

ALL INDIA POWER ENGINEERS FEDERATION



(REGISTERED UNDER SOCIETIES ACT XXI of 1860), Regd. No. 24085/93
REGD HEAD OFFICE B-1A/45A, Janakpuri, New-Delhi-10058
Corres. Address of CHAIRMAN-Hydel Field Hostel, 17 Rana Pratap Marg Lucknow-226001
M: 09415006225 Phone : 0522-4107706(Off), FAX:0522-2205417/0522-4079628
Email : ersdubey@yahoo.com/: ersdubeylko@gmail.com & chairmanaipef@gmail.com

No. 80 - 2020/SBD

11 - 10 - 2020

Sri R K Singh
Power Minister
Shram Shakti Bhawan
New Delhi

Respected Sir,

Sub : standard bidding documents for privatizing of Electricity Distribution : additional comments and objections of AIPEF

Since GoI has extended the last date of comments to 12 Oct, the AIPEF is hereby submitting additional comments and objections which may be considered along with earlier comments. AIPEF has already requested for extending the date to 31 March 2021 . There are several issues which require additional time for detailed study and analysis for which the extended date of 31 March had been asked for.

1. Opening Para-declared of policy “The Ministry of Power is pleased to issue standard bidding documents for private sector participation in power distribution utilities across the country”.

Comments” The way adopted by GOI to encourage and support private sector participation appears to be

- a) To allow undue profits to private companies.
- b) To sell out costly national assets to private parties at throw away prices.
- c) To allow favorable terms and conditions to private co/corporates in process of privatization.

AIPEF strongly objects to such policy/approach.

1.1 Electricity being concurrent subject under Constitution of India, each State has the Constitutional jurisdiction, right and option to decide upon the structure of electricity distribution to be adopted in that State. This option which is available under Constitution cannot be snatched away by Union Power ministry in issue of S B D s . The total proposal of SBDs therefore conflicts with Constitution.

There is huge diversity and variation in the requirement and structure of electricity distribution systems across the country. This variation encompasses differences in agriculture, industry, population profile, terrain, consumption patterns etc. The State in exercising its constitutional right can adopt the electrical distribution system best suited to that State , and the approach of MoP that one size fits all is not acceptable.

The MoP should accept the liberty of States under Constitution and withdraw the SBDs draft as non compatible with Constitution.

2. In RFP document Para 2.2.6 Right to use Para (b), Page 11, it states “In lieu of the right to use of land..... the Deemed Licensee shall remit monthly charges of Indian Rupees One.

However, as per Electricity Act 2003, section 131 (2) it is stipulated.

“Provided that the value of any assets transferred hereunder shall be determined, as far as may be based on the revenue potential of such assets...”

2.1 This proposal of allowing use of land at Rs one per month is not only against Electricity Act 2003 it also demonstrates the keenness of MoP to bestow financial benefits to the corporates even though impermissible under law.

2.2 In several or most States the Fixed Asset Registers are not maintained. This was a major issue in case of Delhi privatization.

3. The entire SBD of Ministry of Power Govt. of India is copied from Odisha documents. In “Bulk Supply Agreement” Page 5 it states

“CC SLDC means Odisha State Load Dispatch Centre”

The title page of SBD document shows the symbol of GOI, and words Government of India, Ministry of Power.

This is a statement and document which is copied from Odisha and fraudulently claimed as Govt. of India/Ministry of Power document.

On this basis alone, the Govt. of India/Ministry of Power should withdraw the Odisha copied document since Odisha is the worst example of privatisation and scam in entire country. A document based on worst precedent cannot and must not be used as a model for drafting /finalizing SBD for all the UTs and states of country.

3.1 MoP should give a comprehensive statement giving details of plagiarized sections of the SBDs document, indicating which portion has been plagiarized from which source.

4. The SBD includes the proposal that State Govt. / State should supply power to private companies at subsidized cost so as to ensure profit of private companies. This means that state should buy costly power from grid /market and sell it at cheaper rate (i.e. subsidized rate) so as to ensure profit to private co/corporate. Vide RFP Para 2.2.7 (d), Page 11.

“The Bulk Supply Agreement signed between (utility/deptt.) and Distribution Company shall be determined based on the paying capacity of the distribution company and not on the basis of cost of power purchase by the utility/department.

Comments: Power Purchase cost is about 70-80% of ARR of state Discom. If power is to be purchased at high cost and sold at cheaper rate (subsidized rate) to private company, state will go bankrupt. The power purchase rate of Agra franchises must be probed by CBI

4.1 The electricity Discoms meet their energy requirement from several diverse sources such as State Genco, Central sector entitlements, PPAs with IPPs etc. In addition the State Discoms have to draw the energy corresponding to RPO (Renewable Power Obligations) which is costly and non flexible in nature. The GoI has fixed a Renewable target of 175 GW by 2022, increasing to 450 GW by 2030 which are Green energy targets declared by Prime Minister. The RPO targets for each State will correspondingly increase, over which the States have no control. Managing the power purchases so as to minimize costs and achieve low energy rate is increasingly becoming more difficult. Under these circumstances to propose that bulk supply be given to Pvt Cos at subsidized ie below cost price rate will impose unbearable financial burden on State just to give undue and unjustified benefit to pvt co/licensee. A strategy to ensure profits to Corporates at direct loss to State exchequer is not acceptable and against national interest.

