

MERALCO’s Comments on the ERC’s Draft “Rules Governing the Execution, Review, and Evaluation of Power Supply Agreements Entered into by Distribution Utilities for the Supply of Electricity to their Captive Market” (Draft No. 2)

Article / Section No.	Section Title / Subject Matter of Concern	Discussion of Comments and/or Questions for Clarification	Recommendations / Suggestions / Proposed Changes
	General Comment	<p>At the outset, Meralco notes that there are inconsistent periods provided in the draft Rules (e.g., submission of the requirements for Notice of Award in Section 23 (20 days in the 1st paragraph and 15 days in the 2nd to the last paragraph); and provision of advice to the proponent of complete/incomplete requirements (15 days in Section 29 and 30 days in Section 30).</p> <p>As such, Meralco observes that a thorough evaluation of the periods/timelines provided in the draft Rules is needed for DUs to have a complete picture of the entire CSP under the draft Rules. Particularly for Meralco, it shall file a supplemental comment thereon, after careful study of the same.</p>	
Article II, (l)	“(l) “Force Majeure” or “Fortuitous Event” refers to an extraordinary event which is not foreseen, or which, though foreseen, is inevitable, such event may be produced by two general causes: (1) by nature, such as but not limited to a typhoon, storm, tropical depression, flood, drought, volcanic eruptions, earthquake, tidal wave, or landslide, and (2) by the act of man, such as but not limited to an act of war, sabotage,	Meralco reiterates its observation that the definition of “Force Majeure” should include any system emergency or Transmission Failure that may affect the delivery of power by the GenCo.	<p>Proposed revision:</p> <p>“(k) “Force Majeure” or “Fortuitous Event” refers to an extraordinary event which is not foreseen, or which, though foreseen, is inevitable, such event may be produced by two general causes: (1) by nature, such as but not limited to a typhoon, storm, tropical depression, flood, drought, volcanic eruptions, earthquake, tidal wave, or landslide, and (2) by the act of man, such as but not limited to an act of war, sabotage, blockage, revolution, riot, insurrection, civil commotion, or any violent, or threatening actions, <u>or any system emergency or Transmission Failure that</u></p>

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	blockage, revolution, riot, insurrection, civil commotion, or any violent, or threatening actions.”		<u>may affect the delivery of power by the GenCo.”</u>
Article IV, (r)	“(r) “Swiss Challenge” refers to a form of public procurement when a Distribution Utility, who received an unsolicited proposal for power supply requirement, publishes the bid and invites third parties to match <u>or exceed it.”</u>	For clarity.	Proposed revision: “(r) “Swiss Challenge” refers to a form of public procurement when a Distribution Utility, who received an unsolicited proposal for power supply requirement, publishes the bid and invites third parties to match <u>or better it.”</u>
Article VII, Section 10	“Section 7. xxx A quorum of the Joint BAC shall be composed of a simple majority of all voting members of the Joint BAC. A decision on all questions of the Joint BAC shall require the majority of all the present members of the Joint BAC. xxx”	Meralco respectfully recommends that for consistency and clarity, the language of Section 10, Article VII of the draft Rules be aligned with Section 8 thereof which provides: “Section 8. xxx A quorum of the BAC shall be composed of a simple majority of all its members. A decision of the BAC shall require the votes of majority of all members present during deliberations. xxx”	Proposed revision: “Section 7. xxx A quorum of the Joint BAC shall be composed of a simple majority of all voting <u>its</u> members of the Joint BAC. A decision on all questions of the Joint BAC shall require the <u>votes of</u> majority of all the present members <u>present during deliberations</u> of the Joint BAC. xxx”
Article VII, Section 12	“Section 12. xxx The following shall be part of	1) Meralco requests for clarification on the rationale for selecting Parent-Teachers Association (PTAs) as CSP	Proposed revision:

