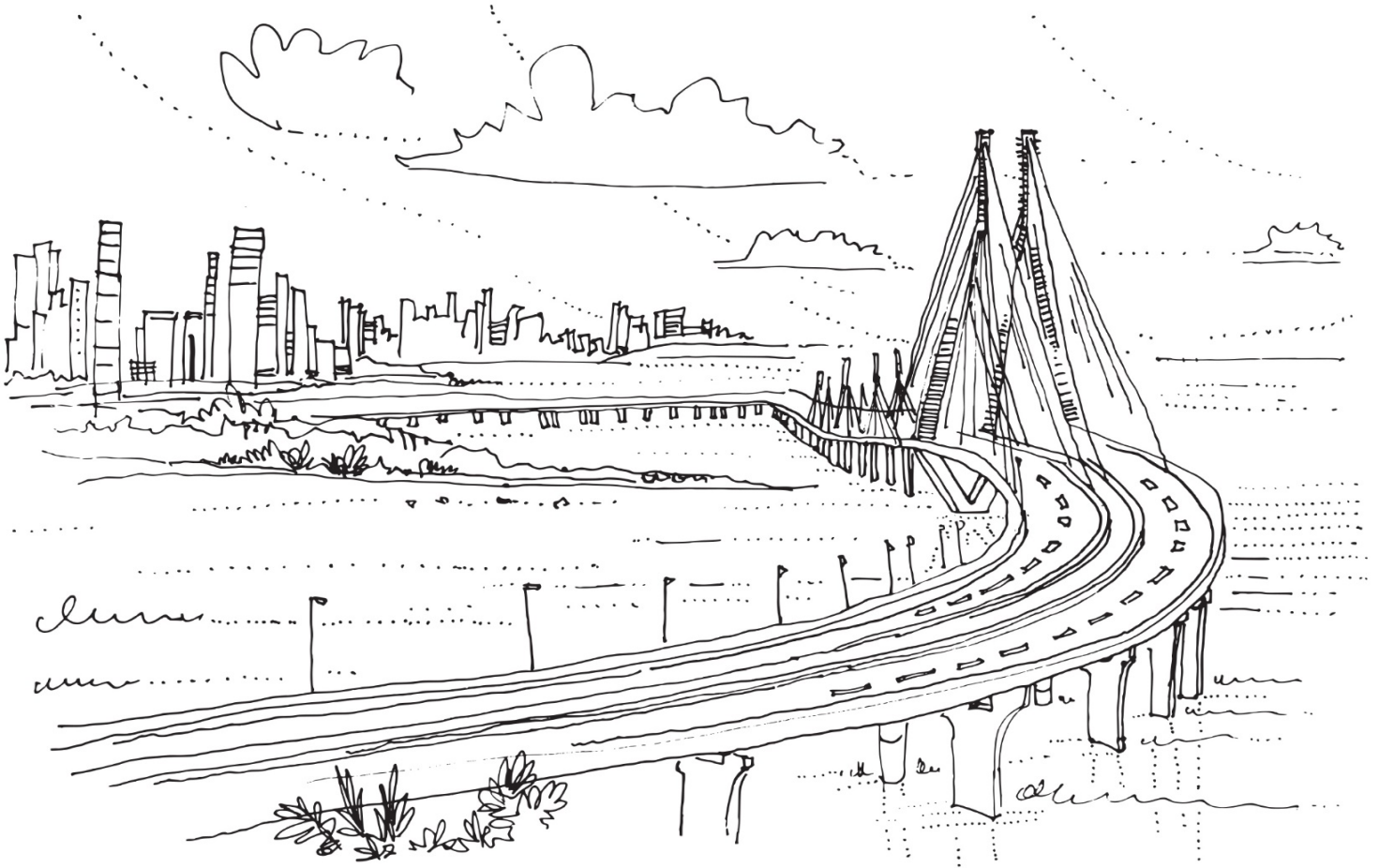




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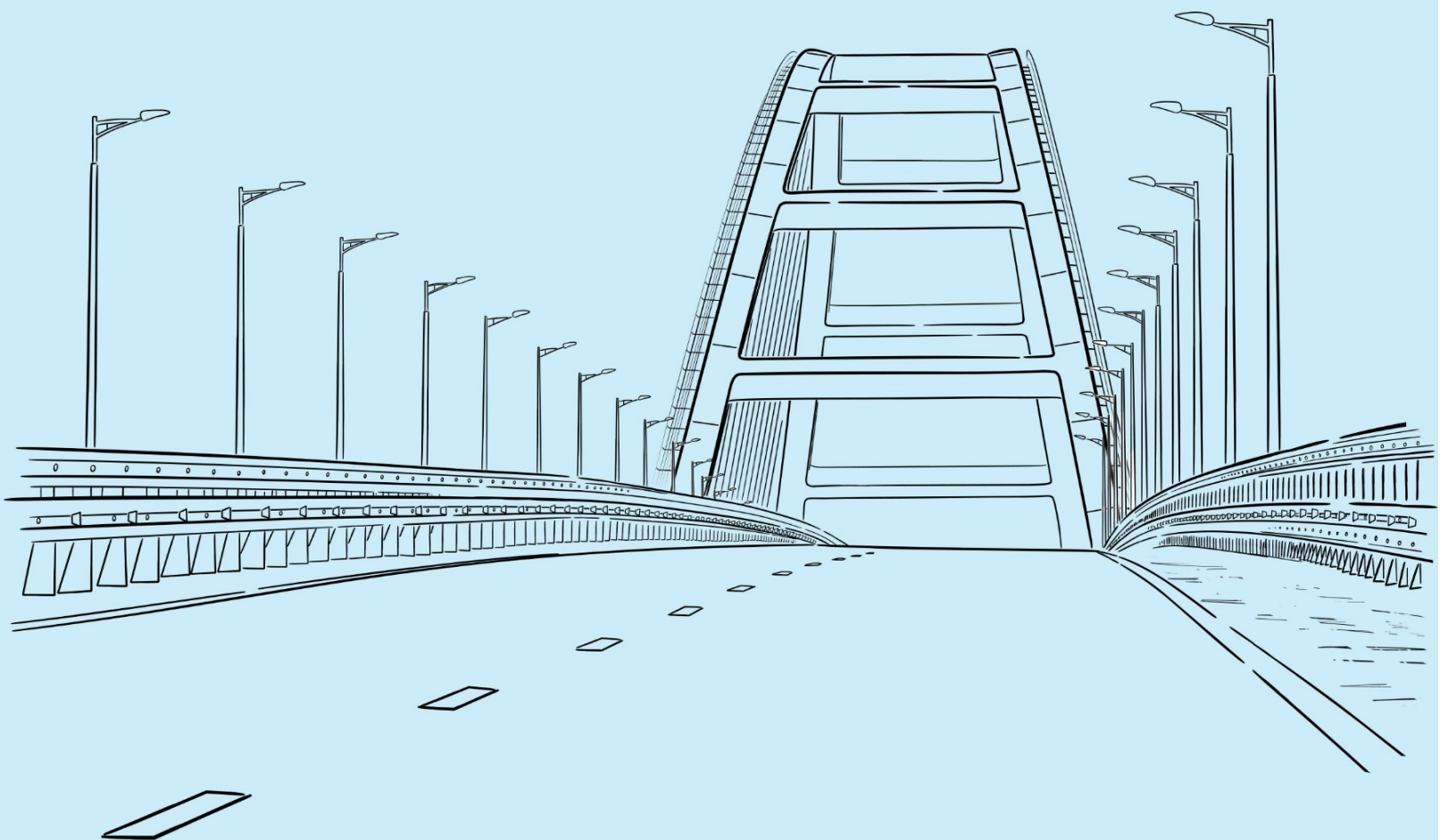


# **Infrastructure and Energy Digest**

## **Overview of Legal and Regulatory Developments**

November 2020

# INFRASTRUCTURE



## INFRASTRUCTURE

### *Change in Model Concession Agreement of Hybrid Annuity Model Projects*

#### Brief Background

The Ministry of Road Transport and Highways (**MORTH**) has, *vide* notification dated November 10, 2020 revised the model concession agreement (**MCA**) of Hybrid Annuity Model (**HAM**) projects (**2020 MCA**). The MORTH had introduced the HAM for highway projects *vide* circular dated February 9, 2016 and released the MCA for HAM projects in December 2016 (**2016 MCA**).

The key changes in the 2016 HAM MCA are as follows:

- **Equity Lock-in Period**

As per the 2016 MCA each consortium member whose technical and financial capacity was evaluated for purposes of pre-qualification and short-listing in response to the request for proposals was required to hold 26% of equity during the 'Construction Period' and 2 years thereafter. The 2-year lock in period has now been reduced to 6 months.

- **Shifting of Utilities**

As per the 2020 MCA, the Concessionaire is responsible for undertaking shifting of any utility (including electric lines, water pipes) if such utility adversely affects the execution of the 'Works' or maintenance of the project highway, in accordance with the Schedule prescribed in the MCA. The cost of shifting utilities indicated in the Schedule attached to the MCA would be payable to the Concessionaire as part of 'Bid Project Cost' whereas the cost of shifting utilities excluded from the Schedule would be considered as a 'Change of Scope'. The dismantled material/scrap of the existing utility would belong to the Concessionaire.

This is in contrast to the provisions of the 2016 MCA, wherein the utility was only required to be shifted if it caused a material adverse effect on the construction, operation or maintenance of the Project. The 2016 MCA did not prescribe a Schedule

of utilities and the cost of shifting any utility was to be borne by the National Highways Authority of India (**NHAI**) or the entity owning such utility.

- **Maintenance during Construction Period**

The 2020 MCA has made provisions for maintenance of existing highway in the event the 'Scheduled Completion Date' gets extended. If the 'Schedule Completion Date' gets extended due to delay solely attributable to the NHAI, then the Concessionaire is required to maintain the Project Highway for such extended period and would be entitled to receive reimbursement of cost of maintenance for such extended period at the prescribed rate.