5. Vide Guidance Note, Page 3, Para 1.1 (e) it states “The successor entity shall be provided with a clean balance sheet free of accumulated losses/ unserviceable liabilities. This proposal implies that Govt. is to bear all the past losses while private company is to pocket all the profits. If Govt. was ready to bear accumulated losses, the existing Discoms (State Govt. Companies) would be able to run in profit without any need to privatize.

6. Electricity Act 2003 Section 133, it is specified “upon such transfer under the transfer scheme. The personnel shall hold office or service under the transferee on such terms and conditions as may be determined in accordance with the Transfer scheme.

Provided that such terms and conditions on the transfer shall not in any way be less favourable than those which would have been applicable to them if there had been no such transfer under the transfer scheme.

Comments: Govt. of India draft does not mean the statutory requirements of Section 133 and is thus not legal.

7. “Standard bid documents” is the terms given to Govt. of India guidelines for competitive bidding for TARIFF of Generation or Transmission, under section 63. Govt. of India proposal of SBD for Distribution does not come under purview of Section 63 and therefore outside scope of Electricity Act 2003 itself.

7.1 Section 63 of E Act 2003 states as under

Section 63. (Determination of tariff by bidding process):

Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

7.2 The “ guidelines “ issued by GOI wrt sec 63 of Act are termed as Standard Bidding Documents . The SBDs as issued by MoP are not for tariff but for selection of distribution licensees . If bidding for generation tariff is carried out under Sec 63 the Regulator has to see whether the Guidelines have been correctly followed . If Regulator finds that guidelines have been correctly implemented then the Regulator adopts the bid tariff as discovered through competitive bidding.

7.3 Sec 63 is clearly for Tariff and not for selection of discom bids. The position has been explained in the Supreme Court judgment in Energy Watchdog case of 11-4-2017 , in para 18 , quoted as under

18. The construction of Section 63, when read with the other provisions of this Act, is what comes up for decision in the present appeals. It may be noticed that Section 63 begins with a non-obstante clause, but it is a non-obstante clause covering only Section 62. Secondly, unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not “determine” tariff but only “adopts” tariff already determined under Section 63. Thirdly, such “adoption” is only if such tariff has been determined through a transparent process of bidding, Page 25

and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. What has been argued before us is that Section 63 is a stand alone provision and has to be construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. One thing is immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. Guidelines have been issued under this Section on 19th January, 2005, which guidelines have been amended from time to time. Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with clause 4.

19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered

Page 26
by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is

Page 27
bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.

Jurisdiction of the Central Commission

7.4 The conclusion is that the entire SBDs proposal of MoP is not covered under Sec 63 of E Act 2003 and neither in any other section of Act. The entire exercise of SBDs is unsustainable under Act and therefore deserves to be withdrawn.

8. Competition bidding criteria are based on principle of cherry picking-whereas GOI and Ministry of Power had earlier declared there would be no cherry picking.

9 Bypassing of SERCs

9.1 Under Sec 86 E Act 2003 it is stipulated

“ The State Commission shall advise the State Govt on all or any of the following matters, namely

iii) reorganization and restructuring of electricity industry in the State”.

9.2 In every State, therefore, it is a statutory requirement to obtain advice of SERC on any proposal for privatization of distribution. The SBDs exercise does not provide for

SERC advice and thus conflicts with Sec 86 of E Act 2003

9.3 Under Sec 88 of E Act 2003 the State Advisory Committee has as one of its objects to advise the State Commission on “major questions of policy”.

9.4 The SERC as well as State Advisory Committee are State Specific bodies with statutory powers. These powers cannot be bypassed or usurped by MoP in the issue of SBDs.

10. In RFP document page 18 (computer page 33/179) the Eligibility criteria for bidders are given at Sr 3.1.4

The following additional eligibility criteria should be added at sr 3.1.4

Following category of Bidders shall not be eligible for Bidding

- i) Bidders who are defaulters of Public sector Banks in India
- ii) Bidders who are facing criminal charges or FIRs
- iii) Bidders facing Court cases involving criminal charges
- iv) Bidders facing criminal investigations by CBI, ED, DRI or other govt agencies.
- v) Bidders who are income tax defaulters, facing income tax evasion charges
- vi) Bidders facing charges relating to over invoicing of imported coal and customs evasion
- vii) Bidders facing charges of over invoicing of equipment and evasion of Customs.

Thank you with regards.

Sincerely Yours

Shailendra Dubey
Chairman

CC:

1. Sri Vishal Kapoor, MoP, New Delhi.
2. Sri Narender Singh, MoP, New Delhi.