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<p>the CSP Observers: xxx</p> <p>(4) Consumer representatives from the Department of Trade and Industry (DTI) – accredited consumer groups; and the Parent-Teachers Association (PTAs) endorsed by the provincial federation of PTAs. xxx</p> <p>CSP Observers shall be allowed to be present in the proceedings but shall not participate, or act in any way that may delay the conduct of CSP. Observers shall be given written and email invitations at least five (5) days before the scheduled pre-bid conference. The invitation shall include a copy of the terms of reference as published by the BAC.</p> <p>An invitation in writing and e-mail to Observers shall be extended at each of the following stages of the CSP:</p>	<p>Observers.</p> <p>Moreover, Meralco notes that the attendance of representatives either from DTI-accredited consumer groups OR duly-endorsed PTAs (i.e., not necessarily both), in addition to the attendance of representatives from the DOE, NEA, in case of ECs, and NPC-SPUG, in case of off-grid ECs, would suffice for purposes of witnessing the CSP procurement proceedings.</p> <p>2) In the earlier version of the draft Rules, it is expressly mentioned that CSP Observers shall also have no right to vote. In the current version of the draft Rules, however, the same was deleted. Meralco notes that considering the CSP Observers are there to simply witness the procurement proceedings, then it should be specified in the draft Rules that they have no right to vote for clarity.</p> <p>3) Meralco reiterates its observation on the following matters:</p> <p>a) The terms “Grid Areas” and “Off-Grid Areas”, while capitalized, are not defined terms. Suggest that definitions of such terms be provided in the draft Rules.</p> <p>b) It is proposed that invitations be extended, only as may be applicable, considering that the presence of CSP Observers may not be necessary in the following stages of the CSP:</p> <p>(i) Post-qualification – considering that this involves mere submission of documents;</p> <p>(ii) Announcement of Winning Bidder/Sending of Notice Award – It may already be sufficient to just</p>	<p>“Section 12. xxx The following shall be part of the CSP Observers: xxx</p> <p>(4) Consumer representatives from the Department of Trade and Industry (DTI) – accredited consumer groups; and OR the Parent-Teachers Association (PTAs) endorsed by the provincial federation of PTAs. xxx</p> <p>CSP Observers shall be allowed to be present in the proceedings but shall not participate, have no right to vote or act in any way that may delay the conduct of CSP. Observers shall be given written and email invitations at least five (5) days before the scheduled pre-bid conference. The invitation shall include a copy of the terms of reference as published by the BAC.</p> <p>An invitation in writing and e-mail to Observers shall be extended at each of the following stages of the CSP, as may be applicable:</p> <p>(a) Pre-bid conference;</p> <p>(b) xxx</p>	<p>“Section 12. xxx The following shall be part of the CSP Observers: xxx</p> <p>(4) Consumer representatives from the Department of Trade and Industry (DTI) – accredited consumer groups; and OR the Parent-Teachers Association (PTAs) endorsed by the provincial federation of PTAs. xxx</p> <p>CSP Observers shall be allowed to be present in the proceedings but shall not participate, have no right to vote or act in any way that may delay the conduct of CSP. Observers shall be given written and email invitations at least five (5) days before the scheduled pre-bid conference. The invitation shall include a copy of the terms of reference as published by the BAC.</p> <p>An invitation in writing and e-mail to Observers shall be extended at each of the following stages of the CSP, as may be applicable:</p> <p>(a) Pre-bid conference;</p> <p>(b) xxx</p>
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	<p>(a) Pre-bid conference; (b) Pre-qualification, if any; (c) Submission and Opening of Bids; (d) Bid Evaluation; (e) <u>Post-qualifications, if any;</u> (f) <u>Awarding; and</u> (g) <u>Contract Signing.</u> xxx”</p>	<p>post the results of the bidding at the concerned DU’s website and the website of the DOE. On the other hand, sending of the notice of award to the winning bidder would only involve such winning bidder. Presence of Observers under Section 12, Article IV of the draft Rules may therefore be dispensed with.</p> <p>(iii) <u>Signing of PSA</u> – Presence of Observers may no longer be necessary as this involves merely the execution of the PSA.</p>	
<p>Article VIII, Section 16.1 vis-à-vis Section 23</p>	<p>“Section 16.1. <i>Pre-qualification Requirements.</i> – Pre-qualification requirements shall consist of the following criteria: xxx (b) <u>Organization structure</u> xxx. (c) <u>Financial Information</u> xxx. xxx Section 23. <i>Notice of Award.</i> – xxx winning Project Proponent must submit xxx: (b) <u>proof of commitment of the required equity contribution, as specified by the DU</u> xxx</p>	<p>Meralco observes that there are documents that are required to be submitted in Section 23 (Notice of Award) that are more appropriate to be submitted as part of the pre-qualification requirements (section 16.1). This way, bidders that don’t meet these requirements may already be disqualified outright, and time and resources that would otherwise be spent evaluating submissions from such bidder/s would be conserved.</p> <p>For example, proof of commitment of the required equity contribution (as specified by the DU) and proof of firm commitments from reputable institution should be submitted in support of the Financial Information during pre-qualification. In addition, the consortium agreement and proof of registration of the SPC should be submitted in support of the Organizational Structure of the bidder.</p>	<p>For consideration.</p>

