



**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**

Document	Article / Section	Discussion of Comment/s and/or Questions for Clarification	Suggestions / Proposed Change(s)
PSA Rules	Article IV Definition of Terms (c) Aggregation refers to the joint action of the DUs to aggregate their demand or energy requirements to jointly procure for their power supply to achieve economies of scale.	We believe that ERC has not yet promulgated rules for demand aggregation.	<i>The rules for demand aggregation shall be a subject of a separate resolution to be promulgated by the ERC.</i>
	Article VII Bids and Awards Committee Section 10. Joint BAC of Aggregated DUs The Joint BAC shall have five (5) members who shall come from any of the participating DUs.	We suggest to clarify the composition of the members of Joint BAC to ensure equitable representation among the aggregated DUs.	The Joint BAC shall have five (5) members who shall come from any of the participating DUs, <i>the selection of which shall also be established through a MOA.</i>
	Article VII Bids and Awards Committee Section 12 CSP Observers To assure all parties that the CSP is conducted in an open, transparent, efficient and equitable manner, the BAC or Joint BAC, shall invite Observers to witness procurement proceedings in accordance with these rules.	We suggest that the Observers be the same person throughout the CSP process, (i.e. Pre-bid conference, Pre-qualification, etc.) so as to provide continuity. If the designated representative is not available, the concerned agency shall inform the BAC in writing and may send an alternate provided the alternate is familiar with the ongoing CSP process. For documents being requested by the Observers, we submit that documents containing proprietary information, duly marked by the	<i>The identified entities eligible to send Observers shall inform the BAC or Joint BAC of their designated Observers throughout the whole CSP process. If the designated representative is not available in any of the CSP stage, the concerned entity shall inform the BAC in writing and may send an alternate provided the alternate is familiar with the ongoing CSP process.</i>

		bidders, be exempted from request of Consumers groups as there is a danger that they can be tapped as consultant of other Gencos in future CSPs.	
	<p>Article VII Bids and Awards Committee</p> <p>Section 8</p> <p>The DU, through its BOD shall designate five (5) members of the BAC with the following:</p> <p>1) An officer or employee knowledgeable in the technical operations of the DU;</p> <p>2) An officer or employee with knowledge and/or experience with any local or international competitive bidding procedures;</p> <p>3) An officer or employee with accounting or finance background who has knowledge and/or experience on electricity pricing;</p> <p>4) An officer or employee with technical experience and/or background.</p>	<p>It is our understanding that the five members of the BAC should shall have distinct expertise enumerated in the list. Also we suggest that BAC members should have at least 3 years minimum experience to be selected. Can we also be clarified what is distinction between qualification no 1 and 4?</p>	<p>The DU, through its BOD shall designate five (5) distinct members of the BAC, with at least 3 years experience, with the following field of expertise:</p> <p>1) An officer or employee knowledgeable in the technical operations of the DU;</p> <p>2) An officer or employee with knowledge and/or experience with any local or international competitive bidding procedures;</p> <p>3) An officer or employee with accounting or finance background who has knowledge and/or experience on electricity pricing;</p> <p>4) An officer or employee with technical experience and/or background.</p>
	<p>Article VII Bids and Awards Committee</p> <p>Section 13.2 Terms of reference</p> <p>(b) Demand Requirement (baseload, mid-merit or peaking)</p>	<p>We request that aside from the nature of the demand requirement, the TOR shall also specify the technology as DUs may be procuring for compliance to the Renewable Portfolio Standards (RPS) as mandated by DOE.</p>	<p>(b) Demand Requirement (baseload, mid-merit or peaking) or capacity compliance for RPS;</p>

