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JUDGMENT UPDATE

REGULATORY & POLICY

Rewa Ultra Mega Solar Ltd, MP Power Management Co Ltd and West Central Railway

CERC Order dated April 25, 2021 in Petition No. 91/MP/2020

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Background facts

- The present Petition has been filed by the Petitioners which are Rewa Ultra Mega Solar Ltd (**RUMSL**), Madhya Pradesh Power Management Co Ltd (**MPPMCL**) and West Central Railway (**WCR**) for seeking certain deviations from the provisions of the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects issued by the Ministry of Power, Government of India on August 03, 2017 (**Bidding Guidelines**) under Section 63 of the Electricity Act, 2003.
- In the present case, RUMSL is solar park developer with responsibility to carry out the bid process to select suitable solar power developers to develop, operate and maintain the solar plants at the parks to be developed. MPPMCL and WCR are the procurers of the power to be generated from the said solar plants.
- For the proper and timely execution and development of the projects, Petitioners suggested following agreements to be executed between Petitioners and Solar Park Developers (**SPDs**):
  - Power Purchase Agreements (**PPAs**) with SPDs and each of the procurers and RUMSL
  - Implementation Support Agreement (**ISA**) between SPDs and RUMSL, setting out terms and conditions of use of internal evacuation infrastructure and associate facility to be constructed and commissioned by RUMSL
  - Land Use Permission Agreement (**LUPA**) with New and Renewable Energy Department, Madhya Pradesh and RUMSL for grant of approval to SPDs to use the land provided by RUMSL for the construction, operation, and maintenance of the solar projects
  - Coordination Agreement (**CA**) with the SPDs, RUMSL, and procurers for the purpose of scheduling of power between the procurers and for effective construction and operation of the solar parks to be provided by RUMSL to SPDs.
- In order to make the solar projects more viable and for obtaining competitive tariff from the bidders/SPDs during the bidding process, Petitioners have filed the present Petition under Clause 18 of the Bidding Guidelines before the Central Electricity Regulatory Commission (**CERC**), for seeking approval for deviating from certain provisions of the Bidding Guidelines issued by Ministry of Power under Section 63 of the Electricity Act, 2003.

Issue at hand

- Whether the deviations to the Bidding Guidelines as sought by the Petitioner are reasonable and tenable in terms of law?

Our viewpoint

CERC before allowing/disallowing the deviation as sought by the Petitioners to the Bidding Guidelines, has looked into the market economics and has allowed such deviations while keeping in mind the benefit of both the SPDs and procurers.

Decision of the Commission

- The Petitioners have sought following deviations from the Bidding Guidelines:

Issues	Clause of Bidding Guidelines	Deviation sought	Order of CERC
Payment Security Mechanism	**Clause 5.3.1:** Procurers as payment security mechanism provide to SPDs the following: ▪ A revolving Letter of Credit (**LC**) of an amount not less than one month's average billing from project under consideration ▪ A payment security fund which shall be suitable to support payments for at least 3 months' billing of all units tied up with such fund.	▪ MPPMCL proposed that the payment security fund may be allowed to be arranged by RUMSL in form of an overdraft/working capital facility. Further, it also proposed that Government of Madhya Pradesh may be allowed to provide state government guarantee as a security mechanism. ▪ WCR sought approval to issue 'Letter of Mandate' instead of LC, wherein Reserve Bank of India (**RBI**) will be authorizing to unconditionally debit the Indian Railways' account maintained with RBI for an amount equivalent to energy charges for 4 months' average billing from the projects upon receipt of a debit claim from the SPDs.	It observed that the deviation from Clause 5.3.1 of the Bidding Guidelines has only been sought only by WCR, whereas the MPPMCL will comply with the requirements under the Bidding Guidelines. Since 'letter of mandate' is a substitute to 'letter of credit' which will provide better security to the developers, the CERC allowed the deviation sought by WCR.
Notification of force majeure event	**Clause 5.4.4:** If performance of any party is affected due to force majeure event, the same shall notify the other party, as soon as reasonably practicable, but not later than 7 days after the affected party knew the occurrence of force majeure event.	The Petitioners suggested that the 15 days' time instead of 7 days be allowed as 7 days might not be adequate for the affected party to notify all the effects of force majeure event.	CERC has allowed the 15 days' time to notify the non-effected party, as sought by the Petitioners.
Applicability of bid responsiveness conditions to affiliates of the bidder	**Clause 7.2.2(a)(ii):** Net-worth to be considered shall be the cumulative net-worth of the bidding company or consortium together with the net worth of its affiliates that undertake to contribute the required equity funding and performance bank guarantees in case the bidder(s) fail to do so. **Clause 7.1:** Sets out various conditions about bid responsiveness which also apply on the affiliates of the bidder, including those whose net worth has not been considered towards meeting financial qualification criteria by bidder.	The Petitioners proposed that in line with Clause 7.2.2.(a)(ii) of the Bidding Guidelines, the applicability of the bid responsiveness condition under Clause 7.1 should also be limited to the bidders and only those affiliates of the bidders whose net worth has been relied upon by such bidders to meet the financial qualification criteria under the RFP.	Since the objective of Clause 7.1 is to ensure that the bidders do not get into litigation because of any of their affiliates and makes the project unsustainable, and the fact that there could be crossholdings between affiliates, corporate guarantees/personal guarantees between 'related parties' and any conduct of affiliates may jeopardize the sustainability of the project, the CERC has disallowed the deviation as sought by the Petitioners.
Inclusion of 'Epidemic, Pandemic, Quarantine, Lockdown or similar action ordered by any government authority' as Force Majeure Events	**Clause 5.4.2.1:** Defines certain events which constitutes as Force Majeure event.	Considering the difficulty faced by various developers due to the lockdown restrictions imposed by Central Government on account of current pandemic of Covid-19, the Petitioners have proposed to add 'Epidemic, Pandemic, Quarantine, Lockdown or similar action ordered by any government authority' as Force Majeure Events under the PPAs.	CERC has partially allowed the deviation sought by the Petitioners limited to 'pandemic resulting in lockdown or similar action ordered by any government authority'.

