

Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

May 2020

INFRASTRUCTURE



Infrastructure

NHAI provides relief measures for contractors, developers and concessionaires in the road sector

Brief Background

The National Highways Authority of India (**NHAI**) *vide* letter dated June 3, 2020 has directed the appropriate officers for providing urgent relief measures to contractors, developers and concessionaires in light of the prevailing situation due to COVID-19. The measures are to be implemented immediately.

What are the key measures?

- Retention money (which is a part of the Performance Security till construction period) has been recommended to be released in proportion to the work already executed in accordance with the contract specification. Retention money from the period from 3 months to 6 months would not be deducted from the bills raised by the contractor. For HAM/BOT contracts, performance guarantee can be released on pro-rata basis as provided in the contract, provided the concessionaire is not in breach of the contract.
- The time given to contractor/concessionaire for meeting their obligation under the contract would be extended for 3 to 6 months depending on site conditions.
- Schedule H of the EPC/HAM contract which deals with monthly payment to the contractor for the work done
 and accepted as per the specification of the contract would be relaxed.
- The approved sub-contractor would be paid directly through the escrow account.
- Penalty for delay in submission of performance security/bank guarantee in new contracts entered between
 March 2020 and September 2020 would be waived.
- The consultants Authority Engineer/Independent Engineer (IE/AE) would be allowed an extension of time ranging from 3 to 6 months depending on site condition. During this Force Majeure Event, they would be considered as if they were on duty.
- For BOT/TOT concessionaires, the concession period of BOT contracts would be extended by a period ranging between 3 and 6 months. However, such extension would be before COD. Additionally, for loss in collection of user fee, the concession period would be extended by a period in accordance with the contract till the time the daily collection is below 90% of the average daily fee.
- With respect to the National Highway Tolling contracts, loss in collection of fee would be compensated in accordance with the contract.

What is the procedure for implementing the measures?

The contractor/concessionaire invoking provisions under Force Majeure Clause (**FMC**) is required to make a proposal, following which the IE/AE will examine and recommend giving relief under the aforesaid measures to the contractor/concessionaire by the PD/Executive Engineer who will approve the relief measures.

Our view: Considering the disruption caused by COVID-19 and the subsequent lockdown in the construction and operation of the highway projects, the relief measures are a step in the positive direction. The immediate and efficient implementation of these measures is crucial.

It may be noted that the despite the acknowledgement of the severity of the issue, the NHAI has not granted extensions as of right and would still require contractors and concessionaires to seek relief.

Additionally, the Ministry of Finance had issued an Office Memorandum on May 13, 2020 (OM) that provided for extensions of time in concession agreements and construction contracts, where the terms differ. The reliefs in the aforesaid OM would be available only where the claimant is not already in default. This condition has not been imposed under the present NHAI letter. Whether there could be claims from the NHAI that the OM and the NHAI letter need to be read harmoniously remains to be seen. These are directions to relevant officers and in any case claimants can press on their contract terms for relief. As for payments to be made to the subcontractors, there ought to be further clarity as it is possible that FMC may have been invoked in such contracts too.

Opening of financial bids of bidder who is not technically qualified

Background:

Vide its decision dated May 18, 2020, in *Lakhvinder Singh vs. South Delhi Municipal Corporation*¹ the High Court of Delhi **(Delhi HC)** passed an order holding that if the bidder is not found to be technically qualified, his financial bid cannot be looked into at all.

What were the facts of the case?

- The South Delhi Municipal Corporation (Respondent) had issued a notice inviting a tender for allotment of multi-level authorized parking spaces. The last date for submission of the bids was April 27, 2020.
- Mr. Lakhvinder Singh (Petitioner) had applied in response to the bid. Subsequently on May 12, 2020, i.e. a day prior to the opening of financial bids, the Petitioner was informed by the Respondent that his bid was rejected on technical grounds. On the same day the Petitioner responded to the aforesaid letter, stating that the correct documents were not uploaded by people engaged by him. He claimed that he had subsequently submitted the correct documents which were accepted by the Respondent. The Petitioner submitted that the Respondent could have communicated the rejection of the technical bid earlier, so that the Petitioner could have availed of his right to approach the Delhi HC in good time, i.e. before the opening of the financial bids.
- Having failed to receive any response from the Respondent, the Petitioner filed the writ petition seeking quashing of the disqualification letter dated May 12, 2020 and cancellation of the auction process.

What did the Delhi HC observe?

