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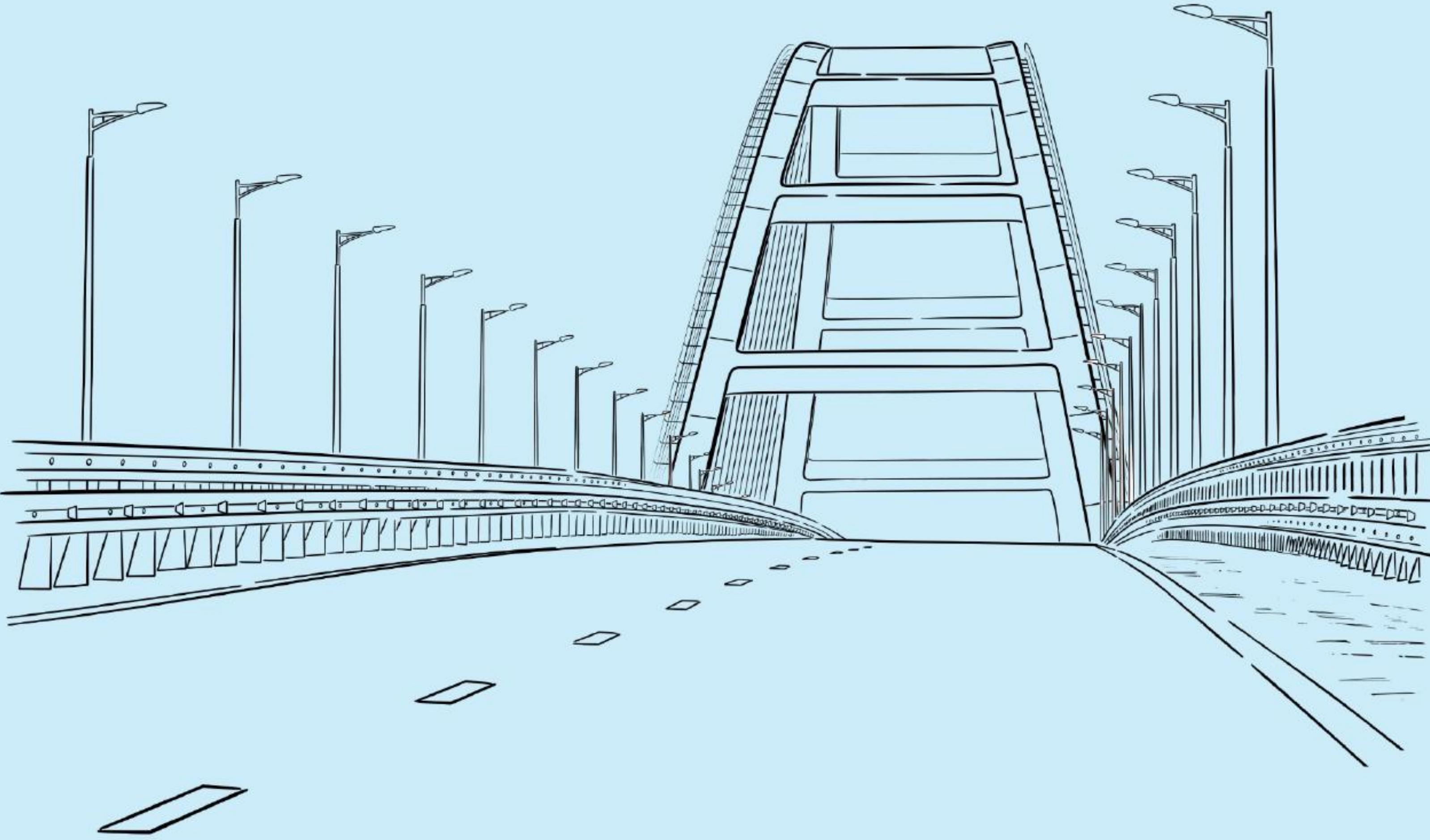
Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

October 2020

INFRASTRUCTURE



INFRASTRUCTURE

Guidelines and Standard Operating Procedure for quality control/assurance in construction of National Highways and other centrally sponsored projects

Brief Background

- On October 1, 2020, the Ministry of Road Transport and Highways (**MoRTH**) issued guidelines for quality control/assurance in construction of National Highways and other centrally sponsored projects (**MoRTH Guidelines**).
- The development and maintenance of National Highways is the responsibility of the Central Government. The construction of National Highways is carried out as per the standards and specifications laid down in various Indian Roads Congress (**IRC**) standards and MoRTH specifications for road and bridge works.
- For construction of quality national highways, it is important to ensure that the quality tests are conducted at specified frequencies. If quality control and assurance is not ensured as per provisions of MoRTH or IRC, various deficiencies to the finished product could occur.
- Accordingly, the MoRTH has stipulated the MoRTH Guidelines for efficient implementation of quality assurance systems.

What are the significant provisions of the MoRTH Guidelines?

