

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 131/MP/2018

Subject : Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Power Purchase Agreement dated 7.8.2007 for (i) revision in tariff in exercise of the general regulatory powers; and (ii) compensation on account of increased cost incurred by Sasan Power Limited consequent to procurer event of default.

Petitioner : Sasan Power Limited

Respondents : MPPMCL & ors.

Date of hearing : **4.6.2019**

Coram : Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member
Shri I.S.Jha, Member

Parties present : Shri Amit Kapur, Advocate, SPL
Shri Vishrov Mukherjee, Advocate, SPL
Shri Yashaswi Kant, Advocate, SPL
Shri Abhimanyu Das, SPL
Shri M.G. Ramachandran, Senior Advocate, HPPC
Ms. Ranjitha Ramachandran, Advocate, PSPCL & Rajasthan discoms
Ms. Poorva Saigal, Advocate, PSPCL & Rajasthan discoms
Ms. Anushree Bardhan, Advocate, PSPCL & HPPC
Ms. Tanya Sareen, Advocate, PSPCL & HPPC
Shri G. Umapathy, Advocate, MPPMCL
Shri Navin Kohli, MPPMCL
Shri Rajiv Srivastava, Advocate, UPPCL
Ms. Ranjana Roy Gawai, Advocate, TPDDL
Shri Chaitanya Mathur, Advocate, TPDDL
Shri Anurag Bansal, TPDDL
Ms. Shefali Sobti, TPDDL
Shri Vishal Vij, TPDDL

Record of Proceedings

During the hearing, the learned counsel for the Petitioner circulated note of arguments and mainly submitted the following:

(a) The Ministry of Coal, GOI on 2.3.2009 approved the mining plan of the project, whereby the total land requirement of development of the Moher and Moher-Amlohri extension coal block was 2084 Ha. Out of this, 1586 Ha of the land was allocated to the Petitioner for mining and 498 Ha of land located in the southern side outside the coal block was earmarked for external OB dumping and mine infrastructure. This 498 Ha of land comprises of 133 Ha of forest land, 53 Ha of Government and 312 Ha of private land.

(b) In terms of Article 3.1.2(A) of the PPA dated 7.8.2007, the Procurers are obligated to ensure that land for captive coal block i.e. Moher and Moher-Amlohri extension coal mine is made available to the Petitioner. However, the procurers have failed to ensure completion of land acquisition proceeding and to provide 414 Ha land (312 Ha for external OB dumping and 102 Ha as coal bearing land) to the Petitioner.



(c) There is no alternate land available for OB dumping at the project since it is surrounded on three sides by coal bearing land which is part of NCL mines. The Petitioner's obligation to generate and supply power is predicated upon mining and supply of coal and any event which prevents performance of an obligation amounts to force majeure. (Article 12 of the PPA and Energy watchdog judgment was referred to).

(d) The Procurers vide their various letters have categorically admitted their failure to fulfill their obligations under Article 3.1.2(A) of the PPA. Such admission is fully binding on the party that makes them and constitutes waiver of proof. The Commission may therefore treat the same as binding.

(e) The Petitioner has been facing difficulties in continuation of mining operation on account of non-availability of sufficient land for external dumping of overburden. Accordingly the Petitioner presented an optimized mitigation plan to the Procurers, wherein the internal dumping over coal bearing areas had to be started in order to sustain coal mining operation. Accordingly, the Petitioner on 13.4.2015 issued a preliminary default notice on account of Procurers' failure to fulfill their material obligation.

(f) Since the Procurers have breached the obligations in terms of the PPA, they may be directed to compensate the Petitioner for additional expenditure incurred/to be incurred due to non-availability of the sufficient OB Dump Land. Moreover, the Petitioner has undertaken all efforts to mitigate the situation arising due to non-availability of land for external OB dumping and hence the non-availability of sufficient land for OB dumping is a force majeure event in terms of Article 12 of the PPA.

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

(a) Article 2.5 of the PPA restricts the authority of the lead procurer for matters specified in schedule 12 of the PPA and hence MPPMCL is not authorized to represent all procurers with regard to all matters under the PPA.

(b) Since the Petitioner has prayed for compensation for additional capital expenditure incurred/to be incurred as a consequence of non-availability of land for OB dumping, the question of seeking relief under Article 12 of the PPA does not arise. The Haryana Utilities have not written any letter nor has admitted to the Procurers default of the obligations under the PPA.

(c) The Procurers' obligation under Article 3.1.2 (A) of the PPA is to hand over possession of the land only in respect of the Power station and does not include the coal mines (Referred to definition of project and Power Station in the PPA). Therefore, there is no obligation to hand over the possession of land for the coal blocks or any land outside the coal block.

(d) As regards coal mine area land, the Procurers were only required to ensure issuance of notice under section 9 of the Land Acquisition Act and the same was duly done. The coal block area allocated is only 1586 ha which does not include land for external OB. The Petitioner was aware of the said allocation and cannot claim that the land outside the coal block should be the obligation of Procurers.

(e) The land identified in the PPA as per Schedule IA of the PPA for 3500 acre is in respect of the Power station which has been handed over to the Petitioner. The mining plan is required to be developed by the Petitioner and there is no obligation on part of the Procurer on this count.

(f) There is no force majeure event in terms of Article 12.3 of the PPA. The mining can be done with the available external OB land or use of internal land for OB. The claim of the Petitioner that use of internal land for OB dumping is more expensive cannot be a force majeure event. The Petitioner was required to manage its affairs



within the coal block allotted and if it chooses to seek more land, the same is a commercial decision by the Petitioner and the consequences of the same cannot be passed on to the procurers.

