



Petition No. 1780 of 2021
BEFORE
THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW

Date of Order 28.10.2021

PRESENT:

1. Hon'ble Sh. Raj Pratap Singh, Chairman
2. Hon'ble Sh. Kaushal Kishore Sharma, Member
3. Hon'ble Sh. Vinod Kumar Srivastava, Member (Law)

IN THE MATTER OF: Petition under Section 86 (1)(b) of the Electricity Act, 2003 for seeking approval of the Supplementary Power Purchase Agreement dated 08.10.2021 regarding certain amendments in the Hydro Power Purchase Agreement dated 17.05.2021.

1. Dakshinanchal Vidyut Vitran Nigam Limited,
Urja Bhawan, NH2 (Agra-Delhi Bypass Road),
Sikandra, Agra - 282002
2. Madhyanchal Vidyut Vitran Nigam Limited,
4A, Gokhale Marg, Lucknow-226001
3. Paschimanchal Vidyut Vitran Nigam Limited,
Victoria Hydel Inspection House,
Hydel Colony, Victoria Park, Meerut-250001
4. Purvanchal Vidyut Vitran Nigam Limited,
Vidyut Nagar, Bhikharipur, P.O. DLW, Varanasi- 220101
5. Uttar Pradesh Power Corporation Limited,
Shakti Bhawan, 14 Ashok Marg, Lucknow - 226001

----- Petitioner(s)

GMR Bajoli Holi Hydro Power Limited (GBHHPL)
New Shakti Bhawan, Building No.302, New Udaan Bhawan Complex, Near
Terminal 3, IGI Airport, New Delhi - 110037

-----Respondent

The following were present:

1. Sh. Altaf Mansoor, Counsel, UPPCL
2. Arindam Chakraborty, Counsel GMR energy Ltd.
3. Shri Sanjiv Shukla, CE-Planning, UPPCL



ORDER

(Date of hearing: 21.10.2021)

1. The Commission, vide its order dated 27.08.2021 in Petition No. 1744/2021, in the matter of procurement of aggregate 400 MW hydro power and adoption of tariff discovered through Competitive Bidding process, filed under section 63 and 86(a)(b) of the Electricity Act'03, for meeting the energy requirements of Dakshinanchal Vidyut Vitran Nigam Ltd., Madhyanchal Vidyut Vitran Nigam Ltd., Purvanchal Vidyut Vitran Nigam Ltd. and Paschimanchal Vidyut Vitran Nigam Ltd. in the months of May to October for 25 years, has adopted the discovered tariff and accorded approval to following:

- (a) PPA with GMR Bajoli Holi Hydro Power Limited (GBHHPL) (60 MW) dated 17.05.2021,
- (b) PPA with Teesta Urja Limited (TUL) (265 MW) dated 17.05.2021 and SPPA dated 16.07.2021
- (c) PPA with Tidong Power Generation Private Limited (TPGPL) (75 MW) dated 17.05.2021

Brief Facts

2. The Petitioner(s), in view of delay in the process of opening of Default Escrow Account and entering Deed of Hypothecation resulting into delay in appointed date and therefore commencement of supply of power, after mutual agreement during meeting held on 13.09.21, entered into supplementary HPPA dated 08.10.2021 to the HPPA dated 17.05.21 to relax the compliance of the Conditions Precedent as per clause 4.1.2(a) and (b) of the HPPA. The instant Petition has been filed for approval of supplementary HPPA dated 08.10.2021 to the HPPA dated 17.05.21.

3. GMR Bajoli Holi Hydro Power Limited, the Respondent, vide its affidavit dated 12.10.2021 in response to the Petition has submitted as under:

"That this Hon'ble Commission may approve the Supplementary PPA dated 08.10.2021 in accordance with the law."