- The roles and responsibilities of various stakeholders are as follows:
  - The quality assurance plan is required to be submitted by the Contractor for the approval of the National Highways Authority of India (**NHAI**) or the Independent Engineer. The NHAI or the Independent Engineer are also to approve the field laboratory.
  - In addition to the specifications laid down by the MoRTH, the field laboratory is to be set up with adequate equipment and facilities. Further, the field laboratory is to be adequately lit, ventilated, with proper water supply and sanitary arrangements.
  - The quality control engineer would be responsible for its proper maintenance or upkeep of the field laboratory.
  - The personnel responsible for the quality control is required to have proper qualifications, experience and expertise.
  - Whilst tests on factory manufactured materials are conducted at the manufacturer's laboratory or specialized laboratory, certain tests are to be conducted by the contractor in the field laboratory.
  - All the inspection, measuring and testing equipment is required to be calibrated with the help of NABL accredited laboratory and verified prior to their use and also at specified intervals.
  - The contractor is required to regularly calibrate and maintain all plant, equipment and machinery deployed in the project.
  - The Contractor is required to maintain all the records/documents for quality control or assurance and handover a copy of it to the NHAI or the Independent Engineer before the completion certificate is issued. The NHAI or the Independent Engineer is also required to ensure that this is done before issuance of the completion certificate.
  - The completion certificate is to be issued by the NHAI or the Independent Engineer with prior approval of the NHAI Authority, as per the contractual provisions. The NHAI or the Independent Engineer are required to ensure that a video of the completed work on the date of completion is prepared and furnished as an

authentic documentary evidence of completion of works within 15 days of completion, without which completion certificate should not be issued. Apart from furnishing a certificate of completion and all tests as per specifications in accordance with the contract, the NHAI's engineer, is also required to certify that all non-conformance reports issued during the contract have been closed after successful rectifications of defects within the completion date.

- The Superintending Engineers or Executive Engineers of the State PWD/Project Directors/Regional Officers or its officers shall devote more time for inspection of the work. They shall also ensure that certain quality tests during execution of the work and also on completion of the work are performed in their presence. The inspection report will need to be uploaded on PMIS portal.
- The Regional Officers or its officers/Superintendent Engineers or Executive Engineers of State Public Works Department/Project Directors are required to ensure that all works are being executed strictly in accordance with the requirement of the MoRTH specifications.
- All executing agencies are required to ensure that the completion certificate is approved after verifying/confirming that all works/items, including ancillary items forming part of the highway are completed in all respects and conform to the standards and specifications of the MoRTH.
- The quality control zone set up by MoRTH, may request any Regional Officer of MoRTH/NHAI/National Highways Infrastructure Development Corporation Limited/Border Roads Organization and/or officers of the Public Works Department to submit the documents related to quality control or assurance and their inspection report of any project under their jurisdiction. Based on such documents, further instructions may be issued for necessary compliance – including - non-acceptance of some of the works completed without following the due procedure as stipulated in the quality assurance plan or not meeting the quality standards as stipulated in the IRC Codes/MoRTH specifications.

Our view: In the Union Budget 2020-21, the Government allocated USD 13.14 billion to the Ministry of Road Transport and Highways. With its plans to invest USD 214.62 billion in the next five years on roads, the government is hoping that investments in this sector will rekindle growth in the economy.

The MoRTH Guidelines tie into the intent of the Government and are a stepping stone towards ensuring quality control of new highways to be constructed

Department of Heavy Industries Issues Expression of Interest for Deployment of Public Electronic Vehicle Charging Infrastructure on Highways/Expressway

Brief Background

On October 12, 2020, the Department of Heavy Industries (**DHI**) issued an Expression of Interest (**EoI**) for building and operating public electric vehicle (**EV**) charging infrastructure on highways and expressways, under Phase II of the Scheme for Faster Adoption and Manufacturing of (Hybrid &) Electric Vehicles in India (**FAME India Scheme**). The EoI has been issued inviting proposals from any government organization/public sector undertaking/(State/Central)/government distribution company/oil public sector undertaking and other similar public/private entities (**Eligible Entity(ies)**). The last date for the submission of proposals in response to the EoI is December 7, 2020.

What is the scope of the EoI?

The scope of the EoI for the installation of the EV charging infrastructure for the full stretch of any of the highways/expressways specified in the EOI is as follows:

- **EV Charging Stations**
  - Charging stations with Electric Vehicle Supply Equipment[1] (**EVSE**) and equipped with advanced features such as smart metering, cellular capabilities, and network connectivity capable of fast charging or slow charging of EVs, along with associated upstream electrical infrastructure and conforming to National or International standards in force (**EV Charging Stations**) are to be installed.
  - In order to promote fast charging at major highways/expressways, the installation of fast chargers of a minimum of 50 KW capacity; and a Bharat DC-001 charger of 15 KW capacity is to be mandatory at each location proposed by the Eligible Entities. However, the installation of Bharat AC 001 chargers of 10 KW capacity and Type 2 AC chargers of 22 KW capacity is optional depending upon the actual site requirements and business potential to ensure the best use of resources.
  - The proposed EV Charging Stations are to start their operations with the specifications as set out in the EoI (**Initial Requirements**) and are to add additional number of chargers of appropriate capacities as and when the volume of the EVs increases.
  - Eligible Entities have been advised that, where feasible, the EV Charging Stations are to be connected with a renewable energy source of required capacity, as per the guidelines issued by the Ministry of New and Renewable Energy so as to ensure grid stability and green energy for EVs. The EV Charging Stations are also to be connected to the grid to ensure round the clock operations.