(g) The rights and obligations of the parties are determined by the PPA which is a binding document and there cannot be any application of equity or restitution principle de hors the provisions of the PPA. (APTEL judgment dated 17.5.2018 in Nabha Power Ltd vs PSPCL in Appeal No. 283 of 2015 was referred to).

3. The learned counsel for the Respondent MPPMCL adopted the above submissions of Haryana Utilities. In addition, the learned counsel pointed out that in terms of clause 4.15 of the 'Guidelines for determination of tariff by bidding process for procurement of power by Distribution Licensees', no escalation of tariff is permitted over and above the rates proposed by the bidder/ seller in the price bid. The learned counsel submitted that the Petitioner has filed Writ Petition No. 8460/2015 before the Hon'ble High Court of Delhi against WRLDC. However, the issues raised in the Writ Petition also cover the issues raised in the present petition. He further submitted that there is no procurer event of default and the obligation of the Procurers under Article 3.1.2 A of the PPA has been fulfilled. Accordingly, the learned counsel reliefs prayed for by the Petitioner may be rejected.

4. The learned counsel for the Respondents PSPCL & Rajasthan discoms adopted the above submissions of Haryana utilities. She also submitted that the Rajasthan discoms have not addressed any letter to the Petitioner admitting the Procurers' event of default. Referring to the Commission's order dated 31.8.2017 in Petition No. 141/MP/2016 (CGPL vs GUVNL & ors), the learned counsel submitted that the obligation of the Procurers is only for the land identified in the bid documents and not open ended for meeting the land requirements chosen by the Petitioner. She also submitted that the Commission has observed that the Petitioner was required to consider the expenditure on mining at the time of submissions of bid and the same was upheld by the APTEL. (Commission's order dated 30.3.2015 in Petition No. 6/MP/2013 and APTEL judgment dated 19.4.2017 in Appeal No. 161/2015 was referred to). She however prayed for grant of time to file its written submissions in the matter.

5. The learned counsel for the Respondents TPDDL adopted the submissions of the Respondent Haryana Utilities and prayed for grant of time to file its reply/ written submissions in the matter.

6. The learned counsel for the Respondent UPPCL adopted the submission made by Haryana Utilities. In addition, the learned counsel submitted that the tariff adopted under section 63 can be modified only in accordance with the guidelines issued by the Central Govt. Accordingly, the learned counsel submitted that the Central Commission is bound by the guidelines issued under Clause 4.15 of Govt of India guidelines, 2005 read with the judgment in Energy watchdog case. He further submitted that the Ministry of Coal and the Ministry of Power may be impleaded in the matter as they are necessary parties for adjudication of disputes.

7. In response to the above, the learned counsel for the Petitioner clarified as under:

(a) The Procurers cannot plead that they were merely required to ensure the issuance of notice under section 9 of the Land Acquisition act. In terms of Article 3.1.2 A of the PPA, the Procurers had to ensure that handing over of land for the power station and issuance of notice under the said section was to be completed. However, the notification under section 9 was issued after delay of more than 3 years and 23 months from issuance of notification under section 6 of the Land Acquisition Act, thereby resulting in undue delay in possession of land by the Petitioner. The Procurers cannot take benefit of their own wrongs.

(b) As the Project is premised for captive coal blocks, the area allocated for coal block is an integral part of the Project and fundamental to its operation. The Commission in order dated 4.2.2015 in Petition No. 21/MP/2013 had held that the



coal blocks are an integral and essential part of the project. Similarly, the APTEL in its judgment dated 20.11.2018 in appeal No. 121/2015 had held that 'the definition of the project in various bidding documents including PPA, the captive coal mines allocated to the Sasan UMPP are an integral and essential part of the Project as a whole....' The term 'Power Station' in the PPA includes assets, buildings/structures etc. required for efficient and economic operation of the power generating facility and hence coal blocks are to be considered as part of Power Station.

(c) As per mining plan approved by Ministry of Coal, the Project required 312 Ha land (approx.) for dumping OB which the Procurers have failed to acquire for the Project. The land in question pertains to land specifically identified for dumping OB in terms of the approved mining plan.

(d) In terms of the PPA, each Procurer had represented and warranted to and agreed with the Seller amongst others that the agreement is enforceable against the Procurers in accordance with its terms and that the consummation of the transactions contemplated in this agreement on the part of the procurer will not violate any provision nor constitute a default etc. to which the procurer is bound which violation, default has not been waived. As per PPA, the Procurers arte to ensure the completion of the tasks namely (i) handing over the possession of land for Power Station and water intake and (ii) issuance of notice under section 9 of the Land Acquisition Act in respect of land for coal mines as applicable. Since the implementation of the said notification has been hindered and the Petitioner was unable to take possession of land, there has been a violation of representation and warranties by the Procurers.

(e) MPPMCL, the lead procurer had written letters to MoC, with copy to all Procurers, highlighting that State of MP has a share in the Project and that land acquisition being the responsibility of the Procurer requested intervention of MoC for resolving the issues of land for OB dump. Similarly, the Govt. of Rajasthan had requested for immediate transfer of land to the Petitioner for OB dump, with copies to the discoms in the said State.

(f) In terms of residuary clause of schedule 12 of the PPA, the Respondent MPPMCL, being the lead procurer is permitted to discharge duties on behalf of all other procurers, the obligations specified in the PPA which provide for joint action by all procurers.

8. At the request of the learned counsel for the parties, the Commission granted time to the parties to file written submissions, with copy to the other, on or before **5.7.2019**. Subject to this, order in the Petition was reserved.

By order of the Commission

Sd/-
(B.Sreekumar)
Dy. Chief (Law)