4. A comparative showing the existing Clauses in the HPPA and the amended Clauses in the Supplementary HPPA are mentioned in the following table:



S. No	Existing Clause in HPPA	Proposed Amendment in Supplementary HPPA
(i)	<p><u>Clause 4.1.2</u></p> <p>The Supplier may, upon providing the Performance Security to the Procurer in accordance with Article 9, at any time within 30 (Thirty) days from the date of this Agreement or on an earlier day acceptable to the Procurer, by notice require the Procurer to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of the notice, and the Conditions Precedent required to be satisfied by the Procurer shall be deemed to have been fulfilled when the Procurer shall have:</p> <p>(a) executed and procured execution of the Default Escrow Agreement in accordance with the provisions of Clause 13.1;</p> <p>(b) executed the Deed of Hypothecation in accordance with the provisions of Clause 13.1.2;</p> <p>(c) procured adoption of the Tariff from the Appropriate Commission for payment of Tariff by the Procurer to the Supplier in accordance with the provisions of this Agreement;</p> <p>Provided that upon request in writing by the Procurer, the Supplier may, in its discretion, grant extension of time, not exceeding 180 (one hundred and eighty) days, for fulfilment of the Conditions Precedent set forth in this Clause 4.1.2.</p>	<p><u>Clause 4.1.2</u></p> <p>The Supplier may, upon providing the Performance Security to the Procurer in accordance with Article 9, at any time within 30 (Thirty) days from the date of this Agreement or on an earlier day acceptable to the Procurer, by notice require the Procurer to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of the notice, and the Conditions Precedent required to be satisfied by the Procurer shall be deemed to have been fulfilled when the Procurer shall have:-</p> <p>a) Deleted</p> <p>b) Deleted</p> <p>c) procured adoption of the Tariff from the Appropriate Commission for payment of Tariff by the Procurer to the Supplier in accordance with the provisions of this Agreement;</p> <p>Provided that upon request in writing by the Procurer, the Supplier may, in</p>

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		its discretion, grant extension of time, not exceeding 180 (one hundred and eighty) days, for fulfilment of the Conditions Precedent set forth in this Clause 4.1.2."
(ii)	<p><u>Clause 4.2: -Damages for delay by the Procurer</u></p> <p>In the event that (i) the Procurer does not procure fulfilment or waiver of any or all of the Conditions Precedent set forth in Clause 4.1.2 within the period specified in respect thereof, and (ii) the delay has not occurred as a result of breach of this Agreement by the Supplier or due to Force Majeure, the Procurer shall pay to the Supplier Damages in an amount calculated at the rate of 0.1% (zero point one per cent) of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum of 20% (twenty per cent) of the Performance Security.</p> <p>If Performance Security is not provided within 30 Days, the Bid Security of the Supplier shall be encashed and appropriated by the Procurer.</p>	Deleted
(iii)	<p><u>Clause 4.4:- Deemed Termination upon delay</u></p> <p>Without prejudice to the provisions of Clauses 4.2 and 4.3, and subject to the provisions of Clause 9.2, the Parties expressly agree that in the event the Appointed Date does not occur, for any reason whatsoever, 120 (one hundred twenty) days from the date of this Agreement or the extended period provided in accordance with this Agreement, all rights, privileges, claims and entitlements of the Supplier under or arising out of this Agreement shall be</p>	Deleted

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	<p>deemed to have been waived by, and to have ceased with the concurrence of the Supplier, and the Hydro Power Purchase Agreement shall be deemed to have been terminated by mutual agreement of the Parties. Provided, however, that in the event the delay in occurrence of the Appointed Date is for reasons attributable to the Supplier, the Performance Security of the Supplier shall be encashed and appropriated by the Procurer as Damages thereof.</p>	
(iv)	<p>Clause:- 13.1.1 Default Escrow Account The Procurer and the Supplier shall, prior to the Appointed Date, execute a default escrow agreement with the Procurer's bank substantially in the form specified in Schedule-C (the "Default Escrow Agreement") for the establishment and operation of the default escrow account (the "Default Escrow Account") in favour of the Supplier. The Parties agree and acknowledge that the Default Escrow Account shall be established and maintained at a bank where at least 30% (thirty per cent) of the Procurer's total monthly Revenues are normally deposited (the "Default Escrow Bank"). The Procurer expressly agrees and undertakes that throughout the term of the Contract Period, no less than 30% (thirty per cent) of its total Revenues shall continue to be deposited at that bank or any substitute thereof that the Parties may by mutual agreement determine and Revenues equivalent to 30% (thirty per cent) of the annual Capacity Charge (the "Maximum Monthly Payment") shall be routed every month through the Default Escrow Account in accordance with</p>	<p>Clause:- 13.1.1 Default Escrow Account The Procurer and the Supplier shall, <u>within 180 days from the Appointed Date or mutually extendable thereafter</u>, execute a default escrow agreement with the Procurer's bank substantially in the form specified in Schedule-C (the "Default Escrow Agreement") for the establishment and operation of the default escrow account (the "Default Escrow Account") in favour of the Supplier. The Parties agree and acknowledge that the Default Escrow Account shall be established and maintained at a bank where at least 30% (thirty per cent) of the Procurer's total monthly Revenues are normally deposited (the "Default Escrow Bank"). The Procurer expressly agrees and undertakes that throughout the term of the Contract Period, no less than 30% (thirty per cent) of its total Revenues shall continue to be deposited at that bank or any substitute thereof that the Parties may by mutual agreement determine and Revenues equivalent to 30% (thirty per cent) of the annual Capacity Charge (the "Maximum Monthly Payment") shall be routed every month through the Default Escrow Account in accordance with</p>