- **Long Range/Heave Duty Chargers**
  - At least one charger of minimum 100 KW (200-750 V or higher) capacity, each of different specification if more than one (CCS/CHAdeMO or any fast charger as approved by the Department of Science and Technology/Bureau of Indian Standards for the aforementioned capacity) with a single connector gun is to be installed after every 3 Charging Stations.

What is the selection procedure?

- The DHI is to form a screening committee for the evaluation of proposals under the chairmanship of the Joint Secretary, DHI with members from NITI Aayog, the Ministry of Power, the Automotive Research Association of India, the Bureau of Energy Efficiency (**Screening Committee**).
- The proposals are to be evaluated in two stages as follows:
  - **Stage I**: Proposals submitted for each highway/expressway are to be evaluated on the basis of a score out of a maximum of 50 in the following way:
    - Financial status of the Eligible Entity: An Eligible Entity having a turnover of INR 50 crores to receive 100% score. An Eligible Entity having a turnover between INR 1 crore and INR 50 crores will be awarded a proportional score keeping INR 50 crores as the denominator.
    - Capability: Eligible Entities having deployed more than 20 charging stations to receive 100% score. Eligible Entities having deployed between 1 to 20 charging stations will be awarded a proportional score keeping 20 as the denominator.

    The top 3 Eligible Entities selected for each highway/expressway are to be empaneled for Stage II.
  - **Stage II:** The empaneled entities for each highway/expressway are to be given 8 weeks to

[1] Electrical equipment that is external to the EV and that provides a connection for the EV to a power source for charging.

conduct a locational assessment and submit the following information:

- Locational assessment: A detailed location assessment of the entire highway/expressway (on both sides) with GPS coordinates and a MoU in principle for land indicated in the location assessment with the land-owning entity.
- Approach and methodology: Land acquisition/renting arrangements and an execution plan to meet the timelines specified.
- Capital subsidy: The benchmark subsidy and the charging fee cap is to be indicated in the bidding document. Any bids with subsidy requirements that are more than the benchmark price are liable to be rejected.

The Eligible Entities with the lowest requirement for subsidy are to be considered for sanction for the installation of the EV Charging Stations. Post the approval of the DHI and other competent authorities the applicant entity is to be informed of the total number of EV Charging Stations sanctioned and is to begin the procurement process.

What are the incentives provided?

- The maximum demand incentive that is to be provided by the DHI under Phase II of the FAME India Scheme is 70% of the cost of the EVSE, with the cost of EVSE to be capped at 70% of the benchmark price for each EVSE (the benchmark price is to be communicated separately).
- 20% of the applicable incentive as finalized by the DHI will be released after the issue of the supply order as a mobilization advance. 80% of the incentive is to be released after the commissioning of the EVSEs as per the bid documents.

Our view: The Government of India continues to be proactive in its goals of implementing EV infrastructure under the FAME India Scheme and seems to be cognizant of the rising market for EVs and related services. The provision of EV Charging Stations and services at regular locations along highways/expressways all over India would alleviate some of the major concerns around adopting EVs as the norm, making the use of EVs a true and sustainable alternative to conventional vehicles.

Public Procurement (Preference to Make in India) to provide for Purchase Preference (linked with local content) in respect of Shipbuilding/Ship repairs

Brief Background

- The Government of India, Department for Promotion of Industry and Internal Trade (**DPIIT**) had issued the "Public Procurement (Preference to Make in India), Order 2017" (**PP Order**) for encouraging 'Make in India' and promoting manufacturing and production of goods and services in India with a view to enhancing income and employment on June 15, 2017. The PP Order was revised by the DPIIT on June 4, 2020 and September 16, 2020 (**September Order**).
- In the light of the PP Order, the Ministry of Shipping (**MoS**) had notified (**MoS Notification**) the minimum local content for shipbuilding/ship repair items on August 31, 2018.
- On October 13, 2020, the MoS issued the following directions (**MoS Revised Notification**) in supersession of the MoS Notification:
  - The MoS indicated that instead of notifying the minimum local content for various items, the minimum local content requirements would be uniform across items. This includes a minimum

of 50% for '***Class – I local supplier'*** and a minimum of 20% for '***Class – II local supplier***'.

