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Research

Smart Meters

Revolutionising the Power Sector

July 2023

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Glossary of Terms

ACS	Average Cost of Supply
AMI System	An integrated system of Smart Meters, communication networks and meter data management systems that enables two-way communication between the utilities and consumer premises equipment
ARR	Average Rate of Return
CBDT	Central Board of Direct Taxes
Competition Act	Competition Act, 2002
DBFOOT	Design Build Finance Own Operate Transfer
DISCOM Indemnified Person	DISCOM and its officers, servants, agents
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act, 1999
FPI	Foreign Portfolio Investor
FVCI	Foreign Venture Capital Investor
FVCI Regulations	SEBI (Foreign Venture Capital Investors) Regulations, 2000
FY	Financial Year
GW	Gigawatts
IM	Investment Manager
INR	Indian Rupees
InvIT	Infrastructure Investment Trust
InvIT Regulations	SEBI (Infrastructure Investment Trusts) Regulations, 2014
ITA	Income Tax Act, 1961
ITAT	Income Tax Appellate Tribunal
ITR	Income Tax Rules, 1962

1. Glossary of Terms

LLP	Limited Liability Partnership
LLP, 2008	Limited Liability Partnership Act, 2008
LP	Limited Partners
NCD	Non Convertible Debenture
NDI Rules	Foreign Exchange Management (Non-debt Instruments) Rules, 2019
OCD	Optionally Convertible Debenture
OCRPS	Optionally Convertible Redeemable Preference Shares
Operational Go-Live	Completion of the site acceptance test for 5% of Smart Meters (along with its related hardware and software equipment) supplied installed and integrated.
Operational Period	Total meter-months of operating the AMI system after Operational Go-Live
PF	Pension Fund
PM	Project Manager
PM-Kusuma	Pradhan Mantri Kisan Urja Suraksha evam Utthan Mahabhiyan
QIB	Qualified Institutional Buyer
RBI	Reserve Bank of India
RFP	Request For Proposal
RDSS	Revamped Distribution Sector Scheme
SEBI	Securities and Exchange Board of India
SPV	Special Purpose Vehicle
SWF	Sovereign Wealth Fund
USD	United States Dollar
Work Completion	Delivery, site installation, integration and operationalization of 100% of Smart Meters each with related hardware, software and equipment as per provision of this AMISP Contract

Introduction

The performance of the power sector demonstrates a sound and resilient economy. As of January 31, 2023, India had emerged as the third largest producer and consumer of electricity worldwide, with an installed power capacity of 411.64 GW.[1] In order to augment the development of the power sector, the Indian government vide the Union Budget for the year 2023-2024 allocated USD 885 million (INR 7,327 crore) for the solar power sector including grid, off-grid and PM-Kusum projects.

While the power sector continues to play an integral part in the Indian economy, it is plagued with various issues such as- high power generation costs, poor financial health of Distribution Companies (**DISCOM**), massive Aggregate Transmission and Commercial (“**AT&C**”)losses and associated operational inefficiencies.[2]

The government of India in June 2021 approved the Revamped Distribution Sector Scheme (“**RDSS**”)to help DISCOMs improve their operational efficiencies and financial sustainability by providing result-linked financial assistance to DISCOMs for strengthening supply infrastructure. The RDSS has an outlay of approximately INR 303,758 crore (approximately USD 36,819,874,091) over 5 years, i.e. — FY 2021-2022 to FY 2025–2026.[3] The RDSS aims to (i) reduce the AT&C losses across India from 22.32% in FY 2020-2021[4] to 12–15% by 2024–2025, (ii) reduce the ACS to ARR from INR 0.69/kWh in FY 2021–2022 to zero by 2024-2025 and (iii) improve the quality, reliability and affordability of power supply to consumers through a financially sustainable and operationally efficient distribution sector.[5]

Additionally, the government of India has established the National Smart Grid Mission (“**NSGM**”) on March 27, 2015 to accelerate smart grid development in India. The NSGM is housed under the Ministry of Power and as on May 2023, 24,214 (Twenty-Four Thousand Two Hundred and Fourteen) and 135,260 (One Hundred and Thirty Five Thousand Two Hundred and Sixty) smart meters have been installed in Chandigarh and Rajasthan, respectively as part of the Smart Grid Project. Additionally, the NSGM has commenced Pilot Projects at IIT Kanpur, Mysore, Haryana, Manesar, Himachal Pradesh, Gujarat, Tripura Telangana, Assam, West Bengal and Puducherry.[6]

In order to achieve the aforementioned objective of RDSS and NSGM, Advanced Metering Infrastructure (“**AMI**”) was proposed to be implemented through the installation of Smart Meters.

What is a Smart Meter?

Smart Meters are a new generation of energy meters that allow consumers to learn about their respective electricity consumption pattern and help DISCOMs conduct system monitoring and customer billing without manual intervention.[7] Smart Meters are expected to prevent electricity theft, reduce AT&C losses to DISCOMs and promote responsible power consumption among consumers. Smart Meters can be in 2 (Two)

1 Available at https://www.ibef.org/industry/power-sector-india, last accessed on June 28, 2023.

2 Available at https://www.financialexpress.com/business/infrastructure-achieving-indias-sustainability-goals-with-smart-metering-2947507/, Last accessed on June 28, 2023.

3 Available at https://recindia.nic.in/revamped-distribution-sector-scheme, last accessed on June 28, 2023.

4 Available at https://www.mercomindia.com/average-atc-losses-for-discoms-increases-to-22-in-fy21, last accessed on May 03, 2023.

