

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 56/MP/2022

Subject : Petition under Section 63 and Section 79 of the Electricity Act, 2003 read with Competitive Bidding Guidelines and Articles 11 and 13 of the Power Purchase Agreement dated 23.5.2018 executed between ReNew Wind Energy (AP2) Private Limited and Solar Energy Corporation of India Limited.

Date of Hearing : 21.3.2022

Coram : Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member

Petitioner : ReNew Wind Energy (AP2) Private Limited (RWEPL)

Respondents : Solar Energy Corporation of India Limited (SECI) and 2 Ors.

Parties Present : Shri Sajjan Poovayya, Sr. Advocate, RWEPL
Shri Vishrov Mukerjee, Advocate, REWPL
Shri Rohit Venkat, Advocate, REWPL
Shri Girik Bhalla, Advocate, REWPL
Shri Sikaner Hyaat Khan, Advocate, REWPL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Shri Ravi Nair, Advocate, SECI
Shri Shreedhar Singh, SECI
Ms. Aditee Nitnavare, SECI
Ms. Neha Singh, SECI
Shri Shubham Mishra, SECI

Record of Proceedings

Case was called out for virtual hearing.

2. Learned senior counsel for the Petitioner submitted that the present Petition has been filed, *inter-alia*, seeking discharge from the Power Purchase Agreement ('PPA') dated 23.5.2018 on account of impossibility and frustration of contract due to intervening events which have rendered the completion of its 100 MW project impossible. Learned senior counsel mainly submitted the following:

(a) Pursuant to the tariff based competitive bid process conducted by SECI for 2000 MW ISTS-connected wind power projects (Tranche-III), the Petitioner was selected as the successful bidder and was issued two Letter of Awards dated 23.2.2018 for capacity of 400 MW (split into two separate projects of 300 MW and 100 MW capacity respectively). Subsequently, the Petitioner entered into two PPAs dated 23.5.2018 with SECI for 300 MW and 100 MW projects.

(b) While the Petitioner has been able to commission its 300 MW project, the construction and commissioning of its 100 MW project has been impacted by



the force majeure events, namely, delay in allocation of land due to change in policy of Government of Gujarat and outbreak of Covid-19 & imposition of lockdown causing disruption in supply chain.

(c) As per Article 4.5.6 of the PPA, the Scheduled Commissioning Date ('SCD') of the project cannot be extended beyond 27 months from the effective date. However, the total delay owing to force majeure events in the present case is approximately 40 months which surpasses the maximum period permitted under the PPA. Further, as per Articles 4.5.3 and 13.5 of the PPA, if a force majeure event continues even after period of 9 months, either party may terminate the PPA without any liability. Accordingly, the Petitioner vide its letter dated 6.2.2022 validly terminated the PPA dated 23.5.2018 for 100 MW project.

(d) The Petitioner has prayed for restraining SECI from taking any adverse or coercive action arising out of or in relation to delays in commissioning of the project, including invocation of Performance Bank Guarantee ('PBG' or 'BG') dated 16.3.2018 during the pendency of the Petition. The said PBG is already alive and valid upto 30.11.2022.

(e) Similar interim protection has been granted by the Commission vide Record of Proceedings for the hearing dated 6.8.2020 in Petition No. 580/MP/2020 in the matter of ReNew Wind Energy (TN) Private Limited v. SECI and Ors., which involved the similar subject matter. In fact, in the said case, the Petitioner therein has sought discharge from the PPA for entire allotted capacity of 265 MW, whereas in the present case, the Petitioner has been able to commission 300 MW project despite various force majeure events and has terminated the PPA only for its 100 MW project.

3. In response to the query of the Commission as to how the conditions differed in respect of 300 MW project vis-à-vis 100 MW project since the Petitioner has been able to successfully commission the former, learned senior counsel for the Petitioner submitted that pursuant to change in the policy by Government of Gujarat for allocation of land, the Petitioner was able to implement 300 MW projects out of the available land to it. However, it could not get the requisite land for 100 MW project despite its best efforts.

4. In response, learned senior counsel for the Respondent, SECI submitted as under:

(a) The Petitioner's contention that delays in allocation of land due to change in policy of Government of Gujarat constitute force majeure is on the basis that the Petitioner ought to have been allocated the revenue land for the project. However, there was no mandate or requirement for the Petitioner to set-up the project only on the revenue land. The Petitioner was at liberty to arrange the private land for setting-up its projects. In fact, the Petitioner has set-up its 300 MW project on the private land also.

(b) The plea of sustained force majeure event is also misplaced. The Petitioner had itself sought an extension of SCD till 31.8.2021 (against the original SCD of 4.11.2019) for entire 400 MW projects, which had been allowed by SECI on the basis of Office Memorandums issued by Ministry of New and Renewable Energy, Government of India.

(c) The Petitioner has failed to place on record the correspondences exchanged between the Petitioner and SECI, wherein SECI has repeatedly stated that the clause relating to sustained force majeure event is not applicable in the present case.

(d) No ground has been made out by the Petitioner for granting any interim relief. Hon'ble Supreme Court, in catena of judgments, has held that the Bank Guarantee is an independent contract between the bank and the beneficiary, and is not qualified by the underlying transaction.

(e) In Petition No. 580/MP/2020, the Petitioner therein had not sought any extension of SCD of the project. Whereas, in the present case, the Petitioner had specifically sought for extension of SCD which was permitted by SECI. However, upon completion of the extended timeline, the Petitioner, instead of completing the project, proceeded with termination of the PPA.

5. In response to the query of the Commission regarding whether the earlier extensions in SCD allowed to the Petitioner were on the basis of force majeure, learned senior counsel for SECI replied in negative and submitted that extensions granted to the Petitioner were on the basis of the OM's issued by Ministry of New and Renewable Energy and not on the basis of the force majeure. Learned senior counsel referred to the MNRE's OM dated 22.10.2019 and submitted that the said OM does not recognize that change in land policy by State Government as force majeure event. *Per contra*, learned senior counsel for the Petitioner submitted that change in land policy allocation by Government of Gujarat has been recognized as force majeure event by MNRE.

6. In response to another query of the Commission regarding SECI having not proceeded with encashment of Performance Bank Guarantee till date since SCD of the project was 31.8.2021, learned senior counsel for SECI submitted that the provisions of the PPA permits the project developer to achieve the commercial operation of the project six months past the SCD with liquidated damages to be apportioned from the PBG and that such period of six months expired only in February, 2022. Learned senior counsel further submitted that project developer also has an option to approach the Dispute Resolution Committee ('DRC') constituted by the MNRE thereafter. However, in the present case, the Petitioner has not approached the DRC.

7. After hearing the learned senior counsel for the Petitioner and SECI, the Commission ordered as under:

(a) Admit. Issue notice to the Respondents.

(b) The Petitioner to serve copy of the Petition on the Respondents immediately, if not already served and the Respondents to file their reply, if any, by 15.4.2022 after serving copy of the same to the Petitioner, who may file its rejoinder, if any, by 29.4.2022.

(c) SECI will not take any coercive action(s) against the Petitioner including invocation of PBG till the next date of hearing.

(d) Parties to comply with the above directions within the specified timeline and no extension of time shall be granted.

8. The Petition shall be listed for hearing along with Petition No. 580/MP/2020 in due course for which separate notice will be issued.

By order of the Commission

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