

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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IA No. 44 of 2022 in CASE No. 187 of 2022

Interlocutory Application filed by M/s Avaada MH Sustainable Pvt. Ltd. in main Case No. 187 of 2022 filed by it seeking extension of the scheduled commercial operation date on account of certain force Majeure events.

Coram
I. M. Bohari, Member
Mukesh Khullar, Member

Avaada MH Sustainable Pvt. Ltd.Petitioner

V/s

Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) Respondent No.1

Maharashtra State Electricity Transmission Co. Ltd. (MSETCL) Respondent No. 2

Appearance

For the Petitioner : Adv. Deepa Chawan

For the Respondent No.1 : Adv. Ravi Prakash
: Adv. Anup Jain
: Mrs. Kavita Gharat, MSEDCL

For Respondent No.2 : Adv. Ankita Nishad
: Pandurang Sude, MSETCL

ORDER

Date: 9 January, 2023

1. M/s. Avaada MH Sustainable Pvt. Ltd. has filed Petition in Case No 187 of 2022 on 30 September, 2022 seeking extension of the Scheduled Commercial Operation Date (SCoD) for its Solar Plant of 250 MW being developed under PPA dated 10 August, 2021 on account of certain force majeure events and other related reliefs.
2. In the Case No. 187 of 2022 the Petitioner has also prayed that the Petitioner has attained the financial closure and therefore the MSEDCL shall not levy any penalty/ punitive

damages/ liquidated damages under the PPA and also prayed to issue direction (s) to MSEDCL to return the Performance Bank Guarantee of the Petitioner.

3. Thereafter, M/s. Avaada MH Sustainable Pvt. Ltd. has filed an Interlocutory Application No. 44 of 2022 in Case No. 187 of 2022, on 21 November, 2022 seeking urgent hearing in the matter in Case No. 187 of 2022.

4. **Main Prayers of Avaada MH Sustainable Pvt. Ltd. in the IA No. 44 of 2022 are as follows:**

“

a) Allow the present Application seeking urgent listing and hearing of and Application at earliest plausible date as per the convenience of this Hon'ble Commission; and / or Pass such order(s), further relief(s) in the facts and circumstances of the case as this Hon'ble Commission may deem just and equitable in favor of the Applicant. ”

5. **M/s. Avaada MH Sustainable Pvt. Ltd. in its IA has stated as under:**

5.1 The implementation of the project was affected by certain force majeure events, which are beyond the control of the Petitioner. Therefore, in the main Petition in Case No. 187 of 2022, the Petitioner is seeking for extension of SCOD as prescribed under the PPA on account of the following:

- (a) Delay by MSEDCL in execution of the Power Purchase Agreement after the Commission directed MSEDCL and the Petitioner herein to do so within two (02) weeks from 16 February, 2021.
- (b) Delay by MSETCL in granting connectivity to the Project.
- (c) Delay by MSETCL in approving Design & Scheme for transmission infrastructure.
- (d) Delay on account of Covid – 19 (Third and Fourth Wave); and
- (e) Delay on account of heavy rainfalls resulted in flood like situation at the Project site.

5.2 The Petitioner has commissioned 200 MW of the Project capacity and is in the advance stage of commissioning balance 50 MW of the Project capacity.

5.3 There is a strong apprehension that the MSEDCL might levy liquidated damages on the Petitioner or may invoke / encash the PBG or even deduct the claim raised by the Applicant under monthly invoices for delay in project.

6. The main matter in Case No. 187 of 2022 along-with the IA No. 44 of 2022 was scheduled for hearing on 13 December, 2022.

7. At the E- hearing held on 13 December 2022 wherein the main matter in Case No. 187 of 2022 along- with IA No. 44 of 2022 was heard, the Advocate for the Respondent No.2 (MSETCL) has stated that the arguing Counsel is unable to appear in the matter due to medical exigency and therefore, requested for grant of adjournment of the matter in Case

No. 187 of 2022. The Advocate for the Petitioner and the Advocate for Respondent No.1 (MSEDCL) did not oppose the request of MSETCL for adjournment. However, the Petitioner prayed for ad-interim relief of refraining MSEDCL from taking any coercive action till disposal of main Petition. Petitioner stated that MSEDCL has unilaterally amended provision of PPA relating to timeline for Financial Closure from 18 months to 12 months and may now impose penalty for delay in Financial Closure based on such revised timeline. MSEDCL opposed such grant of ad-interim relief. The Commission adjourned the main matter in Case No. 187 of 2022 and allowed Petitioner and MSEDCL to submit their written arguments (on the IA No. 44 of 2022) within three days on limited issue of the ad-interim relief.

8. Avaada MH Sustainable Pvt Ltd. in its submission dated 16 December, 2022 has stated as under:

8.1 Under Article 3(1)(ii) of the PPA it was consciously decided that the time period for achieving financial closure will be 18 months (instead of 12 months as provided in bid document). The 18 months is written both in numbers and words in the PPA.

8.2 Under the executed PPA, the FC was required to be achieved on 17 January, 2022 (i.e., 18 months from the Effective Date), which even without any extension on account of Covid-19, has been achieved by 27 December, 2021.

8.3 By considering such unilateral revised date for Financial Closure, MSEDCL may impose penal action against Petitioner.

9. MSEDCL in its submission dated 19 December, 2022 has stated as under:

9.1 In the LOA issued on 17 June, 2020 explicitly required and mandated the Petitioner to adhere to the terms and conditions of RfS, which includes the timeline qua FC & SCOD with reference to the effective date.