5 Id.

6 Available at https://www.nsgm.gov.in/sites/default/files/SG-Projects-Status-May-2023.pdf, last accessed on July 03, 2023.

7 Available at https://recindia.nic.in/uploads/files/FAQs-Smart-Meter-Booklet-with-revised-text-on-27-10-2021.pdf, last accessed on June 28, 2023.

forms, i.e.- (i) prepaid where the consumers would be required to recharge prior to consuming the electricity or (ii) post-paid, where the consumers would be required to pay subsequent to the consumption of electricity.

Under the RDSS, implementation of prepaid smart metering is currently being prioritised for:

i. 500 (Five Hundred) cities under the Atal Mission for Rejuvenation and Urban Transformation with AT&C losses of more than 15%;

ii. All union territories of India (Andaman & Nicobar islands, Dadar & Nagar Haveli and Daman & Diu, Jammu & Kashmir, Lakshadweep, Chandigarh, Government of NCT of Delhi, Ladakh and Puduchery)

iii. Micro Small and Medium Enterprises, industrial and commercial consumers

iv. All government offices at the block level and above

v. Other areas with high losses.

Regulatory Landscape for Implementation of AMI

Implementation of AMI is proposed to be undertaken through a public private partnership model by the respective DISCOMs on Total Expenditure (“**TOTEX**”).[1] For the implementation of the AMI, the respective DISCOMs will float a RFP on a Design Build Finance Own Operate Transfer (“**DBFOOT**”) model in order to identify and select the eligible bidder. Pursuant to the RFP, the eligible bidder shall submit a list of consortium members and subcontractors (if any) along with a valid ISO and CMMI Certificate. Subsequent to the selection of the bidder, the respective DISCOMs would execute a contract (“**AMISP Contract**”) with the selected bidder and the Automated Metering Infrastructure Service Provider (“**AMISP**”) (i.e.- a special purpose vehicle incorporated by the selected bidder).

Considering the fact that the AMISP Contract is on a DBFOOT Model, subsequent to the expiry of the AMISP Contract, (which will be in the range of 10 years) the AMISP shall transfer to the respective DISCOM at no cost, the ownership of the entire system of the Smart Meters including all the hardware, software along with the valid licenses and any data collected during the AMI Project. During the subsistence of the AMISP Contract, AMISP is responsible for the operation and maintenance of the entire AMI for the duration of the AMISP Contract. Additionally, during the subsistence of the AMISP Contract, the respective DISCOMs shall pay the AMISP Service Charge[2] to the AMISP on a monthly basis in accordance with the terms and conditions of the AMISP Contract.

A. Key Parties involved in the implementation of AMI Infrastructure

The bidder, AMISP and DISCOMs are the key parties involved in the implementation of AMI System in India. Please find below a brief analysis of the key obligations of the bidder, AMISP and DISCOMs.

B. Bidder

The proposed bidder can be either an individual entity or a consortium of entities. In circumstances where the bid is being placed through a consortium of members, 1 (One) of the consortium members shall be designated as the as the lead bidder/lead consortium member and the members of the consortium shall enter into a binding consortium agreement for the purpose of submitting the bid. Pursuant to the RFP floated by the respective DISCOMs, the proposed bidder has the option to seek qualification on the basis of technical and financial capability of its parent(s) and/or its affiliates(s).

The tenure of the AMISP Contract is either. - earlier of (a) 10 (Ten) years from the date of execution of the AMISP Contract or (b) expiry of the Total Meter Months of operating the AMI System after Operational Go-Live (“**Contract Period**”).

1 TOTEX approach factors in the total cost of expenditure over the long term operating life of the smart meters. In a nutshell, TOTEX refers to the sum of capital expenditure and operational expenditure.

2 AMISP Service Charge refers to the payment to be made by the respective DISCOMs to the AMISP in Indian Rupees per meter per month for each category of the meter.

For the purpose of qualifying the technical requirements, the bidder shall have:

i. Paid for, or received payments for, construction of Eligible Project(s)[3] and/or paid for development of Eligible Project(s) in the power/natural gas/water/telecom sector in the last 5 (Five) financial years with aggregate project value of not less than INR (40% of the estimated project cost) crores.

ii. Experience of integration of head-end systems with meter data management on standard interfaces and data exchange models for at least 20,000 (Twenty Thousand) customers in an Indian/Global Utility (power/water/natural gas/telecom) in the last 5 (Five) years which are in operation for at least 1 (One) year; or

iii. Installed, integrated, tested and commissioned control centre hardware and application software for at least 50,000 (Fifty Thousand) end points) in the last 5 (Five) years which are in operation for at least 1 (One) year.

Additionally, the entity claiming the aforementioned experience should have either executed such projects itself or must hold at least 26% (Twenty Six percentage) of the shareholding in the company that has executed the aforementioned project(s) up to the date of commissioning such project.

For the purpose of qualifying the financial requirements, the bidder shall have:

i. Positive net worth for each of the last 3 (Three) financial years and such net worth shall be at least 30% (Thirty percentage) of the estimated project cost in any of the previous 3 (Three) financial years; or

ii. Minimum ACI of 30% (Thirty percentage) of the estimated project cost at the close of the preceding financial year.

In circumstances where the selected bidder is a consortium, the lead bidder shall be required to ensure that the Solution[4] is provided to the respective DISCOMs in accordance with the terms and conditions of the AMISP Contract in terms of the schedule for the implementation of the Project, irrespective of any failure/non-performance of the other members of the consortium. This effectively means that the lead member of the consortium has to be prepared to bear the obligation of the full performance on his own (especially given the terms of the performance guarantee that will be discussed subsequently).

