/DBFOO/LT/2013-14/241 dated 17.12.2014. MoP vide amendment Notification No.23/09/2014-R&R dated 5.5.2015 adopted the same procedure and issued revised RFP documents to take care of similar situations.

27. The Commission has examined the explanation submitted by the KSEB Ltd regarding the acceptance of bids other than L1 in both the 1st bid and the 2nd bid. It is noticed that, the KSEB Ltd has followed the procedures stipulated in the repealed RFP guidelines, which were issued by the Ministry of Power on 22.07.2010 for selection of bids other than L1. However the said guidelines were repealed vide the guidelines issued by GoI for the procurement of electricity from thermal power stations set up on DBFOO basis as per the notification No. 23/17/2011- R&R dated 9th November-2013. KSEB Ltd stated that it had followed the provisions of the repealed guidelines for the selection of bids other than L1. At the time of selection of bids, the licensee had also not got the approval of the Central Government for the deviations in the paragraph 3.3 of the RFP documents regarding the selection of the bidder. Though, as per the section 86(1) (b) of the Electricity Act-2003, the Commission is empowered to regulate the power purchase and procurement process by the distribution licensee, the KSEB Ltd had not appraised the issue before the State Commission and sought approval for the deviation. However, the Central Government vide the amendment dated 5th May-2015 of the guidelines for procurement of electricity from thermal power stations set up on DBFOO basis' has modified the paragraph 3.3.3 of the RFP as follows.

> *"3.3.3 In the event that the lowest bidder withdraws or is not selected for any reason in the first instance <u>or the capacity required is not met by the lowest bidder</u> (the "**first round of bidding**"), the utility may invite all the remaining bidders to revalidate or extend their respective bid security, as necessary, and match the bid of the aforesaid lowest bidder (the "**second round of bidding**"). If in the second round of bidding, only one bidder matches the lowest bidder, it shall be the selected bidder. if two or more bidders match the said lowest bidder in the second round of bidding, then the bidder whose bid was lower as compared to other bidder(s) in the first round of bidding shall be the selected bidder. For example, if the third and fifth lowest bidders in the first round of bidding offer to match the said lowest bidder in the second round of bidding, the said third lowest bidder shall be the selected bidder. <u>It is hereby clarified that, the utility will not accept the entire capacity offered of the last lowest bidder in the order of progression, in the event the capacity required gets fulfilled by a part thereof.</u>*

28. (1) It is noticed that KSEB Ltd has not followed the prevalent and relevant guidelines issued by the Government of India for processing the offers other than L1 received in both Bid 1 and Bid 2. As per clause 3.3.3 of the Government of India guidelines 2013, the second round of bidding can be adopted only when the lowest bidder withdraws or is not selected for any reason in the first instance. As per the amendment dated 5th May 2015 one more condition, namely 'the capacity required is not met by the lowest bidder' has been added for adopting the second round of bidding. Thus

after 5th May 2015, if the required capacity is not met by the lowest bidder, the utility can adopt the process of second round of bidding. Strictly speaking, the amendment dated 5th May 2015 was not available for KSEB Ltd while it was processing the offers in both Bid 1 and Bid 2. However in view of the amendment dated 5th May 2015, and taking a very lenient view in public interest, KSEB Ltd can be granted the benefit of the amended guidelines. As per the guidelines, the second round of bidding consists of the following steps,-

(i) Invitation to all remaining bidders to revalidate or extend their bid security and to match their bids to that of the lowest bidder when the lowest bidder withdraws his bid or is not selected in the first instance or the capacity required is not met.

(ii) If only one bidder offers to match with the lowest rate, selection of the said bidder is permissible.

(iii) If two or more bidders offer to match their rates with the lowest rate selection of one bidder from among those bidders. The bidder whose bid was lower as compared to other bidder / bidders in the first round of bidding shall be the selected bidder.

Thus it would appear that the procedure prescribed by the guidelines issued by the Government of India provides only for the second round of bidding and for the selection of one bidder in the second round of bidding. But subsequently the paragraph 3.3.3 of the RFP which has been quoted above has been amended by Government of India on 05.05.2015, wherein it has been stated that second round of bidding can be adopted by the licensee if the capacity required is not met by the lowest bidder. In the last sentence of the said paragraph it has been clarified that the utility will not accept the entire capacity offered by the last lowest bidder in the order of progression in the event of capacity required gets fulfilled by a part thereof. A careful examination of the entire scheme for second round of bidding as prescribed in the guidelines would indicate that the distribution licensee can adopt the selection of bidders at the lowest rates till its entire requirement for power is fully met.