	the provisions of this Clause 13.1 and the Default Escrow Agreement.	the provisions of this Clause 13.1 and the Default Escrow Agreement. "
(v)	<p>Clause:- 13.1.2 The Procurer and the Supplier shall, prior to the Appointed Date, execute a deed of hypothecation substantially in the form specified at of Schedule-D (the "Deed of Hypothecation"), whereby the Procurer shall hypothecate to the Supplier an amount equal to Maximum Monthly Payment, to be deposited every month in the Default Escrow Account for discharging the liabilities arising out of and in relation to the Secured Obligations.</p>	<p>Clause 13.1.2 The Procurer and the Supplier shall, <u>within 180 days from the Appointed Date or mutually extendable thereafter</u>, execute a deed of hypothecation substantially in the form specified at of Schedule-D (the "Deed of Hypothecation"), whereby the Procurer shall hypothecate to the Supplier an amount equal to Maximum Monthly Payment, to be deposited every month in the Default Escrow Account for discharging the liabilities arising out of and in relation to the Secured Obligations.</p>
(vi)	<p>Clause:-2.3.1 of Schedule C Within 30 (thirty) days from the date of this Agreement, and in any case prior to the Appointed Date, the Procurer shall open and establish the Default Escrow Account with the (name of Branch) Branch of the Default Escrow Bank, and such account shall be maintained at all times until the termination of this Agreement under Clause 9 hereof. The Default Escrow Account shall be denominated in Rupees."</p>	<p>Clause:-2.3.1 of Schedule C <u>Within 180 days from the Appointed Date or mutually extendable thereafter</u> the Procurer shall open and establish the Default Escrow Account with the (name of Branch) Branch of the Default Escrow Bank, and such account shall be maintained at all times until the termination of this Agreement under Clause 9 hereof. The Default Escrow Account shall be denominated in Rupees."</p>
(vii)	<p>Clause :3.1 of Schedule C The Procurer expressly agrees that it shall, prior to the Appointed Date, execute the Deed of Hypothecation and create a first priority charge/ security interest in favour of the Supplier on the Revenues deposited into the Default Escrow Account pursuant to this Agreement, but not exceeding the Maximum Monthly Payment for and in respect of each and every month until termination of this Agreement (the "Security").</p>	<p>Clause :3.1 of Schedule C The Procurer expressly agrees that it shall, <u>within 180 days from the Appointed Date or mutually extendable thereafter</u>, execute the Deed of Hypothecation and create a first priority charge/ security interest in favour of the Supplier on the Revenues deposited into the Default Escrow Account pursuant to this Agreement, but not exceeding the Maximum Monthly Payment for and in respect of each and every month until</p>