Additionally, the RFP and AMISP Contract imposes certain key obligations on the bidder, which include:

i. As part of the bid document, the bidder shall submit an approach paper describing the methodology to be adopted in integrating the AMI system with the various existing enterprise applications. The aforementioned approach paper shall clearly state the mechanism in which the data/message originating from the AMI system shall be subscribed/accessed by third party applications.

3 Eligible Projects shall mean works contracts for developing asset/ facility in India or abroad which involve building/ installing, and commissioning/ go-live such asset/ facility but shall not include any assignment where the scope is limited to only (i) supply of goods or (ii) supply of manpower. Eligible Projects in the:

i) power sector shall mean projects relating to generation or transmission or distribution of electricity;

ii) water sector shall mean projects relating to water treatment including desalination or water supply (rural or urban) or wastewater / sewerage or drainage or water pipelines;

iii) natural gas sector shall mean projects relating to natural gas transmission or distribution; and

iv) telecom sector shall mean projects relating to infrastructure cabling or communication systems for setting up Wide Area Network (WAN) or Local Area Network (LAN) or Internet Services or VOIP solutions,

4 Solution means the AMI system implemented in its entirety including but not limited to the designing, financing, supply of hardware, software, transportation, installation, integration, testing, commissioning, operation, maintenance, training and other services by the AMISP.

ii. Providing a list of equipment (including any special equipment) necessary to meet the technical specifications, functional and performance requirements as specified in the AMISP Contract.[5]

iii. Prior to the submission of the proposal, the bidder shall visit the sites (at their own expense) and make surveys and assessments which are necessary for the submission of the proposal.

C. AMISP

Pursuant to the AMISP Contract, the key obligations of the AMISP (which will be the SPV established by the Bidder(s) for executing the project) include:

i. Operation of the AMI System for the Operational Period and bearing the necessary charges to maintain the AMI System.

ii. Deployment of smart meters, communication systems, head to end systems and meter data management systems;

iii. Consuming external data within the AMI system.

iv. Integration with billing systems and existing legacy systems;

v. Deployment of standard interfaces to enable integration of future information technology/operational technology applications into the AMI System (including peak load management, supervisory control and data acquisition, outage management system and distribution automation).

vi. Operations of certain number of meter months of all meters and related infrastructure after operational go-live of the AMI System.

vii. Integration of network interface card/communication module with at least 3 (Three) makes of meters in India, to enable the respective meters to seamlessly integrate with the proposed head end system and/or mobile device management enabling interoperability of the system. Additionally, AMISP shall be responsible for integrating new meter or any other application as mutually decided between the AMISP and the respective DISCOM.

viii. Designing, testing and implementing consumer portal and mobile application covering all consumer categories and category specific features.

ix. Integration with existing payment infrastructure (to be facilitated by the respective DISCOMs) including different payment channels for pre-paid recharges and post-paid bill payments. Additionally, AMISP shall facilitate the availability of infrastructure for recharge of Smart Meters through feature phones and physical channels.

x. Implementing data privacy as per the specifications specified and the same should be in compliance with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

xi. Develop a consumer engagement plan for smooth implementation of the AMI System. The said plan should include educating consumers about the pre-paid recharge mechanism, benefits of pre-paid meters, potential usage of Smart Meters data for consumers.

5 The said equipment shall confirm to the requirements specified under the order issued by the central government including Order No No.9/16/2016-Trans-Part(2) dated 18 November 2020 (is this the PNS type order?) and Order No. 11/05/2018-Coord dated 17 September 2020 issued by Ministry of Power and Order No. F/No.6/18/2019-PPD by Ministry of Finance, Department of Expenditure, Public Procurement Division dated 23 July 2020.

xii. At the pre-operation phase, completion of the training obligations for the respective DISCOM's personnel along with the training documentation.

xiii. At the operational phase, ensure availability of services and spare parts including for expansion.

D. DISCOM

The key obligations of the DISCOMs include:

i. obtaining the requisite statutory clearances and/or approvals as required to be taken for the implementation of the AMI System and providing support and access to facilities at the sites, including consumer premises;

ii. Providing integration interface details and services available for each of the existing enterprise applications which it wants to integrate with the AMI System in accordance with the AMISP Contract.

Brief Overview of the AMISP Contract & RFP

The main, reciprocal obligations of the AMISP and the DISCOM are discussed in the earlier section. This section gives an overview of the other key features of the proposed contractual framework. While there are many features that are akin to a typical "concession agreement" it is not quite the same and a number of differences emerge.

It is expected that the technically qualified bidder with the lowest financial bid shall be awarded the Project at the quoted price in such financial bid.[1] Within 14 (Fourteen) days from the date of receipt of the letter of award, the selected bidder shall be obligated to execute the AMISP Contract. The AMISP Contract is proposed to be executed between the AMISP (i.e.- a special purpose vehicle incorporated by the selected bidder), the selected bidder and the respective DISCOM and such AMISP Contract shall on a DBFOOT model cover end to end metering (including feeders, distribution transformers and all end consumers). Within 14 (Fourteen) days from the date of work completion, AMISP shall be required to provide a separate performance security in the form of an irrevocable bank guarantee amounting to 5% (Five Percentage) of the AMISP Contract value and valid upto a period of 6 (Six) months beyond the term of the Contract Period. Considering the fact that the said performance security is required to be provided for a period of more than 10 (Ten) years (i.e.- 6 (Six) months after the expiry of the AMISP Contract), the same imposes a significant obligation on such AMISP. The stamp duty costs associated with the execution of the RFP, bid documents or Project are to be borne only by the bidders.