The Delhi HC observed that since the Petitioner had not uploaded the requisite documents, the rejection of the technical bid could not be faulted with. The date of communication of rejection was immaterial if the technical bid was correctly rejected (which it was), as long as it was communicated before the opening of the financial bids.

¹ W.P.(C) 3164/2020

- The Delhi HC further observed that there is no communication placed on record as issued by the Respondent, permitting the Petitioner to re-submit the documents. Merely because the Petitioner may have subsequently voluntarily submitted some documents, it does not follow that the Respondent extended the time for the Petitioner, or generally, for acceptance of documents, or that the Respondent was obliged to reexamine the technical bid of the Petitioner.
- The Delhi HC further observed that merely because the Petitioner may have offered higher rates is no reason to recall the tender process. If the Petitioner was not found to be technically qualified, his financial bid could not have been looked into at all. The Delhi HC held that the competition is between only those bidders, who are found to be technically qualified.
- The Court rejected the writ petition.

Our view: The aforesaid decision upholds the sanctity of the bidding process by stipulating that if the bidder does not satisfy the technical requirements, the financial bid will not be considered (even if it is better than the other financial bids). This would ensure certainty for participating bidders and eventually uphold public interest. Further, it would discourage unqualified bidders from putting in their bids.

DHI notifies Phased Manufacturing Programme for xEV parts for eligibility under FAME-II Scheme

Background:

The Department of Heavy Industries (**DHI**) notified the 'Phase II - Faster Adoption and Manufacturing of (Hybrid &) Electric Vehicles in India' (**FAME-II**) on March 8, 2019. Under the FAME-II scheme certain demand incentives were to be made available for different kinds of electric vehicles (including hybrid and pure electric vehicles) (**xEV**). Subsequently, the DHI notified the Phased Manufacturing Programme (**PMP**) for xEV parts for eligibility under FAME-II scheme *vide* notifications dated March 29, 2019 and April 29, 2019. In supersession of the aforesaid notifications, the DHI has notified the revised PMP for xEV parts *vide* notification dated May 13, 2020.

What are the key directives?

- The notification seeks to provide the effective dates of indigenization for the various prescribed xEV parts across different vehicle segments.
- All parts, components, assemblies or sub-assemblies, other than the prescribed parts, are required to be domestically manufactured and assembled. Safety components as notified under the Central Motor Vehicles Rules, 1989 (CMVR) are to be tested by the testing agencies notified under the CMVR.
- Traction battery is required to be assembled domestically. Battery cells associated thermal and battery system can be imported.

Our view: The notification is in line with the earlier notifications issued by the DHI, which aims to promote the indigenous manufacturing of xEV, its parts, sub-parts, assemblies, sub-assemblies etc., over a period of time. In the long run, the PMP would increase value addition, capacity building and domestic employment opportunities.

ENERGY



Ministry of Coal notifies Coal Blocks Allocation (Amendment) Rules, 2020

Background:

On May 16, 2020, the Finance Minister **(FM)** announced several structural and policy reforms in the coal and minerals sector as part of the Atma Nirbhar Bharat Abhiyan relief measures. Such measures briefly touched upon the following:

- A revenue sharing model is to be introduced instead of the current fixed rupee per ton model to encourage private participation.
- Entry norms are to be liberalized with the removal of eligibility conditions and the introduction of an upfront payment (capped by a ceiling).
- Untapped coal beds that are currently with Coal India Limited (CIL) are to be auctioned to private participants for the extraction of Coal Bed Methane.
- INR 50,000 crores is to be invested into the development and creation of evacuation infrastructure so as to evacuate mined coal and to meet CIL's new target of producing 1 billion tons of coal in addition to the coal produced from private blocks. INR 18,000 crores is to be invested into the mechanized transfer of coal through conveyor belts from mines to railway sidings.
- In order to encourage private participation in the exploration of coal, partially explored coal blocks are now to be auctioned as opposed to the current regime of auctioning only fully explored coal blocks. Mining plans are to be simplified, shortened, and made conducive to loading online and are to allow for a 40% increase in annual production.

In this backdrop, the Ministry of Coal notified the Coal Blocks Allocation (Amendment) Rules, 2020 (Amendment) to amend the Coal Blocks Allocation Rules, 2017 (Rules). The Amendment is in effect as on date.

What are the key amendments made?

