

CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Petition No.235/MP/2021 with IA No. 82/2021

- Subject : Petition under Section 79(1)(f) read with Section 79(1)(a) and (b) of the Electricity Act, 2003 read with the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects, 2017 as amended from time to time seeking declaration of discharge from any obligation and liability to the Respondent under the Request for Selection No. SECI/C&P/WPD/1200MW/T7/RfS/022019 dated 22.2.2019, Letter of Award dated 19.6.2019 or otherwise.
- Date of Hearing : 23.11.2021
- Coram : Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member
- Petitioner : Betam Wind Energy Private Limited (BWEPL)
- Respondent : Solar Energy Corporation of India Limited (SECI)
- Parties Present : Shri Sajan Poovayya, Sr. Advocate, BWEPL
Shri Jafar Alam, Advocate, BWEPL
Shri M. G. Ramachandran, Sr. Advocate, SECI

Record of Proceedings

Case was called out for virtual hearing.

2. At the outset, the learned senior counsel for the Petitioner submitted that the present Petition has been filed *inter-alia* seeking discharge of the Petitioner's obligations under RfS, LOA or otherwise including return of the Performance Bank Guarantee (PBG) of Rs. 49 crore due to occurrence of various supervening events that were beyond the control of the Petitioner including frequent changes in the land allotment policy of the Government of Gujarat, delay in issuance of the No Objection Certificates by the Ministry of Defence and delay in approval of the Power Sale Agreement ('PSA') executed between SECI and UPPCL. The learned senior counsel mainly submitted the following:

(a) PSA signed on 1.10.2019 was approved by UPERC on 19.3.2021 i.e. after a delay of almost 17 months from the effective date and one month before the Scheduled Commissioning Date under the proposed PPA.

(b) During this period, the Petitioner on several occasions requested SECI to extend the various project related timelines including date of financial closure and scheduled commissioning date. However, SECI agreed to extend the date of financial closure and scheduled commissioning date for the first time



on 29.10.2021 i.e. after 24 months from the effective date under the proposed PPA. Therefore, the Petitioner is not in a position to execute the PPA.

(c) If the Petitioner is unable to sign the PPA, the maximum liability contemplated under the Clause 3.11(x) of the RfS is up to Rs. 12 crore, which can be encashed as liquidated damages not amounting to penalty. The Commission is required to adjudicate the present matter to assess the reasonableness of the said damages in line with the principles for recovery of liquidated damages laid down by the Hon'ble Supreme Court in various cases including *Maula Bux v. Union of India* [(1969) 2 SCC 554] and *Union of India v. Raman Iron Foundry* [(1974) 2 SCC 231].

(d) The Commission in its various orders has granted stay against invocation and encashment of PBG in similar cases pertaining to termination of agreements. Therefore, the Petitioner in the present case ought to be given parity in treatment with such cases.

3. The learned senior counsel for the Respondent, SECI objected to submissions of the learned senior counsel for the Petitioner and mainly submitted as under:

(a) The other developers selected pursuant to the bid process have already entered into the PPA with SECI and are on verge of completion of their projects. However, the Petitioner has failed to execute the PPA till date.

(b) The amount sought to be encashed by SECI is towards Earnest Money Deposit ('EMD') and the LoA gives express right to SECI to encash the bank guarantee for the amount equivalent to EMD in case the developer refuses to execute the PPA. Thus, SECI has proceeded to encash the bank guarantee furnished by the Petitioner as it has refused to sign the PPA.

(c) As per clause 3.11 (i) and clause 3.13 of RfS, SECI is entitled to encash the PBG available with it for Rs. 15.80 crore towards EMD of Rs. 12 crore and outstanding success fee payable in terms of the RfS.

(d) As per the judgment of Hon'ble Supreme court in the case of *Standard Chartered Bank v. Heavy Engineering Corporation Ltd. & Anr.* [(2020) 13 SCC 574], courts ought not to interfere with the invocation or encashment of bank guarantee unless there is an allegation of fraud, irretrievable injustice.

4. In rebuttal, the learned senior counsel for the Petitioner submitted that to signify its *bona fides* and without prejudice to its rights and contentions, the Petitioner will deposit Rs. 12 crore with SECI as an interim measure, pending the final determination of the captioned matter. Accordingly, he requested the Commission to direct SECI not to encash the bank guarantee of Rs. 40 crore furnished by the Petitioner.

5. After hearing the learned senior counsels for the Petitioner and SECI, the Commission admitted the Petition and directed the Respondent to file its reply by 9.12.2021 with an advance copy to the Petitioner who may file its rejoinder if any, on or before 24.12.2021. The Commission directed the Petitioner to deposit Rs. 12 crore with SECI as an interim measure, within a week. The Commission directed SECI not to take any coercive measures against the Petitioner including any steps

towards invocation and encashment of the bank guarantee furnished by the Petitioner till the next date of hearing. Accordingly, IA No. 82/2021 filed by the Petitioner seeking interim relief is disposed of.

6. The Petition shall be listed for hearing in due course for which a separate notice will be issued.

By order of the Commission

**Sd/-
(T.D. Pant)
Joint Chief (Law)**