In addition to fulfilling the technical and financial requirements by the proposed bidder pursuant to the RFP, the proposed bidder is required to not have a conflict of interest which affects the bidding process ("Conflict of Interest"). In circumstances where pursuant to winning the bid and executing the AMISP Contract, the bidder is found to have a conflict of interest, the DISCOMs have the right to reject the bid and terminate the AMISP Contract. Additionally, the bidder is deemed to have a Conflict of Interest in the following circumstances:

i. If such bidder has a relationship with another bidder, directly or through a common party that puts either or both the bidders in a position to access each other's information about, or to influence the bid of either or each other;

ii. The bidder/Member and any other bidder/Member have common controlling shareholders or ownership interest. However, the aforementioned conclusion shall not apply in circumstances where the direct/indirect shareholding of the bidder/Member in the other bidder/Member is less than 15% (fifteen percentage) of the subscribed and paid up equity share capital.

Considering the fact that the aforementioned disqualification includes the concept of 'indirect shareholding', the RFP provides the mechanism for calculating the concept of 'indirect shareholding'. In circumstances where the indirect shareholding is held through one or more intermediate persons, the said indirect shareholding shall be computed as follows: (A) where any intermediary is controlled by a person through management control or otherwise, the entire shareholding held by such controlled intermediary in any other person (the "**Subject Person**") shall be taken into account for computing the shareholding of such controlling person in the Subject Person; and (B) subject always to sub-clause (i) above, where a person does not exercise

1 Paragraph 5.1, Model Standard Bidding Document- Appointment of Advanced Metering Infrastructure Service Provider for Smart Prepaid Metering in India on DBFOOT basis, National Smart Grid Mission Ministry of Power Government of India

control over an intermediary, which has shareholding in the Subject Person, the computation of indirect shareholding of such person in the Subject Person shall be undertaken on a proportionate basis; provided, however, that no such shareholding shall be reckoned under sub-clause (B) if the shareholding of such person in the intermediary is less than 26% (Twenty Six percentage) of the subscribed and paid up equity shareholding of such intermediary.

A. Contract Price & Payment System

The contract price shall be equal to the total amounts payable by the DISCOM for each category of meter. The said total amount for each category of meter shall be computed by taking into account the total number of meters in such category, per meter rate for such meter as quoted in the bid, multiplied by 90 (Ninety) months. In circumstances where any approval is required for imports and/or use of imported equipment is disallowed in accordance with applicable laws, the same shall not alter the contract price nor shall it result in the revision of the project implementation plan. Thus, said risk in relation to the import of any equipment for the implementation of the AMI in accordance with the AMISP Contract is on the AMISP.

All the prices quoted in the financial bid shall be in INR denomination and the bidder shall bear the risks relating to foreign exchange variations during the Contract Period. Additionally, the unit prices quoted by the bidder shall be firm and final and shall remain constant throughout the Contract Period. Therefore all inflationary risks are to the account of the AMISP.

With respect to the payments required to be made by the DISCOMs to the AMISP in case of hybrid model of payment, a lump sum payment is to be made on the successful operational go-live of the AMI system, with the possibility of making payments through further tranches if funded by the Central government as per the tranches in which the central government makes the payment.

A key feature of the model contract is that within 14 (Fourteen) working days of the Operational Go-Live, the respective DISCOMs are mandated to establish a direct debit facility for the entire online consumer payments to ensure recovery of the AMISP Monthly Fee. In pursuance of this, the respective DISCOMs shall create a separate facility compatible with all the online payments and such facility shall provide for direct debit of 100% (One Hundred percentage) of AMISP Monthly Fee. The said direct debit facility would include a bucket filling approach where all the consumers' recharge bill payments from the 11th (Eleventh) working day of every month up to 10th (Tenth) working day of the immediately succeeding month will be routed directly to the AMISP's bank account till such time the undisputed AMISP Monthly Fee along with any supplementary invoice issued by AMISP is recovered in its entirety. While this facility would ensure collection of payments from areas outside the scope of AMISP's areas of service, there are still some areas of ambiguity on priority of payments and the manner of addressing the disputes (if any) arising thereof.

B. DISCOM's Right to change the Number of Meters to be Installed

The DISCOM has the right to direct the AMISP (through a written notice) to change the number of meters proposed to be installed. However, without the prior approval of the AMISP, the DISCOM cannot require changes where the number of meters to be installed is +/- 20% (Twenty percentage) of the original number of meters to be installed This would appear to be a very high threshold for unilateral decisions by the DISCOM.

Helpfully, the AMISP, through intimation to the DISCOM, is entitled to appoint subcontractor so as to meet its obligations under the AMISP Contract, provided that such sub-contractor is not blacklisted/barred by any government organisation.

C. Indemnity payments vis-à-vis AMISP

The AMISP is required to indemnify the DISCOM Indemnified Persons against any costs, losses, damages, expenses, claims including those from third parties arising out of any:

i. negligence, wrongful act or omission by the AMISP or its agents or employees or any third party associated with AMISP in connection with or incidental to the AMISP Contract;

ii. infringement of patent/copyright/trademark or industrial design rights arising from the use of the supplied Solution or any part thereof.

The indemnity obligations under the AMISP Contract are one-sided, i.e.- the DISCOM is not required to indemnify the AMISP in circumstances where similar losses are attributable to the DISCOM. Additionally, the aforementioned indemnity obligations are vague as there is no limit of the time period or the maximum amount for which the AMISP shall be liable to indemnify the DISCOM Indemnified Parties.