(2) In the Bid 1, KSEB Ltd had invited tenders for 450 MW of power. But it got only 200 MW of power at the rate of Rs.3.60 per kWh, from L1 namely, the Jindal Power Ltd, New Delhi. KSEB Ltd has, without due compliance with the guidelines issued by the Government of India, selected L2 namely Jhabua Power Ltd, Gurgaon, for supply of 115 MW of power at a higher rate of Rs.4.15 / kWh, when compared to the L1 rate of Bid 1. Thus KSEB Ltd could get only 315 MW as against the 450 MW in Bid 1 and there was a deficit of 135 MW. KSEB Ltd is seen to have selected bidders from Bid 2 for this deficit quantity of 135 MW, though it was not included in the original bid documents relating to Bid 2. Such a process is not seen authorized by the provisions in the guidelines issued by Government of India.

(3) It has been specifically stipulated in clause 3.3.3 of the amended guidelines as per the notification dated 05.05.2015 that the utility will not accept the entire capacity offered by the last lowest bidder in the order of

progression in the event of the capacity required gets fulfilled by a part thereof. In Bid 2, KSEB Ltd is seen to have accepted offers for a total of 550 MW as can be seen from Table 7, which is 150 MW above the quantity of power (400 MW) for which Bid 2 was invited. Further it is also above the combined quantity of 535 MW of power, including the deficit quantity of 135 MW from Bid 1 (400 MW of Bid 2 plus 135 MW deficit from Bid 1). This process adopted by KSEB Ltd is also not in accordance with the guidelines issued by the Government of India.

29. Regarding the selection of bids other than L1, the Commission has noted the following,-

(1) 'L3' and 'L5' of the 2^{nd} bid who had quoted higher rates in the original bid are seen to have matched their rates with the L1 rate, as stated in the table below,-

Table-13
Details of the rate quoted by L3 and L5 of Bid-2

Name of the bidder	Original quote			Revised quote		
	Fixed cost	Variable cost	Total	Fixed cost	Variable cost	Total
Jhabua Power Limited, Gurgaon (L3)	2.65	1.76	4.41	2.97	1.32	4.29
East Coast Energy Pvt. Ltd, Andhra Pradesh (L5)	2.95	1.5	4.45	3.14	1.15	4.29

(2) While matching the rates with the lowest tariff, the above bidders are seen to have increased their fixed cost. The bidder 'L3' has enhanced the fixed charge from Rs.2.65/unit to Rs.2.97/unit and the bidder 'L5' has enhanced the fixed charge from Rs.2.95/unit' to Rs.3.14 per unit while matching the overall tariff with 'L1 bidder of the 2^{nd} bid'. The Commission had, vide its letter dated 07-12-2015, directed to explain whether or not the above method of matching with L1 rate has any adverse impact on KSEB Ltd, resulting in payment of full or part of the fixed charges without availing power. On this issue, the licensee, KSEB Ltd has**,** in its letter dated 27.01.2016 , explained as follows,-

"In all situations where the transmission corridor for the supply of power is available, then scheduling of power from among the generators would be carried out strictly on merit order basis wherein the fuel charges of the generators are taken into account. Since the fuel charges of these Suppliers are comparatively cheaper than that of other Suppliers like

CGS, under normal scenario upon obtaining the transmission corridor, KSEB Ltd is not envisaging a situation of non-scheduling of power from 'L3' and 'L5' suppliers. Thus in normal circumstances payment of fixed charges without availing power from these suppliers is not anticipated."

(3) The Commission has examined the explanation submitted by KSEB Ltd on the above issue. As explained already in paragraph 19 above, the fixed charges payable under Article 21 of the power supply agreement (PSA) is linked to the base fixed charges quoted by the bidder. The fixed charge quoted by the bidder is liable to be revised on completion of the project, based on the station heat rate. Thereafter the fixed charge is liable to be revised based on the wholesale price index (WPI). The risks involved in the payment of fixed charge include,-

(i) 50% of the fixed charge payable in the case of shortfall in supply on account of transmission constraints.