	<p>Section 13.2 Terms of reference</p> <p>(d)Cooperation/Contract Period which shall not exceed ten (10) years</p>	<p>The CSP is envisioned to lower prices through competitive pressure and at the same time encourage new investments in the generation sector. A ten year period may not be sufficient to entice investments for new generation capacity due to a mismatch in financing terms that is currently offered by local banks.</p> <p>In addition the ten year may only be applicable for existing plants as greenfield plants will require a longer contract term to be competitive with existing plants whose CRF may have been fully recovered.</p> <p>The DU/EC should be able to determine the cooperation period and we suggest to delete this provision.</p>	<p>d)Cooperation/Contract Period which shall not exceed ten (10) years</p>
	<p>Section 15. Pre-Bid Conference</p> <p>Nothing stated at the pre-bid conference shall modify any provisions or terms and conditions of the bidding documents unless such is made as a written amendment thereto by the concerned DU. Any amendments shall be issued by the DU concerned to all bidders within a reasonable time to allow them to consider the same in the preparation of their bids.</p>	<p>We suggest to replace the reasonable time to 15 days to be specific.</p>	<p>Nothing stated at the pre-bid conference shall modify any provisions or terms and conditions of the bidding documents unless such is made as a written amendment thereto by the concerned DU. Any amendments shall be issued by the DU concerned to all bidders within a reasonable time not later than fifteen (15) days from the scheduled bidding to allow them the participants to consider the same in the preparation of their bids.</p>
	<p>Section 18 Validity of Bid.</p> <p>A bid must be valid for a period of not less than One hundred twenty (120) days from bid Submission</p>	<p>The 120 days may be short considering that after the award the PSA will have to undergo an ERC approval process. We suggest to extend this to</p>	<p>A bid must be valid for a period of not less than One hundred twenty (120) One hundred eighty (180) days from bid Submission</p>

		180 days and for the ERC to endeavor to resolve the same within the bid validity period	
	<p>Section 21. Post-Qualification</p> <p>The Lowest Calculated Responsive Bid (LCRB) shall undergo post-qualification in order to determine whether the bidder concerned complies with and is responsive to all the requirements and conditions as specified in the bidding documents</p>	<p>We suggest that ERC do away with post qualification to obviate the possible contention, controversy, dispute or allegation of favoritism or rigging when a low as-read bid becomes the subject of a post-disqualification, legitimate or otherwise. We suggest that the CSP be conducted in two discrete and separate stages:</p> <p>a. First Stage - Prequalification: The object of this first step is to shortlist only qualified bidders following a detailed examination of eligibility and prequalification requirements such as financial, institutional, technical, marketing and operating capability and experience, proof of working design and technology, and possession of key permits, financing and interconnection to proceed with plant construction and commissioning by target date the contract capacity has to be provided. Short-listed Bidders will be provided full terms and conditions in a Pro-forma PSA which will be the basis of their Price Proposal</p> <p>b. Second Stage – Price Proposal: Only the short-listed and prequalified bidders who accepts the Pro-forma PSA will be allowed to submit a “Price Proposal” comprising of the bidders tariff proposal (based on the DU’s</p>	

		prescribed structure), Heat Rate Proposal, Outage Allowance & Heat Rate Degradation Proposal. Ideally, bidders enter proposal using a DU-issued flash drive containing a transparent evaluation algorithm to calculate resulting rate and required bid security.	
	<p>Section 28 Requisites for Unsolicited Proposal</p> <p>a) Capacity Cap – The contracted capacity subject of the unsolicited proposal shall not exceed 10% of the DUs total annual peak demand</p>	<p>May we know the rationale for the 10% cap. Is there a study on why the cap is at 10%? This will give undue advantage to existing and peaking plants. Rather than put a cap for unsolicited proposal, we suggest that the basis of the DU for accepting unsolicited proposal shall be anchored on its requirement as specified in its PSPP. Corollary, the DU should not accept unsolicited proposal that is not in excess of the uncontracted demand requirement under its PSPP.</p>	<p>a) Capacity Cap – The contracted capacity subject of the unsolicited proposal shall not exceed 10% of the DUs total annual peak demand</p>
	<p>Article XI Emergency Supply Procurement</p> <p>Section 41. Benchmark Rate- The ERC shall establish a benchmark rate that shall serve as reference rate that may be used to assess the prudence and reasonableness of the PSA price.</p> <p>The ERC shall utilize a financial model in calculating the Benchmark Rate. The model inputs, such as capital and operating</p>	<p>We have two concerns:</p> <p>a. We would like to be clarified whether benchmark rate will be adopted by the Honorable Commission as a bid price cap. We note that benchmark rates represent ideal conditions for technology, site and credit risks which may not necessarily match conditions of the CSP. For instance, the buyer's credit risk may actually be worse than the underlying basis of financing terms the ERC adopted for the benchmark rate; thus, the bid would only be viable at a rate higher than the benchmark. In instances such as this, the bid result</p>	