– The definitions of various terms and provisions relating to (i) Eligibility of 'Class-I local supplier'/'Class-II local supplier'/'Non-local suppliers' for different types of procurement (ii) purchase preference (iii) exemption to small purchases (iv) margin of purchase preference would be as stated in the September Order (key points given below):

Provision	Reference
Eligibility of 'Class-I local supplier'/'Class -II local supplier'/'Non-local suppliers'	▪ Only a Class-I local supplier can bid, irrespective of the purchase value for procurement of all goods, services or works, for which the Nodal Ministry/Department has communicated that there is sufficient local capacity and local competition. ▪ Only a Class-I local supplier and a Class-II local supplier can bid in procurements undertaken by procuring entities, except where global tender enquiry has been issued. ▪ Non-local suppliers can bid along with Class-I local supplier and Class-II local suppliers in global tender enquiries. ▪ **Who is a Class-I local supplier?** Class-I local supplier is a supplier or service provider, whose goods, services or works offered for procurement, meets the minimum local content as prescribed for 'Class-I local supplier'. ▪ **Who is a Class-II local supplier?** 'Class-II local supplier' is a supplier or service provider, whose goods, services or works offered for procurement meets the minimum local content as prescribed for 'Class-II local supplier' but less than that prescribed for 'Class-I local supplier'. ▪ **Who is a Non-Local supplier?** 'Non - Local supplier' means a supplier or service provider,= whose goods, services or works offered for procurement, has local content less than that prescribed for 'Class-II local supplier'.

Provision	Reference
Purchase preference	▪ A Class-I local supplier would get purchase preference over a Class-II local supplier and a Non-local supplier in the procurements of goods or works which are divisible in nature, in the manner specified in the September Order. ▪ A Class-I local supplier would get purchase preference over Class-II local supplier and Non-local supplier in the procurements of goods or works which are not divisible in nature and in procurement of services where the bid is evaluated on price alone, in the manner specified in the September Order. ▪ A 'Class-II local supplier' would not get purchase preference in any procurement undertaken by procuring entities.

Provision	Reference
Exemption to small purchases	▪ Procurements where the estimated value to be procured is less than INR 5 lakhs are exempt from the September Order, subject to the procurement not being split for avoiding the provisions of the September Order.
Margin of purchase preference	▪ The margin of purchase preference would be 20%.

- The Directorate General of Shipping (**DGS**) has been specified to be the nodal organization to monitor the implementation of the MoS Revised Notification.
- The 'Technical Committee' constituted by the DGS would continue to function and would *inter alia* (i) carry out independent verification of self-declarations and auditors/accountants certificates on random basis in case of procurement related complaints, (ii) prescribe fees for the administrative cost of handling the above complaints and revision of fees as and when deemed necessary.

- Procuring entities have been advised to revise their tender documents after fully complying with the September Order and subsequent orders that would be issued in this regard by the DPIIT/the MoS from time to time.
- All tenders for procurement by Central Government Agencies have to be certified for compliance of the September Order by the concerned procurement officer of the Government Organization before uploading on the portal.
- All other conditions as stipulated in the September Order would apply.

Our view: The MoS Revised Notification will augment the Make in India initiative of the Government and provide clarity regarding the minimum local content requirements. It would be important that the MoS Revised Notification is implemented in a seamless manner that does not create further uncertainty.

Ministry of Shipping amends Right of First Refusal licensing conditions

Brief Background

- In furtherance of the Government's 'Make in India' policy, the MoS has reviewed the Right of First Refusal (**RoFR**) conditions for chartering of vessels, for all types of requirements, through a tender process and has issued amendments by a notification dated October 23, 2020.
- Under the existing licensing conditions under Section 406 and 407 of Merchant Shipping Act, 1958 (**MSA**), the RoFR is available to Indian flag vessels whenever charter of a vessel is undertaken through a tender process. However, in order to promote the demand of the ships built in India, priority in chartering of vessels is proposed to be given to vessels built in India, flagged in India and owned by Indians.

What was the amendment?

- For any kind of charter of a vessel undertaken through a tender process, the ROFR would be exerted in the following manner:
  - Indian built, Indian flagged and Indian owned
  - Foreign built, Indian flagged and Indian owned
  - Indian built, foreign flagged and foreign owned
- All vessels flying the Indian flag (i.e. registered in India) till the date of issue of new circular by the Director General of Shipping (**DGS**) would be deemed to be Indian built vessels and will fall under the 'Indian built, Indian flagged and Indian owned' category.
- Foreign flagged vessels permitted by DGS under Section 406 of the MSA for chartering by an Indian citizen/company/society, who/which is building a ship in an Indian shipyard for registration under the Indian flag, as a temporary substitute for the Indian ship under construction, meeting the following two conditions, will be deemed to fall under the 'Indian built, Indian flagged and Indian owned' category:
  - 25% of the contract money has been paid to the Indian shipyard and
  - 50% of the hull fabrication has been completed, as certified by a Recognized Organization.

The duration of license to such chartered vessels is to be limited to the period of building of the ship, as mentioned in the ship building contract.

- The RoFR must be applicable to all inquiries for in-charter of foreign flagged vessel within a 20% margin of purchase preference (price band) i.e. the maximum extent to which the price quoted by an Indian Company may be above the L1 for the purpose of purchase preference.

Our view: This is a welcome move which will give a long-term strategic boost to the domestic ship building and shipping industries as well as promote self-reliance of the domestic shipping industry by providing additional market access and business support to ships built in India. This will no doubt contribute towards the long-term development and economic growth of India.