(ii)75% of the fixed charge payable during the period of fuel shortage.

(iii) Incentive payable at the rate of 50% of the fixed charge for the excess generation above 90% of the availability.

(4) Fixed charge is payable once the normative availability of the plant is achieved and declared. Fixed charge is payable by the licensee to the generator, irrespective of the scheduling of power from the project. It is but natural that the generator would prefer to realize maximum amount in the form of fixed charge, especially in view of the conditions enabling the generator to realize 50% of the fixed charge in the case of shortfall in supply on account of transmission constraints and 70% of the fixed charge during the period of fuel shortage. The Commission has noticed that a very casual and evasive answer has been submitted by KSEB Ltd in its explanation to the effect that it does not anticipate any under-scheduling of power and hence payment of fixed charge without availing power from these suppliers is not normally anticipated. The above explanation submitted by KSEB Ltd does not appeal to reason. The failure to supply power on account of transmission constraints and on account of shortage of fuel may not be under normal circumstances. The above conditions relating to payment of fixed charges in the case of such eventualities are to protect the interests of the generators in such abnormal situations. By increasing fixed cost, the generators are ensuring more assured payments during such abnormal situations, even without supplying power. KSEB Ltd ought to have examined the consequences of such conditions of payment of fixed charge in abnormal situations. It should also have safeguarded its own interests and interests of the consumers by minimizing payment of fixed charge when the supply of power is interrupted due to the above reasons.

(5) From Article 22 of the power purchase agreement it can easily be seen that the payment of cost of fuel is linked with coal price notified by the Coal India Ltd (CIL) and cost of transportation of fuel is linked to the rail freight notified by the Indian Railways. Thus there are sufficient safeguards to protect the supplier of power against the likely increases in the cost of fuel and in the cost of transportation.

(6) Therefore the Commission is of the view that, the KSEB Ltd has not properly appraised the risks on account of increase in fixed charges by Jhabua Power Limited, Gurgaon (L3) and East Coast Energy Private Limited (L5) while matching their tariff with that of L1 and its overall impact on the tariffs applicable to the consumers.

30. On appraising the bidding process, the Commission has further noted the following.

(1) As per Article 22.2.1 of the power supply agreement, all the bidders have to provide the split-up details of the fuel cost including (a) cost of fuel and (b) cost of transportation.

Table-14
Cost of fuel quoted by the bidders

Sl No.	Name of Bidder	Quantum Offered MW	Split up details of fuel cost		
			Cost of fuel	cost of transportation	Fuel charge
1	Jindal Power Ltd, New Delhi	200	0.69	0.17	0.86
2	Jhabua Power Limited, Gurgaon-122001	115	0.71	1.05	1.76
3	Bharat Aluminum Company Ltd	100	0.73	0.31	1.04
4	Jindal India Thermal Power limited, New Delhi 110066.	100	0.65	0.10	0.75
5	Jhabua Power Limited, Gurgaon-122001	100	0.71	0.61	1.32
6	Jindal Power Limited, New Delhi	150	0.69	0.17	0.86
7	East Coast Energy Private Limited, Andhra Pradesh	100	0.67	0.48	1.15
	Total	865			

(2) As detailed above,

(i) The ‘cost of fuel’ quoted by the bidders are in between Rs.0.65/unit to Rs.0.73 per unit.

(ii) Further, as per the article 22.2.3 of the PSA, the cost of fuel payable shall be the lower of the (a) indicative cost of fuel computed from the fuel charge, as specified in the bid, and (b) 101% of the price of coal payable by the suppliers to the CIL.

(iii) There is considerable variation in the cost of transportation provided by the bidders along with the PSA, ranging from Rs.0.17/unit to Rs.1.05 per unit. The cost of transportation is generally linked to distance between the source of fuel and location of the power plant.

(iv) As per Article 22.2.4 of the PSA, the total cost of transportation of domestic fuel, forming part of the landed cost of fuel, shall be the lower of, (a) 110% of the freight payable to the Indian Railways for transportation by rail, and (b) the actual cost of transportation. It is further clarified that, the amount of transportation cost specified in Article 22.2.2.1 is equivalent to or less than the 110% of the amount payable to Indian railways as on bid rate. The transportation charge specified in Article 22.2.1 shall be revised only in proportion to the revision in rail freight as compared to the railway freight rate as on bid date.