	<p>costs, rates of return and technical parameters shall be determined and reviewed on regular basis by the ERC through full consultation process.</p> <p>The model will take into account relevant factors such as but not limited to the type of contract (financial or physical), the load factor, load shape and location or reference node to calculate the benchmark price for a portfolio of efficient new entrant plants to match the terms of the PSA being assessed.</p>	<p>should be accepted</p> <p>b. To ensure consistency in the comparative evaluation and analysis bids and the benchmark rate, we suggest that the parameters used in determining the benchmark rate shall also be used as the same parameters in determining the Lowest Calculated Bid. We have provided a calculation methodology for the LCB that the Honorable Commission may consider.</p> <p>We suggest that the LCB methodology, discussed by MGEN under Attachment B be considered.</p> <p>It seems that portfolio is a misplaced word. We suggest that the BR should consider the type, the technology involved, the type of operation, the installed capacity, and the location of the generating plant.</p>	<p>The model will take into account relevant factors such as but not limited to the type of contract (financial or physical), the load factor, load shape and location or reference node to calculate the benchmark price for a portfolio of <u>an</u> efficient new entrant plants to match the terms of the PSA being assessed.</p>
	<p>Article XII Circumstances Exempt from the Conduct of CSP</p> <p>Section 42. Exemptions</p> <p>(c) Provision of power supply by the PSALM corporation through bilateral contracts for the power produced from the undisposed generating assets and IPP contracts duly sanctioned by the EPIRA as deemed by the DUs</p>	<p>May we know the rationale for exempting PSALM owned assets from CSP. This creates a separate class of Genco and creates an undue advantage to PSALM owned and IPPAs Gencos. We suggest to delete the said provision</p>	<p>c) Provision of power supply by the PSALM corporation through bilateral contracts for the power produced from the undisposed generating assets and IPP contracts duly sanctioned by the EPIRA as deemed by the DUs</p>

	<p>Article XV Filing and Review Procedures</p> <p>Section 47. ERC Evaluation of the Application –</p> <p>The second level is to determine the PSA’s “reasonableness” in terms of costs, risk allocation, and other contractual terms.</p> <p>The ERC’s Decision and judgment shall be binding on both parties and shall not be rendered ineffective or nugatory by any termination or “walk-away” clause incorporated in the PSA.</p>	<p>What is the objective measure of “reasonableness”</p> <p>We are of the view that the prohibition against the termination or “walk-away” clauses impairs the parties inherent right to freely contract and establish such terms and conditions in the PSA as the parties may deem convenient.</p> <p>The freedom to contract is both a constitutional and statutory right. A contract is a law between two parties and is enforceable as long as it not contrary to law, morals, good customs and against public policy.</p> <p>Termination or “walk-away” clauses are typically incorporated in PSA to provide an opportunity for both parties to withdraw from contractual obligation, where the outcome of external factors have made a particular undertaking different from what the parties have originally intended and agreed upon.</p> <p>Without termination or “walk-away” clauses, there can be a situation wherein generators would be force to supply electricity to the DU at a rate which is not commercially viable and sustainable. This makes the situation inequitable for the generator.</p>	<p>The ERC’s Decision and judgment shall be binding on both parties and shall not be rendered ineffective or nugatory by any termination or “walk-away” clause incorporated in the PSA.</p>
--	---	---	--

	<p>Article XV Filing and Review Procedures</p> <p>Section 48. Review of the ERC</p> <p>(d) That the risks associated with the supply of electricity such as those pertaining to the tariff structure, economic indices, foreign exchange fluctuations, volatility of fuel prices and the like are efficiently allocated between the parties.</p>	<p>May we know what are the objective parameters that the ERC will use to determine how the foreign exchange fluctuations and fuel price volatility are efficiently allocated between the DU and the Genco. We note that said movement of economic indices are beyond the control of both parties.</p>	
	<p>Section 49. PSA Pricing Structure. The ERC shall determine the reasonable generation cost under the said PSA, taking into account the following fees:</p> <p>(a) CRF – a capital -related component to recover the cost of investment over the economic life of the plant together rate of return. In the case of an Independent Power Purchase Agreement, the CRF shall pertain to the recovery of fees paid/payable to NPC to operate the plant. This amount shall include a reasonable amount of return on capital based on an ERC approve WACC.</p>	<p>In determining the benchmark rate, we suggest to the Honorable Commission the adoption of the Discounted Cash Flow (DCF) methodology in determining the Capital Recovery Fee (CRF) instead of the Annuity methodology. The Annuity methodology does not reflect very well business reality and dynamism and it is prone to model and parameter errors in that it captures only the opening statements for Assets, Debts and Equity as well as Weighted Cost of Capital. The Annuity methodology assumes away key economic and financial parameters which the DCF methodology additionally captures, e.g., changes in debt level over time (hence, changes in WACC over time) and working capital, minimum cash levels and retentions (e.g., amounts for debt reserve, coverage ratio, dividends based retained earnings cap, minimum operating cash balances), cost of equity during</p>	<p>a) Capital Recovery Fee (CRF) - a capital -related component to recover the cost of investment over the economic life of the plant together rate of return. In the case of an Independent Power Purchase Agreement, the CRF shall pertain to the recovery of fees paid/payable to NPC to operate the plant. This amount shall include a reasonable amount of return on capital based on an ERC approve WACC. <u>with cost of capital determined using the Capital Asset Pricing Model (CAPM).</u></p>