D. Events of Default vis-à-vis Termination of AMISP Contract

In circumstances where the Solution supplied by the AMISP does not meet the minimum specifications as per the AMISP Contract and the same is not replaced/modified by the AMISP within a period of 14 (Fourteen) working days of being informed by the DISCOM (or such other period mutually agreed between the DISCOM and AMISP), the DISCOM shall have the right to terminate the AMISP Contract and recover liquidated damages pursuant to the forfeiture of the performance security. Considering the fact that the AMISP is provided only a 14 (Fourteen) day period to rectify the Solution, the same would cast a substantial obligation on the AMISP as it is considered to be a very short remedy period prior to termination.

The termination of the AMISP Contract can occur due to certain events of default attributable to the AMISP (“**AMISP Event of Default**”) or DISCOM (“**DISCOM Event of Default**”). The major AMISP Event of Default include:

i. In the judgment of the DISCOM, the AMISP has engaged in corrupt, fraudulent, collusive or coercive practices in competing for or in executing the AMISP Contract.

ii. Failure of AMISP to provide the Solution in accordance with the technical specifications, functional requirements and service level agreement specified under the AMISP Contract.

iii. The shareholding of the AMISP ceases to be in accordance with the provisions of the AMISP Contract.

The major DISCOM Event of Default include:

i. Failure to establish the direct debit facility through online consumer payments

ii. Non-remittance of Monthly AMISP Fee or any other payment under the AMISP Contract and a period of 90 (Ninety) days has elapsed since such payments are due;

iii. The breach of the DISCOM's obligations under the AMISP Contract which has an adverse effect on the performance of the AMISP's obligations.

The aforementioned events of default shall be considered to be an AMISP Event of Default/DISCOM Event of Default only in circumstances where the AMISP/DISCOM has failed to remedy the said event of default within a period of 90 (Ninety) days of issuance of notice by the DISCOM/AMISP. While a 90 (Ninety) day period is provided to the AMISP for curing the aforementioned event of default, the same appears to conflict with the 14 (Fourteen) working day cure period provided to the AMISP to rectify the Solution in case it does not meet the minimum specifications as per the AMISP Contract.

In circumstances where the AMISP Contract is terminated on account of (A) DISCOM Event of Default, (i) prior to the Works Completion, AMISP shall be entitled to a termination payment equivalent to 100% of the assets value in accordance with the AMISP Contract and (ii) subsequent to the Works Completion, AMISP shall be entitled to receive 100% (One Hundred percentage) of the value of the termination payment as determined in accordance with the AMISP Contract; (B) AMISP Event of Default, (i) prior to the Works Completion, AMISP shall be entitled to a termination payment equivalent to 60% (Sixty percentage) of the value of the assets proposed to be handed over to the DISCOM as certified by an independent valuer and (ii) subsequent to the Works Completion, AMISP shall be entitled to receive 60% (Sixty percentage) of the value of the termination payment as determined in accordance with the AMISP Contract. While, in both the scenarios (i.e.- consequence for an AMISP Event of Default or a DISCOM Event of Default),the result is the same, i.e.- AMISP is entitled to receive a termination payment pursuant to the AMISP Contract, the same does not disincentivise the DISCOM to avoid/mitigate a DISCOM Event of Default as there is no penalty imposed on the DISCOM for a DISCOM Event of Default.

Additionally, unlike typical termination payments in concession agreements, in the current scenario, the same does not take into account provisions in relation to repayment of debt.

E. Change in Law

In case the AMISP/DISCOM is affected by a change introduced to the applicable laws, the said parties are required to negotiate in good faith and ensure that the affected party is placed in the same economic position as if there was no change in the applicable laws. Since the obligation is limited to negotiations alone, there is no actual obligation cast on the non-affected party to compensate the affected party. Given the duration of the contract and the ability of the DISCOMs to alter upto 20% of the volume of the contract, this could represent a significant risk.

F. Intellectual Property

All the intellectual property rights in all the materials which have been created or developed by the AMISP solely during the performance of the services contemplated under the AMISP Contract and for the purpose of use or sub-license of such services under the AMISP Contract, shall be considered to be the sole property of the AMISP.

G. AMISPs Obligations vis-à-vis Change in Shareholding

AMISP shall ensure that the selected bidder subscribes to 100% (One Hundred percentage) of the equity shares of AMISP in accordance with the provisions of the Consortium Agreement. The aforementioned shareholding is required to remain unchanged for a period of 2 (Two) years from the date of completion of the works. Subsequently, AMISP shall ensure that the selected bidder continues to hold 51% (Fifty One percentage) of the equity shares of AMISP.

While an obligation is cast on the AMISP to ensure that the selected bidder continues to hold 51% (Fifty One percentage) of the equity shares of AMISP, AMISP shall also be required to seek the prior approval from the respective DISCOM for any direct and/or indirect change in the shareholding/management of the AMISP. Hence, in circumstances where there is a change in shareholding of the selected bidder, the same would be consummated only with the prior approval of the respective DISCOM as it would amount to an 'indirect' change in the shareholding of AMISP.