(v) It is noted that there are sufficient safeguards to protect the interests of the supplier of power against the variations in the cost of fuel and in the cost of transportation though the fuel charges presently quoted are generally in line with the prevailing coal prices notified by the Coal India Ltd (CIL).

31. KSEB Ltd has also attempted to justify the decisions taken by it on the ground that the tariff of power fixed by Central Electricity Regulatory Commission for the recently commissioned generating stations of NTPC are comparable with the rates obtained in Bid 1 and Bid 2. But for making a sweeping comment as stated above, KSEB Ltd has not submitted any specific case so that the Commission can compare the rates and the conditions relating to variation of rates. As already explained, both the fixed charge and the fuel charge which constitute the tariff obtained in Bid 1 and Bid 2 are likely to increase in terms of Articles 21 and 22 of the power supply agreement. Therefore the explanation submitted by KSEB Ltd in this regard cannot be accepted in the absence of specific data and documents to support and substantiate its claims.

32. KSEB Ltd has stated that it has not deviated from the guidelines issued by Government of India. But it is found that KSEB Ltd has deviated from the procedures prescribed by the guidelines issued by Government of India, when the bids were processed by it. The Commission has also noted that KSEB Ltd has deviated from the procedure specified in Tariff Regulations, 2014. The Commission has noted the following deviations from the standard bidding documents and guidelines issued by Government of India on 08.11.2013 and 09.11.2013 and from the provisions in the Tariff Regulations, 2014 issued by the Commission,-

(i) KSEB Ltd has awarded power purchase contract to the second lower bidder at its quoted rate of Rs.4.15 / kWh which is higher than the lowest rate of Rs.3.60 / kWh in Bid-1, whereas the guidelines issued by the Government of India are only for the selection of the lowest bidder.

(ii) KSEB Ltd has not invited all the remaining bidders other than L1 to revalidate or extend their respective bid security and to match their rates with that of L1.

(iii) KSEB Ltd has purchased 550 MW of power in Bid-2 as against the tendered quantity of 400 MW.

(iv) KSEB Ltd has obtained only 200 MW from the lowest bidder in Bid-1 at a rate of Rs.3.60 / kWh. Thereafter 115 MW power from L2 has also been purchased at a higher rate of Rs.4.15 / kWh. Thus a total quantity of 315 MW was purchased as against the tendered quantity of 450 MW leaving a balance of 135 MW. KSEB Ltd has purchased more quantity of power than the tendered quantity in Bid-2 stating the reason that it could not get the full tendered quantity in Bid-1. Such purchase of more than the tendered quantity is not in accordance with the general principles of tender process.

(v) Even if the above 135 MW is considered for procurement from Bid-2, the total quantity that can be purchased is only 535 MW (400 MW + 135 MW). However KSEB Ltd has purchased 550 MW deviating from the conditions prescribed by Government of India in the para 3.3.3 in the guidelines notified by Government of India on 5th May 2015, which has been relied upon by KSEB Ltd to justify award of power purchase contracts to bidders other than the lowest bidder in Bid-2.

(vi) KSEB Ltd has not obtained prior approval from Government of India for the deviations from the standard bidding documents and the guidelines.

(vii) KSEB Ltd has not obtained approval from the Commission before executing the power purchase agreements.

(viii) KSEB Ltd has not included any clause in the impugned PPAs to the effect that the PPA shall have the effect only with the approval by the Commission as specified in sub-regulation (1) of regulation 78 of the Tariff Regulations, 2014.

33. The award of power supply contract to M/s Jhabua Power Ltd. Gurgaon (L2 of Bid-1) at a higher rate of Rs. 4.15 / kWh is not found to be in order for the reasons explained below. KSEB Ltd had requested the bidders L2 to L4 in Bid 1 to match their rates with that of L1. But none of them matched their rates with that of L1. In the normal course of tender process, KSEB Ltd should have followed the procedures prescribed by Government of India in para 3.3.4 of the guidelines which states as follows,-

> *"3.3.4 In the event that no Bidder offers to match the Lowest Bidder in the second round of bidding as specified in Clause 3.3.3, the Utility may, in its discretion, invite fresh Bids (the "**third round of bidding**") from all Bidders except the Lowest Bidder of the first round of bidding, or annul the Bidding Process, as the case may be. In case the Bidders are invited in the third round of bidding to revalidate or extend their Bid Security, as necessary, and offer fresh Bids, they shall be eligible for submission of fresh Bids provided, however, that in such third round of bidding only such Bids shall be eligible for*

consideration which are lower than the Bid of the second lowest Bidder in the first round of bidding.".