		<p>construction, and dividend payout amounts and timing.</p> <p>We have enclosed a deck on Setting the Capital Recovery Fee for your consideration.</p>	
	<p>Section 51. Procedural Requirements- Prior to the filing with the ERC of the Application referred to in the preceding section, the parties shall comply with Section 4 (e), Rule 3 of the IRR of the Act and Rule 6 of the ERC Rules of Practice and procedure. Any application that fails to comply with the above requirements shall not be accepted. The application shall be treated as a rate case and the procedure applicable to rate case shall be observed.</p>	<p>We understand that the ERC is bound by EPIRA and its IRR provisions in the review and approval of the PSA. However, since one of the objective of the draft rule under letter c is “To streamline the review and approval process of Power Supply Agreements”, the ERC may revise the existing rules and exempt the parties from certain process like publication requirements that was done during the conduct of the CSP.</p> <p>In observing the said procedural requirements, there is no guarantee that the PSA, even if it has undergone CSP, will be spared from dilatory tactics from intervenor or oppositors.</p> <p>In addition, we respectfully suggest that the review and approval process of ERC be also time bounded. We humbly submit that 180 days is sufficient for the ERC to come up with a Final Approval decision</p>	<p>Section 51. Transitory Procedural Requirements- Prior to the filing with the ERC of the Application referred to in the preceding section, the parties shall comply with Section 4 (e), Rule 3 of the IRR of the Act and Rule 6 of the ERC Rules of Practice and procedure. Any application that fails to comply with the above requirements shall not be accepted. The application shall be treated as a rate case and the procedure applicable to rate case shall be observed.</p> <p>ERC shall come up with a revised procedural requirement to further streamline the applicable procedure for rate case taking into consideration that the said application has undergone CSP. In the revised rules, ERC shall endeavor to give a Final approval within 180 days reckoned from the filing date of the PSA otherwise the said application shall be deemed approved.</p>
Appendix A	<p>1-11 Contents of the Bid:</p> <p>1. The First Bid Envelope that shall be marked “Technical Component” shall contain:</p>	<p>May we suggest to revise the content of the technical Component as stated Attachment A</p>	<p>Please see Attachment A</p>
	<p>2. The Second Bid Envelope that shall be marked “Financial Bid Component” The Second Envelop shall contain the following:</p>	<p>There is a mention of Schedule IV, however we cannot find the said schedule in the documents published. In this regard, may we suggest that the content of the financial bid component follow Attachment B.</p>	<p>Please see Attachment B</p>

		<p>In addition the said attachment shows the component of the rates that will be used in calculating the Lowest Calculated Bid. This may be refined by the DU by giving a flash drive with a program wherein all the components of the rates will be inputted by the bidder for ease in calculating the Lowest Calculated Bid.</p>	
	<p>1-18 Post Qualification</p> <p>The Lowest Calculated Bid shall undergo post-qualification in order to determine whether the bidder concerned complies with and is responsive to all the requirements and conditions as specified in the Bidding documents.</p>	<p>We respectfully reiterate our comment in the main draft rules that post qualification is no longer needed as there has already been a Pre-qualification and a Price proposal bidding evaluation.</p>	<p>Delete the section</p> <p>1-18 Post Qualification</p> <p>The Lowest Calculated Bid shall undergo post-qualification in order to determine whether the bidder concerned complies with and is responsive to all the requirements and conditions as specified in the Bidding documents.</p>