Additionally, in circumstances where the DISCOM has provided its prior approval for the change in direct and/or indirect shareholding/management of AMISP and the proposed transferee of the selected bidder's shares in AMISP is an entity based in a jurisdiction which shares land borders with India, or where the beneficial owner of such entity is situated in or is a citizen of a country which shares land borders with India, the prior approval of the government[2] would be required in accordance with the Consolidated Foreign Direct Investment Policy, 2020.[3]

2 Pursuant to Press Note No. 3 (2020 Series) issued by the Ministry of Commerce and Industry, available at https://dipp.gov.in/sites/default/files/pn3_2020.pdf, last accessed on June 29, 2023.

3 Consolidated Foreign Direct Investment Policy, 2020 issued by the Ministry of Commerce and Industry, available at https://dpiit.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020_0.pdf, last accessed on June 29, 2023.

Would Investment in AMISPs Qualify as Investment in the Infrastructure Sector?

Given the importance, and allocation of funds, that the central government has given to the implementation of smart meters in India, attracting patient, significant foreign capital into the sector must surely be a priority.

The single most important factor that will determine the quantum and nature of foreign capital that this sector will attract is its express categorisation, or otherwise, as infrastructure activity in terms of the Updated Harmonized Master List, notified by the Ministry of Finance.[1] The principal reason for that is the reliance on the said Updated Harmonized Master List when determining eligibility for investments through the FVCI route, tax benefits for investments by Sovereign Wealth Funds and Pension Funds, and the establishment of InvITs. The massive benefits of each (and hence the benefits to the cause of smart meters) is discussed in the next section.

The Updated Harmonized Master List, expressly lists only the following as electricity related activities which qualify as infrastructure:

i. Electricity Generation

ii. Electricity Transmission

iii. Electricity Distribution.

Can AMISPs be considered to be engaged in the activity of Electricity Distribution? As things stand, probably not. Should AMISPs be considered to be engaged in the activity of Electricity Distribution? We believe they should.

The principal reasons why we do not believe that the present language of the applicable regulations would categorise AMISPs as engaging in "Electricity Distribution" is for the following reasons:

i. Firstly, and most importantly, any person/entity involved in the distribution of electricity is required to apply to the Central Regulatory Commission to seek a license prior to undertaking the distribution of electricity. Pursuant to the AMISP Contract, the AMISP is not required to seek the aforementioned licence for implementation of the AMI System.[2]

ii. AMISP Monthly Fee is being remitted by the DISCOMs to AMISP for undertaking the Key AMISP Obligations and such other obligations as mentioned in the AMISP Contract. Hence, it could be argued that revenue generated is in the nature of service fee for services rendered, rather than income for distributing electricity.

iii. Distribution of electricity from the DISCOMs to the consumers can take place without the AMI System as the AMI System is required for the purpose of calculating the consumption of units by the consumers, collection of fees and related data analytics.

However, we believe that the AMISPs discharge a fundamental and an inalienable part of the distribution of electricity. The fact that there is a requirement to engage in public private partnership to implement

1 Available at https://egazette.gov.in/WriteReadData/2022/239561.pdf, last accessed on July 04, 2023.

2 Section 14, Electricity Act, 2003

the desired AMI, should not change the fact that AMISPs are clearly engaged in the infrastructure sector. We believe that the most persuasive arguments for expressly categorising AMISPs as infrastructure sector participants in the Updated Harmonized Master List, are as follows:

i. The AMISP owns and possesses the AMI System during the Contract Period (in the range of 10 years) of the AMISP Contract;

ii. The AMISP performs the Key AMISP Obligations during the Contract Period of the AMISP Contract. The said AMISP Key Obligations are functions of the DISCOM, without which there could not have been any meaningful distribution of electricity.

iii. AMI System forms an integral part of the distribution of electricity from the DISCOMs to the consumers. The system of calculating the consumption of units by the consumers pursuant to the electricity being distributed by the DISCOMs, collection of fees, and associated data analytics which are critical for the entire electricity infrastructure, cannot take place without the AMI System .

Foreign Venture Capital Investment

As discussed in Section 4 (*Would investment in AMISPs qualify as investment in the Infrastructure Sector?*) of this paper, in case the AMISP is considered to be engaged in the activity of Electricity Distribution (as mentioned in the Updated Harmonized Master List), institutional investors (such as SWFs/PFs) shall be incentivized to invest in such AMISP under the FVCI route.[1]

The FVCI Regulations make it mandatory for offshore funds to register themselves with SEBI in order to avail the benefits of the FVCI Regulations. As compared to the FDI route, FVCI route is a preferred mode of investment for institutional investors as SEBI and RBI have extended certain benefits including:

a. Free pricing: Registered FVCIs are not restricted by the pricing guidelines applicable to investments through FDI and are provided the advantage of free pricing both at the time of entry as well as exit of their investments. A sale or transfer of securities or instruments can be made by at a price that is mutually agreed between buyers and sellers.[2]

b. Instruments: An FVCI can invest in equity instruments, equity-linked instruments (instruments optionally or mandatorily convertible into equity share) or debt instruments, which include OCRPS, OCD and NCD.

c. Lock-in:[3] Under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018, the entire pre-issue share capital (other than for promoters, where lock in is for a longer period of 18 (Eighteen) months) of a company conducting an IPO is locked-in for a period of 6 (Six) months from the date of allotment in the public issue. However, an exemption from this requirement has been granted to registered FVCIs, provided, the shares have been held by them for a minimum period of 6 (Six) months from the date of purchase by the FVCI. This exemption enables the FVCI to exit from its investments, post-listing.

d. Exemption under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 Takeover Code: SEBI has also exempted promoters of a listed company from the public offer provisions in connection with any transfer of shares of a listed company, from FVCIs to the promoters, under the Takeover Code.

e. QIB Status: FVCIs registered with SEBI have been accorded QIB status and are eligible to subscribe to securities at an IPO through the book building route.[4]

1 Schedule VII, Foreign Exchange management (Non-Debt Instruments) Rules, 2019 allows investments by FVCIs in the infrastructure sector

2 Schedule VII, FEMA (Non-Debt Instruments) Rules, 2019.

3 Regulation 17, SEBI (Issue of Capital and Disclosure Requirements) Regulations 2018.

4 Definition of “Qualified Institutional Buyer”, SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018

Tax Exemption for Sovereign Wealth Funds & Pension Funds

SWFs refer to government owned investment vehicles that mostly invest abroad to meet some pre-determined macroeconomic objectives. PFs refer to funds set up by government or social security institutions with the objective of contributing to financing the relevant pay-as-you-go pension plans.