On the other hand KSEB Ltd is seen to have accepted the second lower offer of M/s Jhabua Power Ltd. Gurgaon (L2) also at a rate of Rs.4.15 / kWh (Rs.2.39 as fixed cost and Rs.1.76 as fuel charge). The justification given by KSEB Ltd for accepting L2 rate of Rs.4.15 kWh in the Bid-1 dated 5/3/2014 is that it is lower than the L1 rate of Rs.4.29/ kWh, in Bid-2 dated 25/04/2014. The rationale and basis adopted by KSEB Ltd for accepting the higher rate offered by L2 in Bid 1, are not in accordance with the guidelines issued by GoI or with the general principles of financial propriety in tender processes for the following reasons,-

(i) The guidelines issued by GoI of India categorically state that the bid process shall be open, transparent, and competitive based on the offer of lowest tariff. Hence there is absolutely no scope for accepting the second lower offer (L2) as per the provisions of the guidelines issued by GoI under Section 63 of the Electricity Act, 2003.

(ii) The offers obtained in both Bid 1 dated 5/3/2014 and Bid 2 dated 25/04/2014 have to be evaluated and decisions taken independently and therefore the rates obtained in Bid 1 dated 5/3/2014 cannot be compared with the rates obtained in Bid 2 dated 25/04/2014 in any manner.

(iii) As per the guidelines issued by the Government of India, the tender process is to discover the lowest tariff and the second round of bidding can be adopted only if the bidders other than L1 offer the lowest rate offered by L1. The licensee cannot accept any higher rate in order to meet its requirements, since it is against the very principle of discovering the lowest tariff in an open, transparent and competitive tender process in accordance with the guidelines issued by GoI.

(iv) The Bid 1 dated 5/3/2014 is for supply of power with effect from December 2016 whereas Bid 2 is for supply of power from October 2017. In the case of Bid 2, the date of commencement of supply of power is after 3 years and hence the generator / supplier need not submit the project specific details as specified in clause 2.2.1 (e) of the Model RFQ. As per clause 2.2.1 (e) of the Model RFQ, the applicant should,-

(a) possess at least one half of the land required for power station,
(b) obtain environmental and forests clearances,
(c) commence the construction of the power station,
(d) have assured supply of fuel, and
(e) other project specific conditions stipulated by the licensee.

The above conditions are not required if the date of commencement of power supply is after 3 years from the date of the RFQ. The date of commencement of supply as per the Bid 1 dated 5/3/2014 is December, 2016 which is within 3 years from the date of RFQ and the date of commencement of supply as per the Bid 2 dated 25/04/2014 is, October 2017 which is after 3 years from the date of RFQ. As admitted by the licensee, no eligibility conditions as stated above have been insisted in the case of Bid 2 dated 25.04.2014. Thus the conditions of tender for the supply of power as per Bid 1 and Bid 2 are different and distinct. Therefore the rates discovered in Bid 1 dated 5/3/2014 and the rates discovered in Bid 2 dated 25/04/2014 cannot be compared.

(v) It is also noticed that KSEB Ltd had not invited all the remaining bidders to revalidate or extend their bid security as specified in paragraph 3.3.3 of the RFP document.

34. KSEB Ltd has submitted that it had taken up the matter with Government of India for approval. But KSEB Ltd has not so far submitted any document relating to the approval if any granted by Government of India. In this regard it has to be noted that as per the provisions of the guidelines issued by Government of India, prior approval of Government of India is required for any deviation. The Hon'ble Supreme Court and Hon'ble High Courts have concurrently and repeatedly held that prior approval cannot be obtained subsequently. Before taking a decision on the approval of power purchases by KSEB Ltd from the bidders other than the lowest bidder, the Commission would like to know the response of Government of India with regard to the approval sought for by KSEB Ltd.

35. The Commission has further noted the following regarding the allocation of long term access (LTA) for the power tied up on DBFOO basis.