Off-take constraints	**Clause 5.5.1:** If after SCOD the plant is ready but necessary transmission infrastructure is not ready, the normative CUF of 19% or committed CUF, whichever is lower, shall be taken for purpose of calculation of generation loss. Corresponding to the generation loss, the excess generation in succeeding 3 contract years, shall be procured by procurer at the PPA tariff.	The Petitioners submitted that since the transmission system is being developed by PGCIL, therefore, for better certainty to the project developers, the Petitioners in case of delay may be allowed to compensate to SPDs in the following manner: ▪ SPDs will be compensated by providing a day-to-day extension to the SCOD ▪ SPDs will be compensated by the Procurers for the generation loss suffered ▪ SPDs will be compensated by off-take of excess generation beyond the guaranteed generation until it is fully compensated. However, in case of Indian Railways, in a given contract year, it will be obligated to offtake only excess generation up to 10% of its guaranteed generation. If SPD's generation loss is not fully compensated by Indian Railways, then Indian Railways may choose to offtake energy beyond 10% of its guaranteed generation, failing which MPPMCL will procure the same ▪ If transmission infrastructure is not ready even after long stop date, then SPDs will have a right to terminate PPAs and RUMSL shall be liable to refund all charges received from SPDs under the ISA till the termination, including the project development fee (if applicable).	CERC, after observing that the deviations is sought to provide greater certainty to investors, has allowed the deviation as sought by the Petitioners.
Bidder's affiliate	**Clause 7.2.2, 10.1 and 13:** Bidders can leverage on the net worth of their affiliates, but in so far as PPA is concerned there is a mandatory requirement for the successful bidder/project company/SPV to sign the PPA. Further, bidders are to ensure that combined shareholding of consortium members in the SPV executing the PPA does not fall below 51% at any time prior to 1st year from the COD, except with the prior approval of the Procurer(s).	The Petitioners proposed that apart from the successful bidder/project company/SPV, the successful bidder's affiliate(s), whose net worth has been relied upon for meeting the qualification criteria, should also be allowed to execute the PPA and other project contracts.	CERC, after considering the intent behind incorporating such a clause within the Bidding Guidelines, has allowed the deviation as sought by the Petitioners.
Controlling shareholding of a listed company	**Clause 13:** The successful bidder shall ensure that its shareholding in the SPV/project company shall not fall below 51% at any time prior to 1st year from COD, except with prior approval of procurer. If successful bidder itself executes PPA, then it shall ensure that its promoters shall not cede control till 1st year from COD, except with the prior approval.	Since in case of a listed company it is not possible to restrict sale and purchase of shares, making it impractical for a listed company to ensure that its promoters/shareholders do not cede control for a specified period, therefore, Petitioners have proposed that listed company shall exempted from requiring their shareholders/promoters to maintain control for lock-in period.	CERC has acknowledged that the flexibility to the Bidding Guidelines as sought by the Petitioners is already existing and no such modification is required.
Grid unavailability	**Clause 5.5.1:** If due to temporary transmission unavailability the power generated from the plant is not evacuated, then the excess generation by the SPDs equal to the generation loss shall be procured by the procurers at the PPA tariff.	On this account the Petitioners have proposed the following: ▪ Pay compensation for a period exceeding 50 generation hours in a contract year by the procurers by procuring excess generation ▪ Procuring excess generation to the extent of the generation loss at 110% of the PPA tariff in a following contract year ▪ In case the SPDs do not produce enough excess electricity, in the following contract year, then the SPDs would be compensated by the procurers for the balance generation loss at PPA tariff at the end of such contract year	CERC, after observing that the deviations is sought to provide greater certainty to investors, has allowed the deviation as sought by the Petitioners.