- **Financial Close**

The 2020 MCA has prescribed amounts for achieving 'Financial Close'. The 'Financial Close' has to be achieved for an amount not lower than either: (a) 'Total Project Cost; or (b) 10% less than ('Estimated Project Cost' minus 40% of 'Bid Project Cost').

- **Payment during Construction Period**

The payment milestones have been increased in the 2020 MCA from 5 to 10. Consequently, the instalment payable on each milestone has been reduced from 8% (eight percent) to 4% (four percent) of the 'Bid Project Cost'.

Under the 2020 MCA, the first instalment is payable on completion of 5% physical progress, while the remaining 9 (nine) instalments are payable on completion of 10% (ten percent), 20% (twenty percent), 30% (thirty percent), 40% (forty percent), 50% (fifty percent), 60% (sixty percent), 70% (seventy percent), 80% (eighty percent) and 90% (ninety percent) physical progress.

The computation of '**Completion Cost**' has also been revised to reflect the increased payment milestones.

### ■ Interest on reducing Completion Cost

The interest payable to the Concessionaire on the reducing balance of 'Completion Cost' has also been revised by the 2020 MCA. The erstwhile interest calculated at the rate of applicable 'Bank Rate' plus 3% has been revised to an interest rate equal to average of one year Marginal Cost of funds based Lending Rate (**MCLR**) of top 5 Scheduled Commercial Banks plus 1.25%.

The Authority will declare the list of top 5 Scheduled Commercial Banks on September 01 every calendar year based on the balance sheet size as declared in their annual report. The 1-year MCLR of the top 5 Scheduled Commercial Banks will be taken at the start of every quarter.

### ■ Mobilization Advance

The rate of interest payable on 'Mobilization Advance' has also been revised in the same manner as interest payable on reducing 'Completion Cost' as mentioned above.

The 'Mobilization Advance' will now be deducted by the Authority in 8 equal instalments, which was earlier deducted in 4 equal instalments and the interest will be recovered from the 9<sup>th</sup> and 10<sup>th</sup> instalment.

### ■ Termination Payment

The termination payment payable by the NHAI on account of termination of the concession agreement due to Non-Political Event, Indirect Political Event, Concessionaire Default and Authority Default has been revised to address the increase in payment milestones.

### ■ Dispute Resolution

The dispute resolution procedure has also been revised by the 2020 MCA. Any dispute between the parties are to be resolved through mediation with the assistance of the Independent Engineer, at the first instance, failing which either party can refer the dispute to the Dispute Resolution Board (**DRB**).

If either party is unsatisfied by the decision of the DRB or if the DRB is unable to resolve the dispute, the parties are required to explore conciliation by the Conciliation Committee of Independent Experts set up by the NHAI in accordance with the prescribed procedure. This is to be done before resorting to arbitration.

The 2020 MCA has introduced the DRB as part of the dispute resolution procedure. The DRB will comprise of 3 members having experience in the field of construction and interpretation of contractual documents. One member would be selected by each party from the list maintained by the NHAI on its website. The third member would be elected from the same list by the 2 elected members. In the event the parties fail to select the members to the DRB in the prescribed time, the members would be selected by the Society for Affordable Redressal of Disputes.

- The detailed procedure of the DRB, the DRB's rules and procedures and the fees and amounts payable to the members of the DRB has been prescribed in the 2020 MCA.

**Our view:** The revisions to the HAM MCA should encourage wider participation by bidders and fast-track construction of highways. The decrease in the equity lock-in period should also attract interest from investors as a faster exit has been permitted. As for changes such as the introduction of the DRB, it remains to be seen whether the same helps achieve effective and speedy redressal of disputes. Considering that the members of the DRB are amongst experts selected by the NHAI, their independence could be called into question.

## Ministry of Finance Reduces Performance Security for Contracts

### Brief Background

Rule 171 of the General Financial Rules, 2017 mandates that performance security is required to be obtained from successful bidders that are awarded contracts so as to protect the interests of the purchasers. The performance security is mandated to be 5%-10% of the value of the contract awarded. The Government of India (GOI) received representations that there is an acute financial crunch among many commercial entities and contractors on account of the slowdown in the economy due to the pandemic, affecting the timely execution of the contracts. Further, it was represented that the ability of contractors to bid in tenders has been adversely affected and has thus reduced the competition in bidding. In response, the GOI has reduced the required performance security from 5%-10% to 3% of the value of the contract through an Office Memorandum dated November 12, 2020 (OM).