Ministry of Railways issues 'Policy on Development of Goods-sheds' at small/road-side stations through private investment

Brief Background

- On October 15, 2020, the Ministry of Railways issued a Policy on Development of Goods-sheds at small/road-side stations through Private Investment (**Policy**).
- Set out below are certain key features of the Policy:
  - Private parties are allowed to develop goods wharf, loading/unloading facilities, facilities for labour (resting space with shade, drinking water, bathing facilities, etc.) approach road, covered shed and other related infrastructure. The private party is to create or develop the facilities through its own investment.
  - All developments for the proposed facility will be as per approved Railways designs and constructed to approved Railways standards and specifications.
  - The Railways cannot levy any departmental or any other charges for the construction.
  - The facilities created by the private party would be used as common user facility, and no preference or priority will be granted to the traffic of such party over the traffic of other customers.
  - The responsibility for maintenance of assets and facilities created would vest with the private party during the duration of the agreement.
- The incentives offered under the Policy are as follows:
  - A share in the Terminal Charges (**TC**) and Terminal Access Charges (**TAC**), as the case may be, for all the inward and outward traffic dealt at the goods-shed for 5 years, from the date of completion of the work. The selection of the party seeking the least share (**TC/TAC**) would be done through competitive bidding. This would be done at the divisional level.
  - The private party would have additional revenue avenues through utilization of available space for establishing small canteen/teashop, advertisements, etc.

Our view: The non-availability of adequate resources has hindered the development of existing goods-sheds. Set against this context, the Policy which enables the private sector to set up new goods shed facilities and develop existing goods sheds at a larger number of railway stations is a welcome move towards augmenting India's terminal capacity. As the facilities are required to be funded and maintained by the private parties, it remains to be seen whether the incentives granted under the Policy would be sufficient to garner interest of

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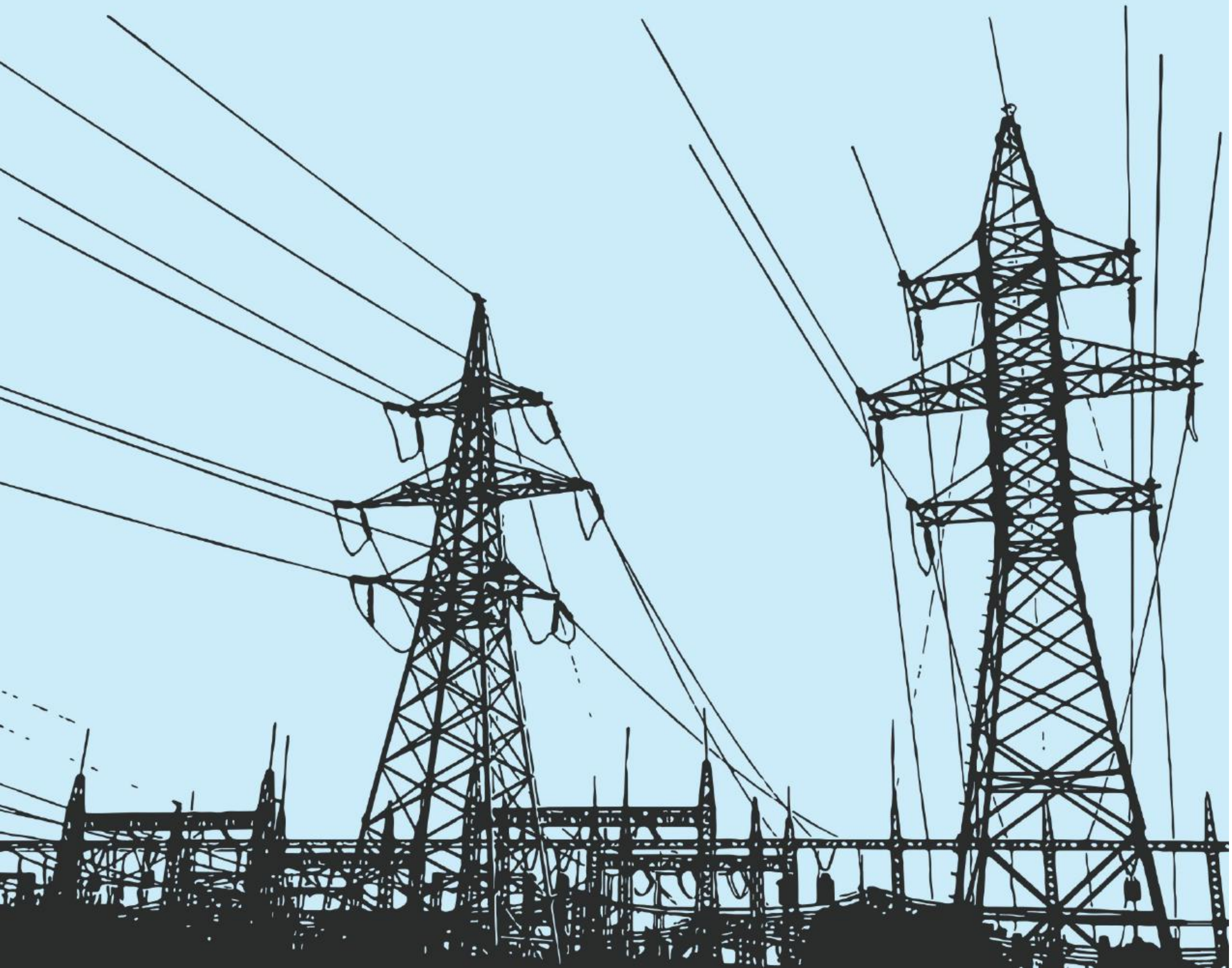