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		termination of this Agreement (the "Security").
(viii)	-	Insertion of New Clause in Article 25 as 25.16 Clause 25.16 Effectiveness <i>The Parties agree and confirm that save and except the modifications mentioned above, the HPPA dated 17.05.2021 shall remain in full force and effect and shall be read in conjunction with this Supplementary Agreement and be enforced as if the modifications made in terms of this Supplementary Agreement were given effect to from the date of signing of the Supplementary PPA.</i>
(ix)	Clause :- 13.2.1 The Procurer shall, no later than 30 (thirty) days prior to the likely date of the Appointed Date, provide to the Supplier, an unconditional, revolving and irrevocable letter of credit for an amount equivalent to the Minimum Monthly Payment (the "Letter of Credit"), which may be drawn upon by the Supplier for recovery of payment due against the Monthly Invoice in accordance with the provisions of this Agreement. The Letter of Credit shall be substantially in the form specified in Schedule-E and shall come into effect on the Appointed Date and shall be modified once every year to reflect the revision in Minimum Monthly Payment in accordance with the provisions of this Agreement.	Clause :- 13.2.1 The Procurer shall, <u>prior to the likely date of the Appointed Date or mutually extendable thereafter</u> , provide to the Supplier, an unconditional, revolving and irrevocable letter of credit for an amount equivalent to the Minimum Monthly Payment (the "Letter of Credit"), which may be drawn upon by the Supplier for recovery of payment due against the Monthly Invoice in accordance with the provisions of this Agreement. The Letter of Credit shall be substantially in the form specified in Schedule-E and shall come into effect on the Appointed Date, and shall be modified once every year to reflect the revision in Minimum Monthly Payment in accordance with the provisions of this Agreement."
(x)	Clause 13.2.2 The Letter of Credit shall be procured by the Procurer from a bank where at least 30% (thirty per cent) of the	Clause 13.2.2 The Letter of Credit shall be procured by the Procurer from a bank where at least 30% (thirty per cent) of the

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	<p>Procurer's total monthly Revenues are normally deposited, and which shall have been appointed as the Default Escrow Bank. All costs and expenses relating to opening and maintenance of the Letter of Credit shall be borne by the Procurer."</p>	<p>Procurer's total monthly Revenues are normally deposited, and which shall have been appointed as the Default Escrow Bank. All costs and expenses relating to opening and maintenance of the Letter of Credit shall be borne by the Procurer.</p> <p><u>Provided that till such time the Default Escrow Bank is appointed, the unconditional, revolving, and irrevocable letter of credit for an amount equivalent to the Minimum Monthly Payment shall be procured by the Procurer from any Bank.</u></p>
(xi)	<p><u>Clause 13.2.3</u></p> <p>In the event of Procurer's failure to pay the Monthly Invoice before the 27th (twenty seventh) day of the month in which the relevant Payment Due Date occurs, the Supplier may, in its discretion, invoke the Letter of Credit for recovery of the amount due, whereupon the Default Escrow Bank shall, without any reference to the Procurer, pay the amount due upon the Supplier presenting the following documents, namely:</p> <p>(a) a copy of the Monthly Invoice which has remained unpaid; and</p> <p>(b) a certificate from the Supplier to the effect that the Monthly Invoice is in accordance with this Agreement and that the amount due and payable has remained unpaid.</p>	<p><u>Clause 13.2.3</u></p> <p>In the event of Procurer's failure to pay the Monthly Invoice before the 27th (twenty seventh) day of the month in which the relevant Payment Due Date occurs, the Supplier may, in its discretion, invoke the Letter of Credit for recovery of the amount due, whereupon the Default Escrow Bank <u>or any other Bank referred to under Article 13.2.2, as the case may be,</u> shall, without any reference to the Procurer, pay the amount due upon the Supplier presenting the following documents, namely:</p> <p>(a) a copy of the Monthly Invoice which has remained unpaid; and</p> <p>(b) a certificate from the Supplier to the effect that the Monthly Invoice is in accordance with this Agreement and that the amount due and payable has remained unpaid.</p>

5. The Petitioner(s) on 13.10.2021 have filed an application for urgent listing and approve the SPPA or as interim measure provisionally accept the amendment and allow to procure power from the Respondent.



Record of Proceedings

- 6. The Commission observed during the hearing on 21st Oct 21 that the Petitioner via affidavit dated 12.10.21 has submitted that the Commission may approve the amendment to HPPA in accordance with law. Sh. Arindam Chakraborty, Counsel of Petitioner, upon query by the Commission regarding their consent to the amended HPPA dated 8.10.21 to the HPPA dated 17.05.21, clarified that they have no objection if the amendment to HPPA is approved by the Commission and submitted that a duly authorized affidavit to that effect shall be filed at the earliest.

The Petitioner has filed its affidavit dated 21.10.2021.