		▪ Risks of SPDs beyond 50 generation hours are covered.	
Event of default on account of SPD's failure to supply energy as per PPA	**Clause 5.6.1 and 5.2.1**: If the SPD fails to supply power to the procurers, it shall be SPDs event of default and SPD shall be liable to pay damages for the same. Further, if the SPD fails to supply energy equivalent of the contracted capacity, then the SPDs shall be liable to pay penalty for such shortfall, subject to a minimum penalty of 25% of the cost of such shortfall.	The Petitioners proposed to incorporate a provision that if the SPDs fail to supply energy up to their yearly minimum supply obligation, the SPDs shall be liable to pay damages. Further, Petitioners have proposed that in event SPDs failing to supply energy up to their yearly minimum supply obligation for a continuous period of 3 contract years, then the procurers shall have the option to (a) treat such failure as SPD event of default and terminate the PPA; or (b) reduce the SPD's yearly minimum supply obligation upon payment of lump-sum damages. Since the Bidding Guidelines do not provide the trigger event upon which a failure to supply power under the PPA would amount to an SPD event of default, Petitioners have proposed to treat SPD's inability to meet 50% of its minimum supply obligation in first operational year as an SPD event of default.	CERC, after observing that the intent of the proposed change is to avoid termination of the PPAs, has allowed the deviation as sought by the Petitioners.
Definition of 'control'	As per the Bidding Guidelines, the term 'control' means 'the ownership, directly or indirectly, of more than fifty percent (50%) of the voting shares of such Company or the right to appoint majority directors'. Further, the term 'Affiliate' in relation to a Company means 'a person who controls, is controlled by, or is under the common control with such Company. The expression 'control' shall mean the ownership, directly or indirectly, of more than 50% of the voting shares of such Company or right to appoint majority Directors'.	The Petitioners proposed to add the following to the definition of the Affiliates 'or the power to direct the management and policies of such Person by operation of law, contract or otherwise'.	Since the proposed change might dilute the definition of the terms, the CERC has disallowed the deviation as sought by the Petitioners.
Events of default and termination consequences	**Clause 5.6:** On event of default by SPD under the PPA, including failure to commission, supply power, assignment or novation of its rights, etc., and its failure to cure the same within the prescribed cure period, the SPDs shall be liable to pay damages equivalent to 6 months, or balance PPA period, whichever is less, of charges for its contracted capacity. Further, if the lenders are unable to substitute the defaulting SPD within the stipulated period, the Procurer are allowed to terminate the PPA and acquire the project assets for an amount equivalent to 90% of the debt due, failing which, the lenders may exercise their mortgage rights and liquidate the Project assets. In the event of procurer event of default, including non-payment of charges, the defaulting procurer shall, subject to prior consent of the SPDs, novate its part of the PPA to any third party.	**Termination in case SPDs default under the PPAs** ▪ Procurers shall be allowed to terminate the PPAs and SPDs shall pay damages to the procurer. ▪ MPPMCL shall be allowed to acquire the ownership of the project on payment of termination compensation equal to 90% of debt due. ▪ If MPPMCL chooses not to exercise its rights, then Indian Railways (**IR**) shall be allowed to acquire the ownership of the project on payment of termination compensation equal to 90% of debt due. ▪ If neither MPPMCL nor IR choose to exercise their rights, then RUMSL shall be allowed to acquire ownership of project on payment of termination compensation equal to 90% of debt due. ▪ If neither of the parties choose to acquire rights over the project, then any charges which RUMSL will be obligated to pay under CERC Open Access Regulations shall be borne by SPDs. SPD will have the right to retain the project and sell entire capacity to a third party. However, Procurers under PPAs will have first right to purchase contracted electricity from SPDs at tariff as agreed under terminated PPAs.	CERC while noting that the changes suggested by the Petitioners is to further explain the clause, the CERC allowed the deviation sought by the Petitioners.