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	<p>i. <u>in case where the Bidder is a corporation</u> xxx</p> <p>ii. <u>in the case of a consortium –</u></p> <p>(c) <u>proof of firm commitments from reputable institution</u> xxx</p> <p>(d) <u>in the case of a consortium, the agreement indicating that the members are jointly and severally liable</u> xxx</p> <p>(e) <u>in case a special purpose company (SPC) is formed xxx, proof of registration in accordance with Philippine laws.</u> xxx”</p>		
<p>Article VIII, Section 19</p>	<p>“Section 19. Bid Security. – Each bidder shall submit as part of the Second Bid Enveloper, a Bid Security in accordance with the following terms and conditions: xxx</p> <p>(a) It is an amount expressed in Philippine Pesos in the form of:</p>	<p>1) Considering that the feasibility of drawing on a bid security essentially rides on familiarity and an established relationship between a bank and a DU, Meralco respectfully recommends that while Section 19 (a) as currently worded may specify minimum requirements, DUs be given leeway in providing a specific list of banks that are acceptable to it.</p> <p>2) For consistency, we propose that the language under Section 18 with respect to validity of a bid be adopted so that the bid security is made valid for a similar period.</p>	<p>Proposed revision:</p> <p>“Section 19. Bid Security. – Each bidder shall submit as part of the Second Bid Enveloper, a Bid Security in accordance with the following terms and conditions: xxx</p> <p>(a) It is an amount expressed in Philippine Pesos in the form of: xxx</p>

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	<p>xxx (ii) Bank draft/ guarantee or irrevocable letter of credit issued by a Universal or Commercial Bank; xxx (iii) in case the bid security is issued by an international bank xxx”</p> <p>xxx (d) <u>However, the Bid Security shall not be forfeited should the failure of the winning bidder to accept the award and enter into a contract be caused by force majeure or through no fault of its own.”</u></p> <p>The required bid security <u>shall be valid for a reasonable period but in no case beyond one hundred twenty (120) days</u> following the submission of the bids. xxx”</p>		<p>(iii) in case the bid security is issued by an international bank xxx <u>Nothing herein shall be construed as preventing the DU from specifying banks acceptable to it.</u></p> <p>xxx The required bid security <u>must be</u> shall be valid for a reasonable period but in no case beyond <u>of not less than</u> one hundred twenty (120) days following the submission of the bids <u>from the Bid Submission Deadline</u>. The execution of the contract shall be made within the period of the validity of the bid security. <u>The BAC may request for extension of the validity of the Bid Security until execution of the Contract.</u> xxx”</p>
<p>Article VIII, Section 20.1</p>	<p>“Section 20.1. The First Envelope Evaluation. –</p>	<p>It is stated in Section 21 that post-qualification entails a determination of whether or not the bidder concerned</p>	<p>For clarification.</p>

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<p>vis-à-vis Section 21</p>	<p>The first envelope evaluation shall involve the assessment of the technical and operational capability of the proposal as contained in the bidders’ first envelopes vis-à-vis the prescribed requirements and criteria/minimum standards and basis parameters prescribed in the bidding documents. Only those bids that have been determined to have positively passed the first stage of evaluation shall be qualified and considered for the second stage of evaluation. xxx</p> <p>Section 21. <i>Post-Qualification.</i> – The Lowest Calculated Bid (LCB) shall undergo <u>post-qualification in order to determine whether the bidder concerned complies with and is responsive to all the requirements specified in the Biding Documents.</u> xxx</p>	<p>complies with and is responsive to all the requirements and conditions as specified in the Bidding Documents. Meralco notes that the same purpose for conducting post-qualification is mentioned in 1-18 of Appendix “A”.</p> <p>It is observed, however, that considering Section 20.1 already mentions evaluation of technical and operational capability of the proposal, it appears that the post-qualification process under this Section and Appendix “A” of the draft Rules may involve only the submission of documents that are required for ERC filing and award of the PSA. If this is the case, we seek clarification on how this is distinguished from the requirements under Section 23.</p>	
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	<p><u>xxx the bidder shall undergo post-qualification and submit the post-qualification requirements within five (5) days from receipt of the notice.</u></p> <p><u>xxx</u></p> <p><u>The post-qualification process shall be completed in not more than fifteen (15) days from determination of the Lowest Calculated Responsive Bid (LCRB). In exceptional cases, the post-qualification period may be extended by the DU BOD, but in no case shall the aggregate period exceed thirty (30) days.”</u></p>		
<p>Article VIII, Section 23</p>	<p>“Section 23. Notice of Award. - xxx The “Notice of Award”, which is issued by the DU, shall indicated, among others, that the winning Project Proponent must submit within twenty (20) days from official receipt of the “Notice of Award” the following:</p>	<p>Meralco seeks clarification on the distinction between “performance security” and “bid security”. It appears that the performance security may have the same purpose as a bid security, i.e., to guarantee the performance of the bidder of its obligations. If this is the case, is it correct to say that the performance security will only replace the bid security of the winning bidder but will follow the same form and amount?</p>	<p>For clarification.</p>