Commission's View

- 7. The Commission has gone through the documents placed on record and has analyzed the HPPA dated 17.05.2021, particularly the appointed date and Conditions Precedents for commencement of supply as follows:

"Appointed Date" means the date on which all the Conditions Precedent are achieved and every Condition Precedent is either satisfied or waived, as the case may be, in accordance with the provisions of this Agreement, and such date shall be the date of commencement of the Contract Period;

"Conditions Precedent" shall have the meaning as set forth in Clause 4.1.1

"4.1 Conditions Precedent

4.1.1 Save and except as expressly provided in Articles 4, 5, 6, 7, 8, 9, 17, 19, 23 and 25, or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in full of the conditions precedent specified in this Clause 4.1 (the "Conditions Precedent"). Provided, however, that a Party may grant waiver from satisfaction of any Condition Precedent by the other Party in accordance with the provisions of Clauses 4.1.2 or 4.1.3, as the case may be, and to the extent of such waiver, that Condition Precedent shall be deemed to be fulfilled for the purposes of this Clause 4.1.1.

....."

The Clause 25.8 of the HPPA provides that no amendment or modification hereto shall be valid and effective unless such modification or amendment is agreed to in writing by the Parties

- 8. The Petitioner(s) have submitted that there would not be any change in tariff. In this regard, the Commission observed that as the base fixed charges during the year of supply commencement remain fixed and variable charges are linked to the WPI during the year, there would hardly be any



change in tariff to make substantial changes in the HPPA dated 17.05.21, approved by this Commission.

9. The Petitioner has filed its consent vide affidavit dated 21.10.2021 with confirmation as following:

"That the Supplementary PPA dated 08.10.2021 amending the original PPA dated 17.05.2021 has been prepared with out consent and knowledge and we have no objections to the Supplementary PPA dated 08.10.2021 enclosed as Annexure-P4 to the Petition being approved by the Hon'ble Commission"

10. The Commission is of the view that the power is being procured under Competitive bidding guidelines and therefore the HPPA dated 17.05.21 signed between the Petitioner and Respondent lays down the legal framework along with terms and conditions of the commercial transaction. However, the parties may amend the provision(s) of the PPA in writing with mutual consent. Clause 25.8 of the HPPA dated 17.05.21 is reproduced below in this context:

"25.8 Entire Agreement

*This Agreement and the Schedules together constitute a complete and exclusive statement of the terms of the agreement between the Parties on the subject hereof, and **no amendment or modification hereto shall be valid and effective unless such modification or amendment is agreed to in writing by the Parties and duly executed by persons especially empowered in this behalf by the respective Parties.** All prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement are abrogated and withdrawn. For the avoidance of doubt, the Parties hereto agree that any obligations of the Supplier arising from the Request for Qualification or Request for Proposals, as the case may be, shall be deemed to form part of this Agreement and treated as such."*

11. Further, fulfillment of the Conditions Precedent (Clause 4.1.2 of Article 4) of the HPPA by the Petitioner's is resulting into delay in commencement of power supply by the generators to meet the State's Power demand to some extent, therefore, for relaxation of time limit, the above-mentioned amendments in the HPPA are necessary. The amendments sought to be incorporated are mainly with respect to deferment to the timeline of opening of default escrow account and entering into hypothecation agreement and the other amendments sought are incidental to the aforesaid amendment.

12. The Commission is also aware that these days there is a gap in the demand / availability in the evening peak hours due to coal supply position at power



plants and therefore, the petitioners are facing hardships in supplying power to the consumers which may further be increased in the upcoming festival season.

13. Therefore, in view of the aforesaid circumstances, through this amendment dated 08.10.2021 to the HPPA dated 17.05.21, the petitioners, would be able to procure power immediately from the respondent, which is ready to supply the power from its Hydro based generating station on urgent basis and has given its consent vide affidavit dated 21.10.2021 for approval of the Supplementary HPPA dated 08.10.2021.

14. The Commission, thus, keeping in view the facts and circumstances of the matter, approves the amendment dated 08.10.2021 to the HPPA dated 17.05.21 and directs immediate commencement of supply of power by the Respondent, the date of commencement of power supply shall be taken as appointed date for the purpose of the Contract.

The Petition is disposed of in terms of the above.

(Vinod Kumar Srivastava)
Member

(Kaushal Kishore Sharma)
Member

(Raj Pratap Singh)
Chairman

Place: Lucknow

Dated: 28.10.2021