		Termination in case the MPPMCL's/WCR's default under PPAs ▪ Subject to SPD's acceptance, IR/MPPMCL shall have the first option to get the MPPMCL/IR PPAs novated in its favour. If IR/MPPMCL refuses to exercise its option or is not acceptable to the SPDs, then MPPMCL/IR/RUMSL, shall have the option to arrange for an alternate buyer acceptable to the SPDs which is ready to offtake the entire contracted electricity. It the procurers fails to provide/arrange for an alternate buyer, then the SPD may choose to (a) require MPPMCL/IR to acquire the project on payment of termination charges equivalent to 100% of the debt due and 110% of the adjusted equity less insurance cover; or (b) retain the project without receiving termination charges. ▪ In case of termination due to MPPMC's/IR event of default, LTA Relinquishment Charges shall be borne by MPPMCL/IR. ▪ MPPMCL/IR shall be liable to pay to the SPDs damages, computed at a rate of applicable tariff for the energy quantum equivalent to the minimum supply obligation for 6 months, or balance PPA period, whichever is less.	
Extension of commissioning timelines	**Clause 14.3:** The projects which are being developed within a solar park must be commissioned within 15 months from the date of signing of the PPAs.	The Petitioners submitted that the construction of evacuation infrastructure will not get completed within 15 months and the Petitioners would 19 months from the date of execution of the PPAs to complete the evacuation facility. On this account, the Petitioners have requested to allow commissioning of the project up to 19 months instead of 15 months as provided under the guidelines.	CERC after considering the fact that the proposed are necessary to avoid uncertainty to the project, has allowed the deviation as sought by the Petitioner.
RUMSL's Additional Conditions Subsequent	**Clause 3.2.2:** In case the project site is located within a solar park, the solar power park developer must fulfil certain conditions, such as identification of land, obtaining environmental clearance, forest clearance, adoption of tariff discovered through the bid process, etc. within specified timelines.	The Petitioners have proposed to include certain additional conditions linked to critical milestones in the development of the internal evacuation infrastructure to help reduce the perceived risk of delay in availability of transmission infrastructure for the Project.	Since the proposed changes are essential to avoid any risk of delay in completion of transmission infrastructure, the Hon'ble CERC has allowed the deviation as sought by the Petitioner.
Termination due to a Non-Natural Force Majeure Event	**Clause 5.4.8.2(a):** On the occurrence of a Non-Natural Force Majeure Event, the SPDs are entitled to terminate the PPA after 180 days from the date of issuance of the notice. The procurer is required to take-over the assets of the SPDs by paying an amount equivalent to 100% debt due and 110% adjusted equity.	The Petitioners submitted that the period of 180 days is not sufficient and accordingly the Petitioners have proposed that the same shall be extended to 365 days from the date of issuance of notice.	CERC after considering the explanation provided by the Petitioners has allowed the deviation as sought by the Petitioners.

Quantum and Mechanism for Change in Law Relief	**Clause 5.7:** In case of a change in law event resulting in any adverse financial gain/loss, the SPDs shall be placed in the same financial position as it would have been if such an event would not have occurred. Further, the Appropriate Commission shall determine the quantum and mechanism for payment of compensation to the affected party.	The compensation due to any change in law event is generally allowed by the commission through one time lump-sum payment or revision of tariff. Since one time lump-sum payments make an adverse impact on the liquidity of the procurer, the Petitioner have proposed that all compensations payable to an affected party due to a change in law event would be granted through a revision in the PPA tariff, which shall be (i) the amount equivalent to the additional expenses incurred by the SPDs; and (ii) and carrying cost on the deferred recovery of such additional expenditure at a rate equivalent to the LPS.	Since the tariff determined through competitive bidding under section 63 of the Electricity Act, 2003 cannot be reopened/revised by the commission and the fact that the commission under Clause 5.7.1 of the Bidding Guidelines is obligated to determine the quantum and mechanism of compensation payable to SPDs, therefore, the quantum and mechanism of compensation payment has to be in the form of a separate/additional component. On this account, the CERC has disallowed the deviation sought by the Petitioners.