### What are the directives pursuant to the OM?

- Performance security has been reduced from the existing 5%-10% of the value of the contract to 3% of the value of the contract. However, the benefit of the reduced performance security is not to be accorded in contracts under dispute wherein arbitration/court proceedings have already been started or are contemplated.
- All tenders/contracts issued/concluded till December 31, 2021 are to provide for the reduced performance security.
- In respect of all contracts eligible for the reduction in performance security, the reduced percentage is to continue for the entire duration of the contract. There can be no subsequent increase in the percentage of the performance security even beyond December 31, 2021. Similarly, for all contracts entered into with the reduced percentage of performance security, the percentage cannot be increased even beyond December 31, 2021.
- If there are compelling circumstances that require performance security in excess of the stipulated 3%, the same it to be done only with the approval of the next higher authority to the authority competent to finalize the particular tender, or the Secretary of the Ministry/Department, whichever is lower. Specific reasons justifying the exception are to be recorded.
- This reduction is to be applicable to contracts regarding all kinds of procurement e.g. goods, consultancy, works, non-consulting services etc.

**Our view:** The reduction in the performance security certainly favors bidders and may play a factor in the increase in tender participation and bidding, if any. However, it remains to be seen how smoothly the reduction in the performance security will be implemented in existing contracts, where existing performance guarantees may need to be replaced, requiring their return from the relevant authority. Further, the ability to demand a higher percentage of performance security may result in further delays in award or commencement of works due to the additional bureaucratic clearances required.

## Adverse Effects of COVID-19 on the Aviation Sector

### Brief Background

In an order pronounced on November 27, 2020 in *Mumbai International Airport Limited vs Airports Authority India and Another*<sup>1</sup>, the High Court of Delhi (**Delhi HC**) decided on Mumbai International Airport Limited's (**MIAL**) petition seeking pre-arbitral interim relief, under Section 9 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**). MIAL seeking an injunction against the Airport Authority of India (**AAI**) from transferring AAI's annual fee.

### What were the facts of the case?

- MIAL and AAI executed an operation, management and development agreement (**OMDA**) on April 4, 2006 in relation to the operation and management of the Mumbai airport (**Airport**). As per the OMDA, MIAL was to pay the stipulated annual fee to AAI.
- As required the OMDA, an escrow account agreement was executed, among MIAL, AAI and the UTI Bank Limited on April 28, 2006. The aforesaid agreement was later, substituted by a fresh escrow agreement dated April 18, 2018 (**Escrow Agreement**) among MIAL, AAI and the State Bank of India.
- The Delhi HC observed that the Escrow Agreement and the OMDA were inextricably interlinked and that, the Escrow Agreement was merely a schedule to the OMDA.
- Till 2020, MIAL claimed to have paid the monthly annual fee promptly. However, MIAL claimed that on account of the sudden COVID-19 pandemic and resultant Government advisories and instructions, a financial impossibility arose, as far as MIAL being able to honor its obligations under the OMDA was concerned.
- Accordingly, on March 17, 2020, MIAL wrote to AAI stating that a force majeure event under Article 16.1.3, had occurred with effect from March 13, 2020. As per MIAL's communication, the force

majeure would cease only on revocation by the Government of Maharashtra, of its notification under the Epidemic Diseases Act, 1897. MIAL informed AAI that it was suspending its obligation towards the payment of the annual fee/monthly annual fee, and that it had instructed the State Bank of India, not to transfer any amount to the AAI Fee account, commencing April 2020. MIAL also requested AAI to recommend providing of financial assistance to MIAL, by the Government of India.

- Thereafter, on account of further developments owing to COVID-19, MIAL wrote to AAI on March 24, 2020 pointing out that, with the discontinuance of all international and domestic flights, without any reduction in operating expenditure of the Airport, the situation had resulted in the cash flow of MIAL turning negative. Further, MIAL stated that it had become impossible for MIAL to meet its expenses with the funds available with it. Accordingly, MIAL requested AAI to write to the State Bank of India, directing it not to transfer any amount to the AAI Fee Account, and to transfer the funds lying in the AAI Fee Account to the Surplus Account, so that the said funds could be utilized by MIAL to meet its immediate requirements, towards the payment of salaries and wages, utilities, airport maintenance expenses, etc.
- During the aforesaid period, various letters were exchanged between AAI and MIAL. In its response dated April 30, 2020, AAI permitted deferral of MIAL's obligation under the OMDA to make Monthly Annual Fee payments for a period of 3 months (i.e. April 2020 to June 2020) on account of Force Majeure event under the provisions of OMDA. At the end of the above 3-month period, the cumulative annual fee amount for the months of April, May and June 2020 (computed on actuals) was to be paid to AAI by July 15, 2020. However, MIAL contended that no monthly annual fees were payable during the period of force majeure.