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	(a) prescribed performance security; xxx”		
Article IX, Section 33 vis-a-vis Sections 35 and 38	<p>“Section 33. <u>Posting of Bid Bond by Original Proponent.</u> xxx the original proponent shall be required to submit a bid security xxx.</p> <p>Section 35. <u>Submission of Proposal.</u> The bidders are required to submit the proposal in three envelopes xxx.</p> <p>Section 38. xxx Sections 22, 23, 24 and 25 of Article VIII also apply to procurement through unsolicited proposal and swiss challenge.</p>	Meralco reiterates its comment that considering the purpose for the bid bond, Meralco proposes that all potential challengers, not just the original unsolicited proposal proponent, must be required to submit a bond/security. It is thus recommended that this requirement be specifically mentioned in Section 38 as applicable also in cases of unsolicited proposal and swiss challenge.	Proposed revision: “Section 38. xxx Sections <u>19</u> , 22, 23, 24 and 25 of Article VIII also apply to procurement through unsolicited proposal and swiss challenge.”
Article XIII, Section 43	“Section 43. <u>Protest on Decisions of BAC or Joint BAC.</u> – xxx After protests have been resolved with finality, any aggrieved	Meralco reiterates its comment that the filing of the action before the ERC will likely result in the suspension of the CSP which will effectively hold the entire CSP, especially the DU seeking immediate supply, hostage in the meantime. In this regard, Meralco recommends that the aggrieved party should	Proposed revision: “Section 43. <u>Protest on Decisions of BAC or Joint BAC.</u> – xxx After protests have been resolved with finality, any aggrieved

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	<p>party may file an action with the ERC.”</p>	<p>be required to furnish a bond to the ERC, as a condition for filing the action, to protect the DU and the entire bidding process from nuisance/frivolous suits.</p> <p>Further, to facilitate the timely conclusion of the CSP proceedings and deter the filing of nuisance/frivolous suits/actions, Meralco respectfully recommends that it be clarified in the draft Rules that no suit or action can be filed by CSP Observers while the CSP proceedings are underway. At any rate, such entities may intervene and submit their concerns/issues for disposition of the ERC when the corresponding application for approval of the PSA is filed with it.</p>	<p>party may file an action with the ERC. <u>Such filing shall be accompanied by an acceptable surety bond in an amount to be determined by the ERC.</u></p> <p><u>For clarity, no suit or action can be filed by the CSP Observers.”</u></p>
<p>Article XV, Section 47</p>	<p>“Section 47. ERC Evaluation of the Application – Any PSA submitted to the ERC shall be reviewed on two (2) levels. xxx”</p>	<p>To facilitate energy sourcing and planning activities of DUs, and allow parties to a PSA visibility on when the same may be implemented, it is recommended that the provision specify that a decision shall be reached within a period of 180 days from when the PSA is submitted to the ERC for review. In any case, the executed PSA has undergone extensive CSP.</p>	<p>Proposed revision:</p> <p><u>“Section 47. ERC Evaluation of the Application</u> – Any PSA submitted to the ERC shall be reviewed on two (2) levels. xxx <u>The relevant PSA application shall be resolved within one hundred-eighty (180) days from the time the case is submitted for decision; otherwise, said application shall be deemed approved.”</u></p>
<p>Article XV, Section 50</p>	<p>“Section 50. Other Documentary Requirements. – In addition to the requirements under <u>Section 2 hereof,</u> the following supporting</p>	<p>Proper reference may be to Section 46, not Section 2 as the latter pertains to the principles that govern the implementation of the proposed Rules while the former mentions the supporting documents to be included in the application for approval of the PSA.</p>	<p>Proposed revision:</p> <p><u>“Section 50. Other Documentary Requirements.</u> – In addition to the requirements under <u>Section 46 hereof,</u> the following supporting documents are required to be attached as listed in</p>

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	documents are required to be attached as listed in <i>Appendix "C".</i>		<i>Appendix "C".</i>
Additional Comments	New Section	To ensure that participation of GenCos in the CSP is carefully thought out and DUs are not left hanging by a winning GenCo after the completion of a CSP, to the ultimate prejudice of its customers), it is respectfully proposed that a penalty of disqualification for [at least] five (5) years in event of failure to deliver under an awarded PSA be expressly provided.	It is respectfully recommended that a penalty of disqualification for the winning GenCo that backs out from the awarded PSA be included in the Invitation to Bid: <i>[NEW] "Penalty of disqualification from CSPs of the DU for at least the next five (5) years, in the event of failure by the winning GenCo to deliver under an awarded PSA."</i>