

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 235/MP/2015**

Subject : Petition under Section 79 of the Electricity Act, 2003 read with Article 13 of the Power Purchase Agreements dated 2.2.2007 and 6.2.2007 executed by Adani Power Limited with Gujarat Urja Vikas Nigam Limited and the Power Purchase Agreements dated 7.8.2008 executed by Adani Power Limited with Uttar Haryana Bijli Vitran Nigam Limited/ Dakshin Haryana Bijli Vitran Nigam Limited.

Date of hearing : 19.5.2016

Coram : Shri Gireesh B. Pradhan, Chairperson  
Shri A.K. Singhal, Member  
Shri A.S. Bakshi, Member  
Dr. M.K. Iyer, Member

Petitioner : Adani Power Limited

Respondents : Uttar Haryana Bijli Vitran Nigam Limited and others

Parties present : Shri Krishnan Venugopal, Senior Advocate, APL  
Ms. Poonam Verma, Advocate, APL  
Shri Gaurav Dudeja, Advocate, APL  
Shri Akshat Jain, Advocate, APL  
Shri Gaurav Ray, Advocate, APL  
Shri Anand K Ganesan, Advocate, GUVNL  
Shri G.Umapathy, Advocate, Haryana Utilities

**Record of Proceedings**

At the outset, learned senior counsel for the petitioner submitted that as per the Commission's direction dated 13.4.2016, the petitioner has filed written submissions on the limited aspect of the concessions being availed at the time of the bid and its effect on the bid of the petitioner. Learned senior counsel for the petitioner further submitted that during the last hearing, the Commission had flagged the following two issues, namely (a) whether the petitioner had informed the procurers at the time of submission of bid, that the contracted capacity will be supplied from a power plant situated in SEZ? (b) The other bidders might have bid differently, had they known that concessions available to the project located in the SEZ would be required to be factored in the bid. Learned senior counsel for the petitioner further submitted as under:

- (a) The structure of RfP was such that procurers were totally neutral to the location, technology, fuel, etc. Procurers did not care about these aspects

including any advantage/disadvantage available to the bidders in terms of legal and fiscal regime. The procurers were also not concerned about the circumstances in which individual bidders were placed and were concerned only about achieving lowest levelled tariff. In fact, they expressly discouraged from offering additional information other than what was asked in the bid.

(b) GERC vide its order dated 21.10.2011 in Petition No. 1080 of 2011 had held that GUVNL approached the petitioner to lower the quoted tariff considering all the benefits, tax exemptions and incentives available to SEZ. Thereafter, the tariff was reduced and the PPA was executed by GUVNL. Therefore, GUVNL was barred by estoppel from claiming that it was not aware about the fact that the petitioner was enjoying fiscal benefits on account of its power plant being located in the SEZ area. On the contrary, GUVNL was fully aware that the plant was located in SEZ and had availed benefits attached to it.

(c) At the time of bid, no bidder was aware of the exemptions or benefits that the other bidders had availed. Other bidders also may have got concessions/exemptions for being located in a rural area in a state.

(d) 'Change in Law' is a *quid pro quo* in the competitive bidding to procure power at the lowest tariff. While the bidder takes the commercial risk and quote lowest tariff, the procurer agrees to bear the regulatory risk of compensating them for changes in law. The procurers knew that the petitioner was bound to take any exemptions while they enjoy the benefits of lowest tariff. Learned senior counsel referred to the judgment of Hon'ble Supreme Court in Sumitomo Heavy Industries Ltd vs ONGC and submitted that the principle of strict interpretation does not apply to a change in law clause in a commercial contract.

(e) The procurers are also entitled to the benefit of any change in law that reduces the bidder's cost or increases his revenues. If further exemptions are granted to the petitioner, the procurers would be entitled to such benefits in terms of lowering of tariff.

(f) From the submissions made by the respondents, it is clearly evident that neither GUVNL has contradicted the benefits available to the petitioner for being located in SEZ in its affidavit nor it comes out from the submission of the Haryana Utilities that it was mandatory on the petitioner to disclose the location at the time of the bidding.

2. Learned counsel for the Haryana Utilities submitted as under:

(a) The bidders were free to select the location of the project; and procurers were to pay tariff as per the provisions of the PPA, including Change in Law as

per the terms of the PPA only in respect of the project location selected by the bidder and the project could be established anywhere in the country.

(b) It was mandatory for the bidder to quote tariff considering such applicable duty/taxes/levies under the RfP documents, although it did not require specifying prevailing duties, taxes and levies. Therefore, it is essential to ascertain the applicability of basic custom duty on imported coal at the time of bid and to allow the change in law.

(c) Prudent check is required on admissibility of claim on account of change in law by the Commission as the petitioner has submitted that the bidder is required to inform the procurers that the power plant is situated in the SEZ area or any other area and the power plant would be entitled/not entitled to fiscal benefits.

3. Learned counsel for GUVNL submitted that it is well settled that the relief which can be claimed has to be dealt with strictly in terms of the PPA and not *de-hors* the same. For the purpose of calculation of the consequence of change in law, the petitioner is bound by the norms and parameters submitted by it and adopted for the purpose of granting the change in law relief by GERC vide its orders dated 21.10.2011 and 7.1.2013 in Petition Nos. 1080 of 2011 and 1210 of 2012.

4. After hearing the learned senior counsel for the petitioner and learned counsel for the respondents, the Commission reserved the order in the petition.

**By order of the Commission**

**Sd/-  
(T. Rout)  
Chief (Law)**