<sup>1</sup> O.M.P. (I) (COMM.) 174/2020 & I.A. 5430/2020, I.A. 5467/2020 and I.A. 5468/2020



- MIAL vide letter dated May 26, 2020 to AAI, reiterated that the situation that had arisen as a consequence to the COVID-2019 pandemic satisfied all the indicia of force majeure, contemplated by Article 16.1.2 of the OMDA. The insistence, by AAI, that MIAL clear all cumulative Annual Fee liabilities not later than July 15, 2020, was contrary to the contractual stipulation. This was reiterated by MIAL, vide its letter dated June 25, 2020 and similar communication was exchanged between the parties thereafter.
- On the direction of AAI, the State Bank of India transferred an amount of INR 29 crore 7 lakhs from the Proceeds Account to the AAI Fee Account on July 7, 2020, purportedly towards the monthly annual fee payable by MIAL for the month of July 2020. MIAL was apprehensive that such pattern of payment would continue in the future, regardless of MIAL's current financial situation due to the COVID-19 pandemic.
- Accordingly, MIAL approach the Delhi HC for pre-arbitral interim relief as under the Arbitration Act, seeking an injunction against AAI from transferring any amount from the Proceeds Account to the AAI Fee Account, and to transfer moneys from the AAI Fee Account to the Surplus Account, so that the petitioner is in a position to run the airport.
- The COVID-19 pandemic, and its sequelae in the form of the various restrictions imposed by the Governmental authorities, on which MIAL relies, were clearly beyond the reasonable control of MIAL. MIAL could not, with the exercise of good industry practice or reasonable skill and care, have avoided either the pandemic, or the imposition of the restrictions and lockdown that followed thereupon. Nor could it be said that the pandemic, or the resulting restrictions and lockdowns, resulted from any negligence or misconduct of MIAL, or the failure of MIAL to perform its obligations under the OMDA. Thus, conditions of "force majeure" as set out in Article 16.1.2 of the OMDA, were satisfied.
- Payment of annual fee at the rate 38.7% of the projected Revenue for each year was, undisputedly, one of the obligations of MIAL, under the OMDA. Such annual fee was payable in 12 equal monthly instalments.
- Noting that the Delhi HC was not required, for the purpose of deciding the Section 9 application, to enter into the subtle niceties of the obligations of MIAL under the OMDA, the judge observed that MIAL would be obligated, under the OMDA, to pay monthly annual fee on the basis of its projected and billed revenue, irrespective of actual earnings therefrom. In the judge's view, it made no difference since, if MIAL is entitled to the benefit of Article 16.1.1 and 16.1.5(b) of the OMDA, MIAL would equally be entitled to suspend or excuse the performance of the said obligations, to the extent it is unable to render such performance by the event of force majeure.
- A prima facie case, in favor of MIAL, is made out even on the basis of the e-mail, dated March 30, 2020, addressed by AAI to the State Bank of India, with a copy marked to MIAL, wherein the 3 month deferral was stated to be granted on account of a force majeure event under the OMDA. As such, AAI accepted (i) the existence of force majeure, as a consequence to the COVID-19 pandemic, (ii) the fact that, as a consequence thereof, performance of the obligation, of MIAL, to pay monthly annual fee has, at the very least,

### What did the Delhi HC observe?

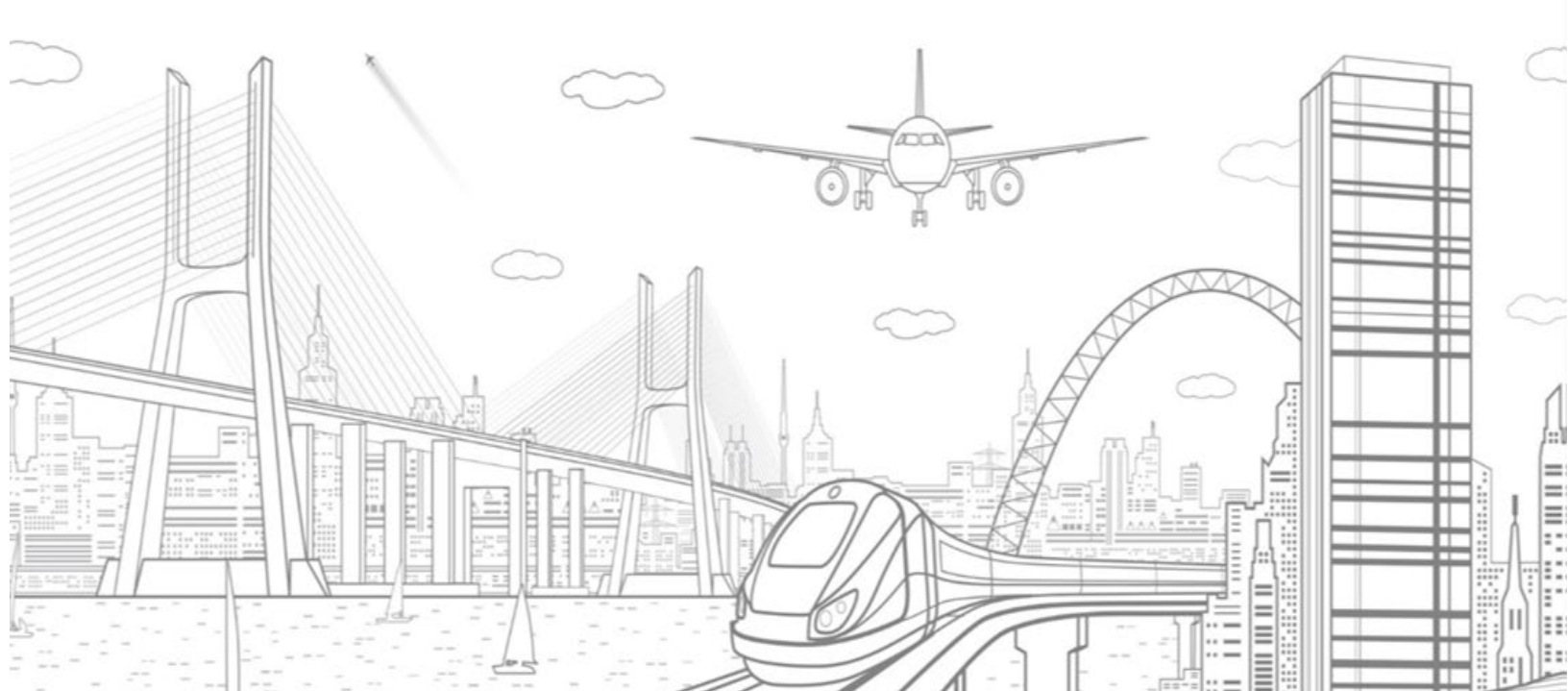
- The Delhi HC observed as follows:
  - An arbitral dispute exists, between MIAL and AAI and thus, the Delhi HC is proscribed, completely, from usurping the jurisdiction of the arbitrator or the arbitral tribunal, as the case may be.
  - The COVID-19 pandemic, as well as the resulting lockdowns, advisories and restrictions, imposed by the Government authorities would be eligible to be regarded as "**Force Majeure**" for the purposes of Article 16.1.3 of the OMDA, only to the extent they "satisfy the requirements set forth in Article 16.1.1 and Article 16.1.2". The force majeure provisions under the OMDA are extracted in the **Annexure** hereto.