(1) As per the details provided by KSEB Ltd, the supply of power tied up through 1st bid (315 MW) has to commence from December 2016 and the supply of power tied up through the 2nd bid has to commence from October 2017.

(2) The Article 21.4.3 provides that, if the power flow could not materialize due to transmission constraints, the utility has to reimburse the fixed charges corresponding to 50% plant availability.

(3) As per the records available, KSEB Ltd had applied for long term access for the power tied-up through DBFOO basis during the month of December-2014.

(4) The CTU vide the Minutes of meeting held on 13.08.2015, has conditionally granted the LTA as detailed below,-

A. Grant of LTA to the utilities as per the applications received in 12/2014

Sl. No.	Applicant	App. Date	LTA / MTOA	Quantum	Injection point	Drawl	Start date	Date upto which LTA granted
1	Bharat Aluminium Company Limited	Dec-14	LTA	95	BALCO, Chhattisgarh	KSEB	"	30.09.2040
2	Jindal Power Ltd	Dec-14	LTA	190	Tamnar Chhattisgarh	KSEB	"	30.11.2040
3	Jindal Power Ltd	Dec-14	LTA	142.5	Tamnar Chhattisgarh	KSEB	"	30.06.2040
4	Jindal India Thermal Power	Dec-14	LTA	95	Angui, Odisha	KSEB	"	30.09.2040
5	Jhabua Power Limited	Dec-14	LTA	204.25	Jabalpur Pool, Madhya Pradesh	KSEB	"	30.12.2040

***Start date of LTA shall be from (a) the date from which LTA has been sought or (b) from the date of commissioning of Angul-Srikakulam-Vemagiri 765kV D/c line along with "Constraints in 400kV bay extensions at Vemagiri" or "Wardha - Maheshwaram 765kV D/clink with anchoring at Nizamabad", whichever is later between (a) & (b).*

- *It was decided to grant notional LTA to the Dec'14 LTA applicants as tabulated above, subject to:*

i) Availability of the dedicated transmission system.

ii) Commissioning of Angul-Srikakulam-Vemagiri 765kV D/c line along with "Constraints in 400kV bay extensions at Vemagiri" or "Wardha - Maheshwaram 765kV D/c link with anchoring at Nizamabad".

iii) KSEB shall ensure reconfiguration of the network and loads to meet the power demand with reliability and able to sustain any (n-1) contingency. Reconfiguration of system as informed by KSEB is given at Annexure IV.

iv) Commissioning of identified transmission systems given at Annexure-I.

(5) As detailed above, the LTA for the power tied-up through DBFOO was granted subject to the following:

(a) Availability of the dedicated transmission system associated with the power plants.

(b) The commissioning of Angul-Srikakulam-Vemagiri 765kV D/c line along with "Constraints in 400kV bay extensions at Vemagiri" or "Wardha - Maheshwaram 765kV D/c link with anchoring at Nizamabad".

(c) Net-work reconfiguration of the KSEBL transmission system proposed therein and also ensuring the timely completion of the transmission elements proposed as Annexure-III of the minutes.

(d) Timely commissioning of the transmission system given as Annexure-I.

36. In order to avoid the risk of transmission constraints including the additional liability likely to be incurred by KSEB Ltd, it has to take necessary and sufficient steps urgently as indicated below,-

(1) KSEB Ltd with the support of the State Government has to take necessary steps for the timely commissioning of the Angul-Srikakulam-Vemagiri 765kV D/c line, and appraise the importance of the early commissioning of the line with :

(a) Central Government

(b) CTU

(c) SRPC forums.

(2) KSEB Ltd has to take necessary steps for the timely commissioning of the transmission elements identified and given under Annexure-III to the Minutes of Meeting held on 13.08.2015 for processing of Dec'14 LTA as per the CERC directions vide orders dated 16.02.2015 & 03.07.2015& June'15 MTOA applications.

(3) KSEBL has to re-configure its transmission network as proposed in Annexure-IV and the same may be reported to the CTU without laxity.

(4) KSEB Ltd has to report the progress of the above directions, on quarterly basis before the Commission.

(5) If KSEB Ltd fails to comply the directions given as above, the Commission shall not allow to pass on to the consumers, the liability arising out of the transmission constraints.