- The definitions of 'ceiling price', 'floor price', and 'reserve price' have been amended to now include a percentage in addition to the price. Such percentage would be fixed by the Central Government (presumably meaning the percentage of the revenue share model to be introduced in auctions).
- With respect to coal blocks specified for auction for the bidders' own consumption, the Amendment has now
 ensured that the tender document will specify the proportion of capacity of the end use project for which a
 bidder is bidding to the capacity of coal block.
- As per the original Rules, if the coal block is specified for the purpose of own consumption and a bidder having a coal linkage becomes the successful bidder, then the entitlement to receive coal pursuant to such coal linkage for the end use plant on the basis of which it became a successful bidder may be reduced on such basis as may be specified by the Central Government. Pursuant to the Amendment, the entitlement to receive coal pursuant to such coal linkage would be reduced in the manner as specified in the tender document. The requirement for end use plant has been done away with. Similar changes have also been made in respect of an allotment.
- For both auctions and allotments, the Central Government may now not only specify the maximum number of coal blocks or amount of coal reserves, but also a limit based on any other parameter regarding production of coal or any combination thereof that may be allocated to a company or corporation or its holding company or subsidiary company.

- The Amendment has now introduced a composite prospecting license cum mining lease that may be awarded to the successful bidder along with awards of sole prospecting licenses or mining leases. Earlier on March 13, 2020, the Mineral and Minerals (Development and Regulation) Act, 1957 (MMDR Act) was retrospectively amended with effect from January 10, 2010, by the Mineral Laws (Amendment) Act, 2020 so as to empower the Central Government to grant prospecting cum mining leases in respect of coal and lignite. (A detailed analysis of the Mineral Laws (Amendment) Act, 2020 has been provided in our January and March issues.)
- The Amendment has specified that the agreement executed by the successful bidder/allocatee with the Central Government containing the terms and conditions of allocation of the coal block is to terminate on the grant of the permission by the Central Government to open a coal mine as per the Colliery Control Rules, 2004. Earlier this agreement was to terminate on the grant of the mining lease.
- Post the Amendment, upon grant of the mine opening permission under Rule 9 of the Colliery Control Rules, 2004, the successful allocatee is required to provide an unconditional and irrevocable performance bank guarantee in favor of the State Government for the amount equivalent to the performance bank guarantee submitted by it to the Central Government for ensuring the production of coal as per the mining plan. Earlier the State Governments could exercise their discretion in requiring the successful allocatee to provide a performance bank guarantee.
- The allocation order for the coal block can now be cancelled by the Central Government not only due to the cancellation of the mining lease, but also the cancellation of the reconnaissance permit, prospecting licence or prospecting licence-cum-mining lease. Similarly, the allocation order can also be cancelled on the recommendation of the State Government due to a breach in the terms and conditions of the reconnaissance permit, prospecting license, or prospecting license cum mining lease, in addition to that of the mining lease.
- Pursuant to the Amendment, only the successful allocatee of a coal block for own consumption, can, with the prior approval of the Central Government, enter into agreements or arrangements with other successful allocatees for optimum utilization of coal block for the same purpose in the public interest and to achieve cost efficiencies. Earlier coal linkage holders were eligible to enter into such agreements too.

Our view: These measures help realize the Governments' intent to streamline the process and incentivize private participation in the sector. In line with the earlier announcements by the FM and the amendment of the MMDR Act, the introduction of the composite prospecting and mining license in the coal sector ought to significantly reduce the uncertainty with respect to the award of the mining lease post the prospecting phase. The Amendment has also looked to provide some security to States by making the provision of a bank guarantee compulsory. While efforts are being made to end the Government's monopoly and make the sector attractive for private participation, only time will tell whether they have translated into development and an increase in revenue for the Centre and States.

CCEA approves adoption of methodology for auction of coal and lignite mines/blocks for sale of coal/lignite on revenue sharing basis; increases tenure of coking coal linkage up to 30 years

Background:

As part of the structural and policy reforms announced in the coal and minerals sector by the FM, on May 20, 2020, a press release was issued by the Ministry of Coal. This release stated that the Cabinet Committee on Economic Affairs (CCEA) approved the methodology for auction of coal and lignite mines/blocks for sale of coal/lignite on revenue sharing basis and has increased the tenure of coking coal linkage up to 30 years.

What are the key features of the methodology?