In cases where AMISP is considered to be engaged in the activity of Electricity Distribution (as mentioned in the Updated Harmonized Master List), SWFs and PFs shall be incentivized to invest in such AMISP as any distributions received by SWFs / PFs in form of specified sum should be exempt from tax in their hands subject to fulfillment of conditions under section 10(23FE) of the ITA. Hence, in order to promote investment by SWFs and PFs, the Finance Act, 2023 extended the applicability of section 10(23FE) of the ITA to specified sum referred to in section 56(2)(xii) of the ITA as well.

Specified Investments vis-à-vis Tax Exemption

Investments by SWFs and PFs in (A) InvITs/REITs or (B) a company or enterprise engaged in business of (i) developing, or operating and maintaining, or developing, operating and maintaining any infrastructure facility or (ii) infrastructure sub-sectors mentioned in updated harmonised master list of infrastructure sub-sectors;[1] shall be eligible for exemption under section 10(23FE) of the ITA. Detailed rules have been prescribed in relation to computation of income which will be considered to be exempt in hands of specified person.

The additional conditions required to be fulfilled by these SWFs / PFs in order to claim exemption under section 10(23FE) of the ITA are as below:

a. Filing of income-tax returns & Quarterly Statements: It has to file income tax returns, as per the provisions of the ITA, for all the years in which the investment(s) eligible for exemption under section 10(23FE) of the ITA was held by it ("Relevant Investment Period"). Additionally, it has to electronically furnish a quarterly statement within one month from the end of each quarter in the specified format,[2] in respect of each investment made by it during the said quarter;

b. Audit and Segmented accounts: It has to get books of account audited for the Relevant Investment Period by an accountant specified under section 288 of the ITA. Further, such audit report has to be furnished in the specified format[3] at least one month in advance to the due date specified for furnishing tax returns under section 139 of the ITA. Additionally, it has to maintain a segmented account of income and expenditure in respect of all specified investments;

c. Ownership: It should continue to be owned and controlled, directly or indirectly, by its establishing government and regulated under the law(s) of its establishing government. Further, no other person should exercise control or have any ownership (directly or indirectly) in the SWF / PF at any point in time.

1 Notification S.O. 2227E, CBDT, July 6, 2020

2 Form II, Circular No 15 of 2020, July 22, 2020, F. No. 370142/26/2020- TPL, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes.

3 Annexed to the notification in the Official Gazette notifying an SWF as a specified person

Infrastructure Investment Trusts vis-à-vis AMISP

Infrastructure sector, being capital intensive and with projects having long gestation periods, InvITs are ideal investment avenues for long term investors such as SWFs and PFs. Recognising the potential for investment under this sector, the Government of India, through SEBI promulgated the InvIT Regulations. As on July 10 10, 2023, there are 21 (Twenty One) registered InvITs in India.[1]

In cases where AMISP is considered to be engaged in the activity of Electricity Distribution (as mentioned in the Updated Harmonized Master List), the investments by institutional investors (eg: SWFs and PFs) can be structured through the incorporation of an InvIT. Pursuant to the incorporation of the InvIT, the AMISPs would be acquired by such InvIT and from a monetization perspective, the same would incentivise large institutional investors to invest in such InvITs.

Investment Conditions and Distributions by InvIT: As the InvIT is a specialized vehicle formed with the intent to invest into infrastructure projects, SEBI provides certain conditions and restrictions pertaining to investments by InvITs to ensure that the object of the InvIT Regulations is not defeated.

i. **Investment Conditions**:

An InvIT is permitted to invest only in a holding company, SPV or infrastructure projects or securities in India in accordance with the investment strategy as detailed in the offer document or placement memorandum.[2] If the InvIT has to invest in an infrastructure public private partnership project, then the same has to be routed through the holding company or the SPV.[3]

In circumstances where the InvIT invests in any infrastructure projects through SPVs, (a) a shareholders'/ partnership agreement has to be entered into between the InvIT and the shareholders/partners of the SPV, wherein such agreement shall specify that the shareholder or partner of the SPV shall not exercise any rights to prevent the InvIT from complying with the InvIT Regulations,[4] (b) the IM shall ensure that in every meeting of the SPV, the voting of the InvIT is exercised.