been severely impacted and (iii) in view thereof, deferral of such obligations was the appropriate step to take, and was justified.

### What was the Delhi HC's decision?

- 38.7% of the actual payments, received by MIAL, from the activities connected with the OMDA and the functioning of the Airport, will be deposited in the Proceeds Account in the Escrow Account maintained by State Bank of India.
  - AAI was restrained from transferring the aforesaid amounts, lying in, or to be deposited in, the Proceeds Account to the AAI Fee Account.
  - MIAL would be entitled to utilize the amounts lying in the Proceeds Account, for meeting its expenses in connection with its obligations under the OMDA,
- MIAL and AAI were both directed to appoint 1 arbitrator each, within the prescribed period and to communicate the choice of arbitrator to each other. The 2 arbitrators, so appointed, were required to appoint the Presiding Arbitrator, on or before December 31, 2020.
  - The Delhi HC clarified that all observations and findings, contained in the judgement, are only for the purposes of disposing of MIAL's application.

**Our view:** The Delhi HC has clearly stipulated that the aforesaid decision does not represent any binding expression of opinion, by it, on the merits of the claim of MIAL, or of the opposition, by AAI, thereto. Accordingly, the aforesaid decision would not serve as a precedent. However, having said that, prima facie the Delhi HC has opined in favor of MIAL and recognized the impact of the adverse consequences of the COVID-19 pandemic, thereby opening the door for claims of financial impossibility as a ground for claiming relief, flying against the position usually taken by courts. Whilst the final say on this would be that of the arbitration tribunal's and that decision would not be publicly available, the reasoning adopted by the Delhi HC should have persuasive value in contractual disputes of a similar nature.





# ENERGY



## ENERGY

### Amendment in Equity Lock-in Period

#### Background:

The Ministry of Power (**MoP**) issued a notification dated November 5, 2020 wherein it stated that the issue of "Equity lock-in period" of the selected bidder in the existing Standard Bidding Documents (**SBDs**) for selection of Transmission Service Provider through Tariff Based Competitive Bidding Process to establish Inter-State Transmission System Projects has been examined by the MoP and the Request for Proposal (**RfP**) and Transmission Service Agreement (**TSA**) will be amended as provided in the notification.

#### What are the amendments in the RfP?

- As per the amendment, the aggregate equity share holding of the selected bidder, in the issued and paid up equity share capital of the special purpose vehicle (**SPV**) cannot be less than 51% up to a period of 1 year after commercial operations date (**COD**) of the project. Under the existing RfP, the selected bidder is required to hold 51% of the issued and paid up equity share capital of the SPV for a period of 2 years after the COD of the project and 26% for a period of 3 years thereafter.
- Further, the amendment provides that the aggregate equity shareholding of the bidding consortium or a bidding company in the issued

and paid up equity share capital of the SPV cannot be less than 51% up to a period of 1 year after the COD of the project (*as opposed to the earlier period of 2 years from the COD*). The lead member of the consortium is to have the equity shareholding at not less than 26% (twenty six percent) up to a period of 1 year after COD of the project (*as opposed to the earlier period of 5 years from the COD*).