- The bid parameter is to now be a revenue share. The bidders would be required to bid for a percentage share of revenue payable to the Government. The floor price shall be 4% of the revenue share. Bids would be accepted in multiples of 0.5% of the revenue share till the percentage of revenue share is up to 10%. Thereafter, bids would be accepted in multiples of 0.25% of the revenue share. There is to be no restriction on the sale and/or utilization of coal from the coal mine. The successful bidder will be required to make monthly payments which shall be determined as a product of:
 - percentage of revenue share (final bid);
 - quantity of coal on which the statutory royalty is payable during the month; and
 - notional price or actual price whichever is higher.
- The upfront amount shall be 0.25% of the value of estimated geological reserves of the coal mine payable in 4 equal instalments. However, the upfront amount payable would be as per actual calculation as per the method mentioned above or as per ceilings as determined by the CCEA, whichever is lower. Upper ceilings of upfront amounts have been fixed by the CCEA at INR 100 crores for up to 200 MT and INR 500 crores for over 200 MT, of geological reserves available in mines.
- Commercial exploitation of the Coal Bed Methane (CBM) present in the mining lease area has been permitted.
 The tenure of coking coal linkage in the non-regulated sector linkage auction has been increased up to 30 years.
- Incentives are to be offered to the successful bidder by way of rebates in revenue share for early production of coal from the coal mine. It will be based on the total quantity of coal consumed or sold or both for gasification or liquefaction on an annual basis from the coal mine.
- The entire revenue from the auction/allotment of coal mines is to accrue to the coal bearing States to incentivize such States with increased revenues. These increased revenues are to then be utilized for the growth and development of backward areas and their inhabitants.

Our view: The above methodology is aimed at maximizing the availability and efficiency of the coal reserves present in India. If implemented effectively, the methodology is oriented to make maximum coal available in the market at the earliest and also enables adequate competition which will allow discovery of market prices for the blocks and faster development of coal blocks. Higher investment will create direct and indirect employment in coal bearing areas especially in mining sector and will have an impact on economic development of these regions.

Replacing Import of Coal with Domestic Coal

Background:

On April 28, 2020, the Ministry of Power (MoP) issued a letter to generating companies (Gencos) regarding reduction of import of coal for blending purposes and replacing it with domestic coal

What was the advisory issued by the MoP?

- All Gencos that are importing coal for blending purposes were advised to make best efforts to replace their imports with domestic coal.
- Further, in case the Gencos have any difficulty in getting the requisite quantity and quality of coal from the
 coal companies or any other logistical bottleneck, the Gencos are to inform the MoP/Central Electricity
 Authority (CEA). The matter will then be taken up by the concerned institution and resolved.
- Thermal power plants are exhorted to import coal for blending purposes, only if the requisite quantity and quality of coal is not made available.

Our view: This move is in line with the Prime Minister's vision of a "Atma Nirbhar Bharat" and will largely benefit the domestic coal supply market. Gencos with long-term contracts with foreign coal suppliers or with minimum purchase obligations may need to revisit the same in line with the aforesaid advisory.

CERC Order on Conditions for Waiver of Bank Guarantee for Long-Term Access Applicants

Background:

- On May 9, 2020, the Central Electricity Regulatory Commission (CERC) passed an order in an interlocutory application (IA) filed by the Power Grid Corporation of India Limited (PGCIL). The IA comes in response to petitions filed by ACME Solar Holdings Private Limited (ACME) before the CERC seeking the issuance of directions to PGCIL to grant inter alia exemption from construction phase bank guarantee (BG) for 4 separate Long Term Access (LTA) applications for 300 MW each for its Fatehgarh-III & IV solar projects having power purchase agreements in place.
- In terms of the IA, PGCIL sought clarity as to whether the requirement to provide construction phase BG can be waived off for an applicant who signs a power purchase agreement (PPA) post submission of LTA application.
- Some of the key submissions made by PGCIL before the CERC are set out below:
 - The signing of a PPA did not mitigate the risk of inter-State transmission licensees during construction phase of generators for its delay, failure, exit, abandonment or relinquishment of LTA.
 - PPAs in solar projects awarded through competitive bidding should be supported by back to back power sale agreements (PSA) with the beneficiaries. This would help establishing a clear connection for supply of power by the generating station to the beneficiaries.

What were the prayers of PGCIL?

PGCIL sought the following reliefs from the CERC in addition to the grant of other relief by CERC:

- Issuance of clarification or appropriate directions on the issue whether exemption from submission of construction phase BG can be extended to
 - phases between the making of LTA application to LTA grant,
 - signing of LTA Agreement, or
 - the last due date for submission of construction phase BG in the ordinary course.
- Issuance of directions for treatment of construction phase BG submitted by some LTA applicants pending adjudication of the IA.