In circumstances where the InvIT invests in any infrastructure projects through the Holding company, apart from complying with the aforementioned conditions, the ultimate holding interest of the InvIT in the underlying SPV(s) shall not be less than 26% (Twenty Six percentage).[5] Lastly, the InvITs shall: (a) not invest in units of other InvITs;[6] (b) undertake lending to any person other than the holding company or the SPV(s), provided however, investment in debt securities is permitted;[7] and (c) hold an infrastructure asset for a period of not less than 3 (Three) years from the date of purchase of such asset by the InvIT, directly or through holding company and/or SPV.[8]

1 Registered InvITs, SEBI (as on July 10, 2023), available at https://www.sebi.gov.in/sebiweb/other/OtherAction.do?doRecognisedFpi=yes&intmId=20

2 Regulation 18(1), SEBI (Infrastructure Investment Trusts) Regulations, 2014.

3 Regulation 18(2), SEBI (Infrastructure Investment Trusts) Regulations, 2014.

4 Regulation 18(3)(a), SEBI (Infrastructure Investment Trusts) Regulations, 2014

5 Regulation 18(3A)(a), SEBI (Infrastructure Investment Trusts) Regulations, 2014.

6 Regulation 18(9), SEBI (Infrastructure Investment Trusts) Regulations, 2014.

7 Regulation 18(10), SEBI (Infrastructure Investment Trusts) Regulations, 2014

8 Regulation 18(11), SEBI (Infrastructure Investment Trusts) Regulations, 2014

ii. **Distributions by InvIT:**

The manner and quantum of distributions in an InvIT is one of its most remarkable features which attracts many potential investors. The following are the key conditions that are placed on the InvIT, the Holding company and SPV regarding distribution of the net distributable cash flows:[9]

a. not less than 90% (Ninety Percentage) of net distributable cash flows of the SPV shall be distributed to the InvIT /holding company in proportion of its holding in the SPV, subject to applicable provisions under the CA, 2013 or LLP, 2008;

b. not less than 90% (Ninety Percentage) of net distributable cash flows of the InvIT shall be distributed to the unit holders;

c. not less than 90% (ninety percent) of net distributable cash flows generated by the Holding company on its own, shall be distributed by the holding company to the InvIT. Provided however, the entire cash flows received by holding company from underlying SPVs shall be distributed to the InvIT.

9 Regulation 18(6), SEBI (Infrastructure Investment Trusts) Regulations, 2014

Conclusion: The Way Forward

Smart Meters are considered as a game changer for energy transition. The Indian government plans to roll out 250,000,000 (Two Hundred and Fifty Million) Smart Meters by 2025.[1] The aforementioned sector has already seen participation by various institutional investors in India in the first half of 2023.[2]

We believe addressing the following in the existing regulatory framework will open the flood gates of investment by institutional investors:

i. First and foremost is the express categorisation of investments in AMISPs as investments infrastructure for the purpose of the Updated Harmonized Master List. This issue is discussed in detail in Section 4 (Would investment in AMISPs qualify as investment in the Infrastructure Sector?) of the paper

ii. Second, and perhaps more important, is the fact that investors in AMISPs are being asked to take the credit risk of DISCOMs in India. The distressed balance sheets of various DISCOMs in India is a well-known and well chronicled fact. If we seriously want smart meters to be implemented across the countries, then it may not be realistic to expect investors to take such a risky credit call. While the central government has allocated significant resources for this programme, perhaps an event better model would be to establish a nodal agency analogous to SECI which could intermediate between the AMISPs and the DISCOMs.

iii. The provisions in relation to changes in shareholding need to be significantly relaxed. As things stand in the model contract, no changes in shareholding, direct or indirect, are possible without the approval of the DISCOMs. While there is some headroom, basis other provisions in the contract, such a blanket embargo seems an unworkable and, perhaps, an unintended restriction.

iv. Consequences of changes in law on the commercial contracts should be brought in line with the approach adopted for most concession agreements in use for infrastructure in India. This would be especially important given the long-term nature of the contract, the absence of any inflation linked escalation clauses and the apportionment of all tax and duty related risks to the AMISP.

AMISPs are expected to execute a difficult combination of hardware, services, retail interactions, data analytics, software development and integration, payment gateway integration, training and maintenance as part of their contractual obligations. This is atypical of traditional infrastructure creators and therefore making this category doubly important. Thus, in order to achieve the aforementioned target by 2025, active participation of institutional investors in India is essential in the coming years, and addressing these issues should go a long way in attracting them.

We have always taken initiatives to provide updates and analysis on the latest legal developments. We believe in knowledge sharing and hence would appreciate any feedback or comment. Feel free to direct your comments/views on this paper to:

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1 Available at https://www.smart-energy.com/industry-sectors/smart-meters/indias-smart-meter-rollout-250-million-meters-by-2025/, Last accessed on July 04, 2023.

2 Few notable examples of investments in smart meters sector include:

i) I Squared Capital's acquisition of a controlling interest in Polaris Smart Metering Pte. Ltd ("**Polaris**"). Polaris has a wholly owned subsidiary named Gram Power (India) Pvt. Ltd., which is India's only domestically grown integrated smart metering solutions provider and energy analytics company (available at https://www.grampower.com/static/pdf/ISQ%20News.pdf)

ii) Government of Singapore Investment Corporation (GIC) acquires a 74% stake in Genus Power & Infrastructure's new smart metering solutions venture for USD 2 billion (available at https://www.livemint.com/industry/energy/gic-to-buy-74-stake-in-genus-power-s-smart-metering-venture-for-2-billion-11688479922434.html)

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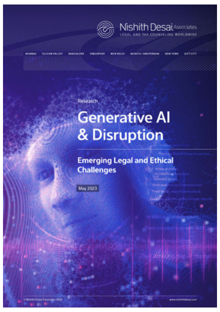

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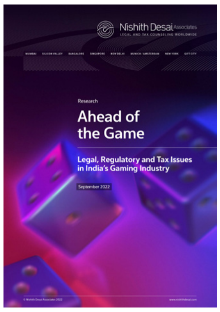

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