ENERGY

MERC Relaxes Renewable Purchase Obligations for Captive Power Plants

Background:

- Vide its order dated October 5, 2020, the Maharashtra Electricity Regulatory Commission (**MERC**) relaxed the Renewable Purchase Obligation (**RPO**) targets for captive power plants (**CPP**).
- The Captive Power Producers Association (**CPPA**) filed a petition before the MERC in July 2020 against the Maharashtra Energy Development Authority (**MEDA**) seeking relaxation of RPO targets for CPPs under the Maharashtra Electricity Regulatory Commission (Renewable Purchase Obligation, Its Compliance and Implementation of Renewable Energy Certificate Framework) Regulations, 2016 (**RPO Regulations 2016**) and the Ministry of Power's (**MOP**) circulars dated February 1, 2019 and October 1, 2019.

What were the contentions of the CPPA?

- The CPPA placed before the MERC the MOP's order dated February 1, 2020 which clarified that the RPO of the CPP is to be pegged at the RPO level applicable in the year in which the CPP was commissioned. The additional RPO would have to be complied with only when additional capacity is added to the CPP and there cannot be an increase in the RPO of CPPs without any additional fossil fuel capacity being added.
- The CPPA also referred to the MOP's order dated October 1, 2020 which clarified that the RPO for CPPs commissioned before April 1, 2016 would be at the level mandated by the appropriate commission for financial year 2015-16 For CPPs commissioned from April 1, 2016 onwards, the RPO level as mandated by the appropriate commission or Ministry of Power, whichever is higher, for the year of commissioning of the CPP would be applicable. .
- Further, a reference was made to the Maharashtra Electricity Regulatory Commission (Renewable Purchase Obligation, Its Compliance and Implementation of Renewable Energy Certificate Framework) Regulation, 2019 (**RPO Regulations 2019**) published by the MERC on December 27, 2019 which takes into account the aforementioned orders of the MOP. The RPO Regulations 2019 specifically provides that the composite RPO target for CPPs commissioned before April 1, 2016 would be capped at 9%. However, as the aforesaid provision was implemented with effect from April 1, 2020, the CPPA contended that similar provisions ought to be incorporated in the RPO Regulations 2016.

What were MERC's views?

- The MERC considered previous orders wherein issues regarding capping of the RPO on CPPs was raised in the case of verification of compliance of RPO by Maharashtra State Electricity Distribution Company Limited. In such orders, it was noted that the MERC will initiate the next proceedings of RPO compliance once the consolidated data of OA consumers and CPP users is received from MEDA. It was further stated that any impact of MOP's clarification could be dealt with during proceedings of RPO compliance of OA consumers and CPP users or through amendment of regulations as deemed appropriate at that time. The MERC noted that, due to various reasons, the proceedings were not initiated.
- The MERC also noted the that as per the existing RPO targets notified for CPPs under RPO Regulations 2016, the CPPs must comply with the composite RPO targets of 11% to 15% from FY 2016-17 to FY 2019-20 respectively. Whereas, as per the RPO Regulations 2019, for the CPPs commissioned before April 1, 2016, the composite RPO target is fixed at 9% from FY 2020-21 to FY 2024-25. The MERC observed that this creates a situation wherein RPO targets for past period (under the RPO Regulations 2016) are more than

present or future RPO targets (under RPO Regulations 2019) and that such a situation is not as per normal circumstances wherein the RPO target gradually increases over the period.

- Thus, in consideration of the above, the MERC ruled that the composite RPO targets for the CPPs commissioned before April 1, 2016 are to be 9% for the operating period of the RPO Regulations 2016. In case of augmentation of the capacity of the CPP, the RPO target would be the RPO applicable to the year in which the capacity was augmented.
- Further, the MERC held that the composite RPO target for projects commissioned on or after April 1, 2016 would be equal to the target applicable for the year in which project is commissioned, for the operating period of RPO Regulations 2016 onwards.
- The MERC also considered the request of MEDA to provide bifurcation of the composite target of 9% in terms of solar and non-solar sources. In response, the MERC held that the for the projects commissioned before April 1, 2016, the solar and non-solar targets shall be 0.5% and 8.5% respectively, subject to the provisions for cross-over of one source to another, as provided in the RPO Regulations 2016 and RPO Regulations 2019.

Our view: The order of the MERC provides a much-needed clarification regarding the anomaly created in RPO compliance due to the RPO Regulations 2016, the orders of the MoP and the RPO Regulations 2019. The clarification would help provide certainty to CPP producers as regards their RPO obligations over the years.