What was the decision of the CERC?

- The requirement to submit BG either with the application form or the construction phase BG does not apply
 to an applicant in a case where beneficiaries are already firmed up by virtue of PPAs.
- The aforesaid waiver can be availed subject to fulfilment of the following conditions:
 - Beneficiaries have to agree to bear the transmission charges in the meeting of Standing Committee on Power System Planning/Regional Power Committee.
 - The LTA Agreements or tripartite agreements have to be signed with the beneficiaries.
- Citing non-fulfilment of the above conditions by ACME, the CERC directed that ACME could not avail the waiver of construction phase BG.
- If PPA is signed between LTA applicant and beneficiaries or between LTA applicant and intermediary agency with back to back PSA with the beneficiaries, the construction phase BG does not have to be furnished for the quantum for which such PPA, or PPA with back-to-back PSA has been signed with beneficiaries. Further, construction phase BG (if already furnished) corresponding to the quantum, for which PPA or PSA with beneficiaries has been signed would be returned to the LTA applicant.

Our view: The CERC order comes in the backdrop of the detailed procedure under the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009. The order clarifies that an LTA applicant can avail waiver from the requirement of furnishing a BG provided there is a signed PPA or PPA backed by PSAs between the LTA applicant and the beneficiaries.

Supreme Court's decision on past electricity dues payable by an auction purchaser

Background:

The Supreme Court (**SC**) *vide* its judgement dated June 1, 2020 in the case of *Telangana State Southern Power Distribution Company Limited and Another vs. Srigdhaa Beverages*², decided whether the liability towards previous electricity dues of the last owner could be mulled on to an auction purchaser.

What were the facts of the case?

- SB Beverages Private Limited (SB Beverages) was the owner of a mineral water bottling plant (Bottling Plant).
- Since SB Beverages failed to pay its dues, Syndicate Bank, who was the secured creditor auctioned the Bottling Plant under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
- The bottling plant was auctioned on an "as is where is, whatever there is and without recourse basis" and Srigdhaa Beverages (**Respondent**) was the successful auction purchaser.
- Subsequently, when the Respondent applied to the Telangana State Southern Power Distribution Company Limited and Another (Appellant) for an electricity connection for the Bottling Plant, the Appellant denied the request and demanded that the past electricity dues be paid by the Respondent in light of the 'General Terms and Conditions of Supply of Distribution & Retail Supply Licensees in Andhra Pradesh'.
- Consequently, the Appellant filed a writ petition before the High Court of Telangana and Andhra Pradesh, wherein the High Court issued directions quashing the demand of the Appellant. Thereafter, an appeal was made by the Appellant in the SC.

What were the observations of the SC?

- As the Respondent was bidding in an "as is where is, whatever there is and without recourse basis" the Respondent would have inspected the premises and made inquiries about the dues in all respects.
- If any statutory rules govern the conditions relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfillment of the requirements of such rules and regulations so long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable. A condition for clearance of dues cannot *per se* be termed as unreasonable or arbitrary.
- Electricity dues, where they are statutory in character under the Electricity Act, 2003 (EA) and as per the terms and conditions of supply, cannot be waived in view of the provisions of the EA itself more specifically and cannot partake the character of dues of purely contractual nature.
- Where, the existence of electricity dues, whether quantified or not, has been specifically mentioned as a liability of the purchaser and the sale is on "as is where is, whatever there is and without recourse basis", there can be no doubt that the liability to pay electricity dues exists on the purchaser.
- Finally, in light of earlier judicial pronouncements and facts of the case, the SC set aside the order of the High Court and held that the Appellant would be within its right to demand the arrears due of the last owner, from the Respondent.

² Civil Appeal No.1815 OF 2020

Our view: The judgement provides clarity on the liability of parties with respect to statutory dues. Further, prospective acquirer would have to be wary of the terms and conditions of the auction notice to determine the nature and extent of liability accruing on account of such purchase. Even if the auction notice is silent about the nature of liability, in case of any acquisition under the SARFAESI Act on an "as is where is" basis, the prospective acquirer would have to conduct a thorough diligence regarding the liabilities attached to such asset. Acquires could also consider procuring a no dues certificate from all concerned stakeholders so as to mitigate any such potential liabilities.