9.2 Merely on account of a typographical error in the PPA dated 10 August, 2021 with regard to the FC date (18 months instead of 12 months), which evidently rather admittedly was prima facie in deviation to the RfS and draft PPA cannot be relied upon.

Commission's Analysis and Ruling:

10. The Commission notes that the main Case No. 187 of 2022 has been filed by M/s. Avaada MH Sustainable Pvt. Ltd. seeking extension of the scheduled commercial operation date on account of certain force Majeure events or further relief(s) in the facts and circumstances of the case.

11. The Commission notes the submission of the Petitioner that it has strong apprehension that MSEDCL might levy liquidated damages on the Applicant or may invoke / encash the PBG or even deduct the claim raised by the Applicant under monthly invoices. Therefore, prayed

to refrain MSEDCL from taking any coercive and precipitative step / action against the Petitioner till final decision in main Petition in Case No. 187 of 2022.

12. The Commission also notes the submission of MSEDCL wherein it has contested the ad-interim relief on various issues which are the subject matter of the main Case No. 187 of 2022.

13. The Commission notes the provision regarding the Performance Bank Guarantee stipulated in the RfP as under:

“3.9

.....(v) ***If the Successful Bidder fails to achieve Financial Closure as prescribed in Clause 3.13, the MSEDCL shall encash the Performance Bank Guarantee (PBG) unless the delay is on account of delay caused due to a Force Majeure. An extension for the attainment of the financial closure can however be considered by MSEDCL, on the sole request of the Solar Power Generator, on payment of penalty of Rs.10000/- per day per MW (excluding 18% GST. If applicable). This extension will not have any impact on the Scheduled Commissioning Date (SCOD). However, such amount of penalty paid so shall be returned to the Solar Power Generator without any interest within a period of 30 days of achievement of successful commissioning provided such commissioning is within the Scheduled Commissioning Date (SCOD)....***

.....
.....

.....(x) *The PBG of the solar power generator / bidder shall be returned within 30 days of successful commissioning of their projects as per Terms of PPA, after taking into account any liquidated damages due to delays in commissioning as per Clause 3.14 of RfS and Article 3.3 of PPA.”*

14. The Commission also notes the provision for performance Bank Guarantee in the PPA executed between the Petitioner and MSEDCL as under:

“4.2.2 If the Solar Power Developer fails to achieve Financial Closure as prescribed in clause 3.13. of the RfS and Article 3.1 (ii) of the PPA, the MSEDCL shall encash the Performance Bank Guarantee (PBG) unless the delay is on account of the delay caused due to a Force Majeure.....

.....

4.2.2 MSEDCL shall release the Performance Bank Guarantee upon successful commissioning of full contracted capacity after adjusting Liquidated damages (if any) as per Article 3.3 within 30 days...”.

15. The Commission notes the Scheduled COD or Scheduled Commercial Operation Date specified in the PPA executed between the Petitioner and MSEDCL is as under:

“Scheduled COD” or “Scheduled Commercial Operation Date” means 17.10.2021 (not exceeding 15 (fifteen) months for projects being set up inside Solar Park) from the actual effective start date of PPA i.e., 17.07.2020) and 17.01.2022 (not exceeding 18 (eighteen)

months for projects being set up outside Solar park) from the actual effective start date of PPA i.e., 17.07.2020.


16. The Commission notes that the main dispute is regarding the dates of the Financial Closure and SCOD as specified in the PPA and RfS. The provisions of PPA states that the project shall be commissioned within a period of 15 (fifteen) months for projects being set up in Solar Park, and within a period of 18 (eighteen) months for projects being set up outside Solar Park from the actual effective start date of PPA i.e., 17 July, 2020. MSEDCL's argument of typographical error in writing the dates and the period in the PPA for Financial Closure needs to be decided on its merit after hearing all the parties in the main matter in Case No. 187 of 2022.
17. The Commission notes that the Petitioner has already achieved the financial closure on 27 December, 2021 which is not disputed by MSEDCL. The Commission also notes that as stated in the Petition, the project (200 MW) is already commissioned partly on 6 August, 2022 (100 MW) and 3 September, 2022 (100 MW) and remaining 50 MW was at advance stage of commissioning. It is important to note that as per above quoted provisions of the RfS and PPA, charges to be lived for delay in Financial Closure is to be refunded if project is commissioned within SCOD.
18. The FC has already been achieved and the issues regarding the extension of the SCOD is under adjudication before the Commission in the main Petition in Case No. 187 of 2022. Therefore, as per the provisions of PPA if the extension of the SCOD is allowed by the Commission in main matter, the amount of penalty will be required to be returned to the Petitioner within a period of 30 days of achievement of SCOD. Therefore, there is no urgency to impose such penalty on Petitioner especially when dispute on date of Financial Closure and SCOD is to be decided in the main matter.
19. Therefore, the Commission is inclined to accept the submission of Petitioner to Grant ad-interim relief and directs MSEDCL to refrain from taking any coercive action against the Petitioner till disposal of the Case No. 187 of 2022.
20. Hence, the following Order:

ORDER

1. **The I.A. No. 44 of 2022 in Case No. 187 of 2022 is allowed.**
2. **The Commission grants ad interim relief to the Petitioner and directs MSEDCL to refrain from taking any coercive action against the Petitioner till disposal of the Case No. 187 of 2022.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I. M. Bohari)
Member


(Abhijit Deshpande)
Secretary