Guidelines for Tariff Based Competitive Bidding Process for procurement of power from Grid Connected Wind Solar Hybrid Projects

Background:

- The Government had issued Wind-Solar Hybrid Policy dated May 14, 2018 with an objective to provide a framework for promotion of large grid connected Wind-Solar PV hybrid system for optimal and efficient utilization of transmission infrastructure and land, reducing the variability in renewable power generation and achieving better grid stability.
- Subsequently, a scheme for setting-up of 2500 MW wind-solar hybrid power projects was sanctioned on May 25, 2018 for the procurement of hybrid power at a tariff discovered through transparent process of bidding by Solar Energy Corporation of India (**SECI**).
- In order to ensure availability of renewable energy to DISCOMs at competitive rates, the Ministry of New and Renewable Energy (**MNRE**) has issued Guidelines for procurement of wind- solar hybrid power through Tariff Based Competitive Bidding Process (**Guidelines**) dated October 14, 2020.

What is the objective of the Guidelines?

- The objective is to provide a framework for procurement of electricity from ISTS grid connected wind-solar hybrid power projects (**Hybrid Power Project**) through a transparent process of bidding.

What are the main provisions of the Guidelines?

- The individual minimum size of project allowed is 50 MW at one site and a single bidder cannot bid for less than 50 MW.
- The rated power capacity of one resource (wind or solar) is required to be at least 33% of the total contracted capacity.
- The SECI would be the nodal agency for implementation of these Guidelines. The selection

of the Hybrid Power Projects will be through a transparent e-bidding process followed by e-reverse auction.

- The solar and wind projects can be located at same or different locations.
- The Guidelines permit storage to be added to the Hybrid Power Project.
- The power procured from the project can be used for fulfilment of solar RPO and non-solar RPO in the proportion of rated capacity of solar and wind power in the plant respectively.
- Unless otherwise indicated, the provisions of the Guidelines would be binding on both the procurer and the SECI.
- The Intermediary Procurer, i.e. SECI, is required to enter into a Power Purchase Agreement (PPA) with the Hybrid Power Generator(s) and also enter into a Power Sale Agreement (PSA) with the distribution licensee(s)/consumer(s). The PSA is to contain the relevant provisions of the PPA on a back to back basis. If SECI is unable to enter into a PSA to sell power from projects awarded to distribution licensee(s) or bulk consumers within 6 months from issue of letter of award, the projects would be cancelled.
- The duration of the PPA period cannot be less than 25 years from the Scheduled Commissioning Date.
- SECI has been authorized to charge a trading margin of seven paise/kWh from the buying entity/Procurer for purchase and sale of the hybrid power.
- The bidders may avail fiscal and financial incentives available for such projects as per prevailing conditions and rules, and the same may be disclosed by the SECI in the Request for Selection document.

What will be the role of SECI and State Nodal Agencies?

- The objective is to provide a framework for procurement of electricity from ISTS grid connected wind-solar hybrid power projects (**Hybrid Power Project**) through a transparent process of bidding.
- The SECI would conduct the e-bidding process, followed by e-reverse auction for eligible bidders and develop a suitable mechanism for monitoring the performance/commissioning of the projects.
- The State Nodal Agencies (**SNAs**) appointed by the respective State Governments are to provide the necessary support to facilitate the required approvals and sanctions in a time bound manner so as to achieve commissioning of the projects within the scheduled timeline.
- If any difficulty arises in giving effect to any provision or the interpretation or modification of the Guidelines, MNRE is empowered to do the same, with the approval of the minister of MNRE. The decision will be binding on all the parties concerned.

Our view: The Guidelines will help promote competitive procurement of electricity from grid connected Hybrid Power Project by distribution licensees and protect the consumer interests. It will help facilitate transparency and fairness in procurement processes and will provide a risk-sharing framework between various stakeholders, involved in the wind solar hybrid power procurement, thereby encouraging investments, enhanced bankability of the projects and profitability for the investors.

UPERC's order penalizing solar developer for non-compliance with previous order

Background:

- On October 16, 2020, the Uttar Pradesh Electricity Regulatory Commission (**UPERC**) passed an order in a petition (Petition) filed by the U.P. Power Corporation Limited (Petitioner) seeking appropriate action against Pinnacle Renewable Energy Private Limited (Respondent), a solar developer, for non-compliance with an order dated March 5, 2019 of the UPERC (Previous Order).
- The Respondent had previously sought extension of time for setting up a 5 MW solar photovoltaic power project (Power Project) on the grounds that:
  - The procurer was under an obligation to put up an evacuation system at the cost of the Respondent, which had not been done,
  - The temporary connectivity from 33 KV Kanduni sub-station was not provided, and
  - The Respondent faced other problems in setting up of the plant.
- Taking into consideration the status of the Power Project and the willingness of the Respondent, the UPERC had, in its Previous Order:
  - Allowed the Respondent to set up the Power Project by April 15, 2019 subject to the imposition of liquidated damages under the power purchase agreement,
  - Directed the Petitioner to provide connectivity to the Respondent from 33 KV Kanduni substation on payment of cost of bay within the timelines prescribed under the Previous Order,
  - Directed the Respondent to deposit the cost of laying the 132 KV transmission line to the Petitioner within the timelines prescribed under the Previous Order, and
  - Clarified that no further extension would be granted.
- Alleging that the Respondent had not complied with the Previous Order and noting that it had challenged the same before the Appellate Tribunal for Electricity (**APTEL**), the Petitioner approached the UPERC to summon the Respondent and punish them under the relevant provisions of the Electricity Act, 2003 for deliberately and willfully flouting the orders passed by the UPERC.