CERC defers implementation of the CERC (Deviation Settlement Mechanism and related matters) (Fifth Amendment) Regulations, 2019

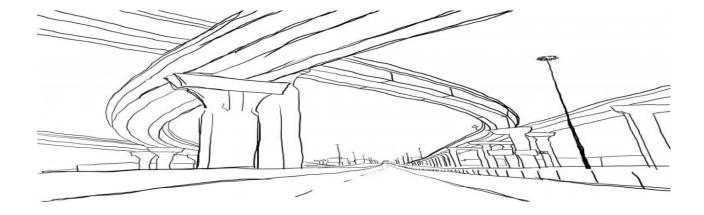
The CERC notified the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and related matters) Regulations, 2014 (**DSM Regulations**), on January 6, 2014, which came into force with effect from February 17, 2014.

Subsequently, the CERC notified the CERC (Deviation Settlement Mechanism and related matters) (Fifth Amendment) Regulations, 2019 (**DSM Fifth Amendment Regulations**) on May 28, 2019, which came into force with effect from June 3, 2019.

The DSM Fifth Amendment Regulations had amended *inter alia*, Regulation 7(10)(b) of the DSM Regulations which deals with settlement of deviation from schedule for the period commencing from April 1, 2020.

The CERC *vide* its order dated March 27, 2020 had deferred the date of implementation of Regulation 7(10)(b) to June 1, 2020.

Taking into account the difficulties faced by the stakeholders in implementing the aforesaid regulation due to the lockdown, the CERC has *vide* its order dated May 29, 2020 further deferred the date of implementation of Regulation 7(10)(b) to December 1, 2020. Additionally, the applicability of Regulation 7(10)(a) of the DSM Regulations, which deals with settlement of deviation from schedule for the period upto March 31, 2020, has been extended upto November 30, 2020.



RENEWABLE ENERGY

Advisory to CERC and SERCs for hearing cases online

Background:

On May 18, 2020 the Ministry of New and Renewable Energy (MNRE) issued an office memorandum requesting all State Electricity Regulatory Commissions (SERCs) to consider allowing online listing of petitions and start hearing of petitions through video conferencing.

Office Memorandum:

- Renewable power developers had submitted to the MNRE that SERCs have postponed listing and hearing of petitions due to the extended nationwide lockdown. They stated the need for timely filing and disposal of petitions in SERC and highlighted that any delay in relief from SERCs will adversely affect the financial viability of their projects. Further, they cited the precedence of the Supreme Court, High Courts and Appellate Tribunal for Electricity.
- With a view to providing support to the renewable sector in regularizing the matters at SERCs, the MNRE
 requested all SERCs to consider allowing filling and listing of petitions online and to hear urgent matters
 through video conferencing.

CERC Notice

Prior to this, on April 30, 2020 the CERC had issued a notice for virtual court room platform during COVID-19. As per such notice, the CERC would hear urgent and part-heard cases during the on-going pandemic through video conferencing.

Our view: MNRE's direction to the SERCs should safeguard the investments made in the sector as it would ensure timely disposal of urgent matters. Delays in adjudication of disputes could cause irreparable harm to claimants and hence this is a welcome relief.

MNRE extends timelines for implementation of One Sun One World One Grid Program

The MNRE issued a request for proposal (RFP) in May 2020 for developing a long term vision, implementation plan, road map and institutional framework for implementing "One Sun One World One Grid". Vide notification dated June 4, 2020, the MNRE has extended timelines under the RFP, such as pre-bid meeting, submission of questions and submission of proposals, in light of the lockdown. The deadline for submission of proposals has been extended till July 22, 2020 (online) and July 24, 2020 (hard copy).



MUMBAI

109 A, 1st Floor, Dalamal Towers Free Press Journal Road, Nariman Point Mumbai 400 021 T: +91 22 6636 7000

NEW DELHI

801 A, 8th Floor, Konnectus Tower, Bhavbhuti Marg Opp. Ajmeri Gate Railway Station, Nr. Minto Bridge New Delhi 110 001 T: +91 11 4152 8400

AHMEDABAD

801, 8th Floor, Abhijeet III Mithakali Six Road, Ellisbridge Ahmedabad 380 006 T: +91 79 6605 4480/8

PUNE

202, 2nd Floor, Vascon Eco Tower Baner Pashan Road Pune 411 045 T: +91 20 4912 7400

BENGALURU

6th Floor, Rockline Centre 54, Richmond Road Bengaluru 560 025 T: +91 80 4168 5530/1

CHENNAI

No 18, BBC Homes, Flat-7 Block A South Boag Road Chennai 600 017 T: +91 44 4210 4863



o/1 , Flat-7 Block A 3

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