#### What are the amendments in the TSA?

- As per the amendment, the aggregate equity share holding of the selected bidder in the issued and paid up equity share capital of the SPV will not be less than 51% up to a period of 1 year after COD of the project. Under the existing TSA, the selected bidder is required to hold 51% of the issued and paid up equity share capital of the SPV for a period of 2 years after the COD of the project and 26% for a period of 3 years thereafter.
- In case the selected bidder is a bidding consortium, the lead member is to continue to hold equity of at least 26% (twenty six percent) up to a period of 1 (one) year after COD of the project (*as opposed to the earlier period of 5 years from the COD*).

**Our view:** The aforesaid amendment would aide faster exits by bidders and encourage investments in the sector.

## RENEWABLE ENERGY

### *MNRE Issues Amendments and Clarifications to the Implementation Guidelines of the PM-KUSUM Scheme*

#### Background:

The Ministry of New and Renewable Energy (**MNRE**) had sanctioned the Pradhan Mantri Kisan Urja Suraksha evam Utthan Mahabhiyan Scheme (**Scheme**) on March 8, 2019. As per the operational guidelines for implementation of the Scheme dated July 22, 2019, the Scheme aimed to add solar and other renewable capacity by 2022 through the following components with central financial support:

- **Component A:** Installation of decentralized ground/still mounted grid-connected solar or other renewable energy-based power plants.
- **Component B:** Installation of standalone solar powered agricultural pumps.
- **Component C:** Solarization of grid-connected agricultural pumps.

The MNRE has issued amendments and clarifications to the implementation guidelines of the Scheme on November 13, 2020 (**Amendment**).

#### What are the amendments?

##### ▪ **Component A:**

- Earlier, the solar power pumps were to only be installed on barren, fallow, and/or agricultural land. Now, the solar pumps can also be installed on pasturelands and marshlands of farmers.
- The capacity of the solar power projects was earlier had a minimum limit of 500 KW. The MNRE has now directed that projects smaller than 500 KW can also be allowed by States based on techno-commercial feasibility in order to support small farmers.
- The MNRE had originally mandated a penalty to be paid by the Renewable Power Generator (**RPG**) to the state distribution companies for shortfall in solar power generation from the

minimum prescribed Capacity Utilization Factor. This penalty has now been removed.

- The selected RPG is to commission the solar power plant within 12 (twelve) months from the date of the issuance of the letter of award.

##### ▪ **Component B:**

- MNRE is to retain 33% of the eligible service charges for nationwide information, education, and communication activities.
- 50% of the eligible service charges for the sanctioned quantity may be released by MNRE to State implementation agencies after the placement of the letter of award for preparatory activities.
- For solar pumps to be set up and used by water user associations, farmer producer organizations, primary agriculture credit societies, or for cluster-based irrigation system, central financial assistance is now allowed for solar pump capacity of higher than 7.5 HP considering up to 5 HP for each individual in the group.
- The MNRE has directed that (a) manufacturers of solar PV modules or manufacturers of solar pumps or manufacturers of solar pump controllers using indigenous technology, and (b) joint ventures of any such manufacturers along with system integrators would be eligible for participation in centralized tendering.
- Quantity equivalent to 10% of the total quantity under the particular category would be allocated to the lowest bidder (L1 bidder). An option to match the L1 bidder is to be provided to all bidders falling under a limit of L1 price + 15%. If the number of bidders is less than 5 (five), the option to match is to be offered to all bidders in ascending order of the

price quoted by them until 5 (five) bidders agree to match the L1 or all bidders have been given an option to match the L1 price, whichever is earlier.

- The MNRE has directed that test certificates already available for a particular model of solar pumping system can be used by other installers provided they obtain written consent from the owner of the test certificate to use the same. In case of change in the model/type of solar module of an already tested solar pumping system the installers are to get a technical compatibility certificate for the changed solar module as provided in the testing procedure specified by the MNRE so as to avoid repetitive testing of the same model of solar pump and for faster implementation.
- Separate bid price for solar water pumping system with Universal Solar Pump Controller (USPC) is to be invited and subsidy is to be made available for these pumps according to

benchmark price of solar pumps without USPC, even if the price discovered for solar pumps without USPC are less than benchmark price.

■ **Component C:**

- MNRE is to retain 33% of the eligible service charges for nationwide information, education, and communication activities.
- 50% of the eligible service charges for the sanctioned quantity may be released by MNRE to State implementation agencies after the placement of the letter of award for preparatory activities.
- For grid-connected solar pumps used by water user associations, farmer producer organizations, primary agriculture credit societies, or for cluster-based irrigation system, central financial assistance will be allowed for solarization of pump capacity higher than 7.5 HP considering up to 5 HP for each individual in the group.

**Our view:** The Amendment to the Scheme issued by the MNRE has made the Scheme more inclusive of smaller farmers and will facilitate the faster implementation of the Scheme. The target of achieving the additional capacity in renewable energy by 2022 is laudable and the steps undertaken by the MNRE through the Amendment would be instrumental in achieving the same.