37. The Commission has, after careful examination of the procedures followed and decisions taken by KSEB Ltd in respect of the power purchases as per the first tender dated 5/3/2014 and the second tender dated 25/04/2014 in the light of the relevant legal provisions, the regulations, the guidelines and the facts explained above, found that,-

(1) In the case of Bid 1 dated 5/3/2014 which was opened on 31.10.2014, the lowest bid was submitted by M/s Jindal Power Ltd, New Delhi for 200 MW, at the rate of Rs.3.60/- per kWh (Rs.2.74 as fixed charge and Rs.0.86 as fuel charge). The award of power supply contract to M/s Jindal Power Ltd, New Delhi being the lowest bidder (L1) is found to be in order.

(2) In the case of Bid 2 dated 25/04/2014 which was opened on 14.11.2014, the lowest bid was submitted by M/s Bharat Aluminium Company Limited,

Chhattisgarh for 100 MW, at the rate of Rs.4.29/- per kWh (Rs.3.25 as fixed charge and Rs.1.04 as fuel charge). The award of power supply contract to M/s Bharat Aluminium Company Limited, Chhattisgarh being the lowest bidder (L1) is found to be in order.

38. KSEB Ltd has submitted that Government of Kerala has accorded sanction for the procurement of 865 MW of power on DBFOO basis, vide GO (MS) No. 45/2014/PD dated 20.12.2014. It is not known to the Commission whether or not all the matters discussed above have been duly placed before the Government of Kerala by KSEB Ltd, and whether or not Government have considered such matters before issuance of the said Government Order. Therefore, before taking a decision on the approval of purchases of power by KSEB Ltd, from the bidders other than the lowest bidder of Bid-1 and Bid-2, the Commission has to necessarily ascertain the views of Government of Kerala after examining the issues explained above.

39. Shri. K. Vikraman Nair, Member of the Commission has refrained from passing an order in this issue since he was, in the capacity of the Director (Transmission and System Operation), KSEB Ltd, involved in the tender processes leading to the decision on the impugned long term purchase of power under DBFOO system. Shri. S. Venugopal, Member has also refrained from passing an order in this issue on the same grounds since he was the Director (Finance) of KSEB Ltd at the time of processing the impugned tenders under DBFOO system, though he has stated that his views on certain points mentioned in the order are different.

Order of the Commission

40. In view of the facts, circumstances and legal provisions explained above the Commission hereby issues the following orders,-

(1) The purchase of 200 MW of power by KSEB Ltd from M/s Jindal Power Ltd, New Delhi at the rate of Rs.3.60 / kWh as per the Bid -1 dated 05.03.2014 which was opened on 31.10.2014, is approved.

(2) The purchase of 100 MW of power by KSEB Ltd from M/s Bharat Aluminium Company Ltd, Chhattisgarh at the rate of Rs.4.29/ kWh as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014, is approved.

(3) The approval of the following purchases of power by KSEB Ltd from the bidders other than the lowest bidder (L1) will be considered on getting the approval from Government of India for the deviations from the guidelines and on getting the views from Government of Kerala on the issues raised in paragraphs 34 and 38 of this order.

(a)	The purchase of 115 MW of power by KSEB Ltd from M/s Jhabua Power Ltd, Gurgaon at the rate of Rs.4.15/ kWh as per the Bid -1 dated 05.03.2014 which was opened on 31.10.2014.
(b)	The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jindal India Thermal Power Ltd, New Delhi (L2) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.
(c)	The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jhabua Power Limited, Gurgaon (L3) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.
(d)	The purchase of 150 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jindal Power Limited, New Delhi (L4) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.
(e)	The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s East Coast Energy Private Limited, Andhra Pradesh (L5) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.

(4) A copy of this order will be submitted to Government of Kerala with request to communicate their views after duly considering the relevant facts and legal provisions in view of the Government Order GO (MS) No. 45/2014/PD dated 20.12.2014 sanctioning the purchase of 865 MW of power by KSEB Ltd on DBFOO basis.

(5) KSEB Ltd is directed to follow up the matter in Government of India and in Government of Kerala and to submit the results to the Commission as early as possible, considering the fact that the power purchases as per Bid-1 will have to commence with effect from December, 2016.

(6) All the orders above are subject to the final decisions of the Hon'ble High Court in Writ Petition No. WP (C) 33100/2014.

Sd/-
T.M. Manoharan
Chairman

Approved for issue,

Sd/-
Santhosh Kumar.K.B