## ANNEXURE

### FORCE MAJEURE PROVISIONS UNDER THE OMDA

#### CHAPTER XVI - FORCE MAJEURE

##### 16.1 Force Majeure

16.1.1 The JVC, or AAI, as the case may be, shall be entitled to suspend or excuse performance of its respective obligations under this Agreement to the extent that AAI or JVC, as the case may be, is unable to render such performance by an event of Force Majeure (a **Force Majeure**).

16.1.2 In this Agreement, “Force Majeure” means any event or circumstance or a combination of events and circumstances, which satisfies all the following conditions:

- (a) Materially and adversely affects the performance of an obligation;
- (b) Are beyond the reasonable control of the affected Party;
- (c) Such Party could not have prevented or reasonably overcome with the exercise of Good Industry Practice or reasonable skill and care;
- (d) Do not result from the negligence or misconduct of such Party or the failure of such Party to perform its obligations hereunder; and
- (e) (Or any consequence of which), have an effect described in Article 16.1.1.

16.1.3 “Force Majeure” includes the following events and/or circumstances to the extent that they, or their consequences satisfy the requirements set forth in Article 16.1.1 and Article 16.1.2:

- (i.) War (whether declared or undeclared), invasion, armed conflict or act of foreign enemy in each case involving or directly affecting India;
- (ii.) Revolution, riot, insurrection or other civil commotion, act of terrorism or sabotage in each case within India;
- (iii.) Nuclear explosion, radioactive or chemical contamination or ionizing radiation directly affecting the Airport, unless the source or cause of the explosion, contamination, radiation or hazardous thing is brought to or near the Airport by the JVC or any affiliate of the JVC or any contractor or sub-contractor of the JVC or any such affiliate or any of their respective employees, servants or agents;
- (iv.) Strikes, working to rule, go-slows and/or lockouts which are in each case widespread, nationwide or political;
- (v.) Any effect of the natural elements, including lightning, fire, earthquake, unprecedented rains, tidal wave, flood, storm, cyclone, typhoon or tornado, within India;
- (vi.) Explosion (other than a nuclear explosion or an explosion resulting from an act of war) within India;
- (vii.) Epidemic or plague within India;
- (viii.) Aircraft accident or breakdown;
- (ix.) Any period of step-in by AAI, under Article 14.1(d) exceeding a period of three months; or
- (x.) Any event or circumstances of a nature analogous to any events set forth in paragraphs (i) to (viii) of this Article 16.1.3 above within India.



16.1.4 Notwithstanding anything contained herein, a strike by General Employees at the Airport shall be an event of Force Majeure.

16.1.5 Procedure for Force Majeure

- (a) If a Party claims relief on account of a Force Majeure event, then the Party claiming to be affected by the Force Majeure event shall, immediately on becoming aware of the Force Majeure event, give notice of and describe in detail: (i) the Force Majeure event(s) that has occurred; (ii) the obligation(s) affected as described in Article 16.1; (iii) the dates of commencement and estimated cessation of such event of Force Majeure and (iv) the manner in which the Force Majeure event(s) affect the Party's obligation(s) under this Agreement. No Party shall be able to suspend or excuse the non-performance of its obligations hereunder unless such Party has given the notice specified above.
- (b) The affected Party shall have the right to suspend the performance of the obligation(s) affected as described in Article 16.1, upon delivery of the notice of the occurrence of a Force Majeure event in accordance with subclause (a) above.
- (c) The time for performance by the affected Party of any obligation or compliance by the affected Party with any time limit affected by Force Majeure, and for the exercise of any right affected thereby, shall be extended by the period during which such Force Majeure continues and by such additional period thereafter as is necessary to enable the affected Party to achieve the level of activity prevailing before the event of Force Majeure.
- (d) The Party receiving the claim for relief under Force Majeure shall, if it wishes to dispute the claim, give a written notice of dispute to the Party making the claim within 15 days of receiving the notice of claim. If the notice of claim is not contested within 15 days as stated above, all the Parties to this Agreement shall be deemed to have accepted the validity of the claim. If any Party disputes a claim, the Parties shall follow the procedures set forth in Article 15.

16.1.6 Mitigation

The Party claiming to be affected by an event of Force Majeure shall take all reasonable steps to prevent, reduce to a minimum and mitigate the effect of such event of Force Majeure.

16.1.6 Termination Due to Force Majeure

- (a) If Force Majeure event continues for more than 365 days either Party shall have the right to terminate this Agreement by giving a notice of termination in respect thereof.
- (b) In the event of any such termination, AAI shall-
  - (i) Acquire all of JVC's rights, title and interests in and to the Transfer Assets in the manner set out in Article 19, on payment within 6 months of Transfer Date of 100% of Debt in respect of the Transfer Assets as recorded in the books of the JVC, as determined in accordance with Article 19.6.
  - (ii) Have the right but not the obligation to acquire all of JVC's rights, title and interests in and to all or any of the Non-Transfer Assets in the manner set out in Article 19, on payment within 6 (six) months of Transfer Date of Discounted Fair Value (Lower of Book Value (as recorded in the books of the JVC) and the Net Present Value) of such Non-Transfer Assets, as determined in accordance with Article 19.6."

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