What was the observation of the UPERC?

Whilst considering the petition of the Petitioner, the UPERC, after relying on orders passed by APTEL on May 3, 2019 and May 22, 2019, noted as follows:

- The question of setting up a power evacuation system would arise only if the Respondent had completed the setting up of solar plant in full, and
- Temporary connectivity had been provided to the solar power plant on May 23, 2019. However, neither the current status of the Power Project nor the status of compliance with UPERC's directives had been placed on record by the Respondent.

What was the decision of the UPERC?

The UPERC directed the Respondent to

- Show cause within 4 weeks as to why appropriate action should not be taken against it for non-compliance of the Previous Order; and
- Pay penalty of up to INR 1 lakh/an additional penalty for non-compliance.

Our view: The order of the UPERC highlights the fact that non-compliance with orders of state commissions would not be dealt with leniently by such commissions. Further, the order also clarifies that only once a power plant has been set up would issues regarding generation and evacuation of power from the same be relevant. Accordingly, the developer would not be able to claim reliefs on account of breaches by the counterparties unless they have themselves fulfilled their relevant obligations under the power purchase agreement.

MNRE Issues Draft Policy Framework for Decentralized Renewable Energy Livelihood Applications in Rural Areas

Background:

On October 19, 2020, the MNRE issued a draft policy framework for the development and promotion of Decentralized Renewable Energy (**DRE**) livelihood applications in rural areas (**Draft DRE Policy**). The MNRE has proposed the Draft DRE Policy in order to provide a conducive environment for the development and large-scale adoption of such applications. DRE livelihood applications are applications powered by renewable energy, which are used for earning livelihoods directly. Examples of such applications are solar dryers, solar powered cold storages/chillers, solar charkhas or which help in earning livelihoods such as solar lighting systems.

What are the features of the OM?

The Draft DRE Policy notes that there are successful pilots and business models of DRE livelihood applications in agriculture, agro-processing, dairy, poultry, fisheries, tailoring and other industries. Such applications have been tested at the field level and have the potential to be replicated in large quantities.

In light of the above, the MNRE has indicated that there is a need to: (a) scale up the currently available DRE livelihood applications in rural areas; and (b) explore the development of new DRE livelihood applications in rural areas.

The MNRE also intends to integrate DRE livelihood applications with other schemes for rural development implemented by various Ministries in order to promote the use of the applications. SNAs for renewable energy having expertise in the renewable energy sector are to coordinate with implementing agencies under the Draft DRE Policy to provide technical support for DRE livelihood applications in rural areas. Alternatively, SNAs could be appointed as implementing agencies as per the Draft DRE Policy.

Background:

The following interventions have been proposed:

- To enable a market – oriented framework to attract private sector participants for the development and deployment of DRE livelihood applications;
- To provide easy access to end user finance for DRE livelihood applications;
- Introduction of standards, stringent monitoring and evaluations frameworks;
- Skill development for the strengthening of the service infrastructure at the local level;
- Encouragement of innovation and research and development in efficient and cost-effective DRE livelihood applications.

What are the steps proposed to implement the Draft DRE Policy?

The following steps have been proposed:

- **Assessment of Demand:** The possibilities or potential of deployment of DRE livelihood applications across sectors of the rural economy and regions are to be assessed in order to map the needs of the beneficiaries with the appropriate DRE livelihood applications. The MNRE is to develop a list of DRE livelihood applications in

consultation with stakeholders, which is to be updated regularly.

- **Research, Development, and Standardization:** Institutions of the MNRE, as well as other Ministries at the Central level and institutions at the State level are to help in the development of new devices and applications for the rural economy. In addition to the governmental efforts, the private sector, technology incubation centers, bilateral and multilateral agencies and NGOs are to participate in the research and development activities. In order to test innovative solutions on ground, grassroot organizations that lead up to prototyping and demonstration projects will also be involved.
- **Pilot and Upscaling:** Pilots are to be taken up across various industries and sectors in line with the guidelines issued by the MNRE for innovative solar pumps and other schemes.
- **Access to Finance:** It has been indicated that the MNRE would pursue financial institutions for credit facilitation.
- **Skill Development and Capacity Building:** The MNRE is to facilitate the development and implementation of skills and training programs for DRE livelihood applications with the Skill Council for Green Jobs and IITs for the promotion of rural development; and the National Institute for Rural Development and other organizations of stakeholder Ministries/Departments of the Government of India. Additionally, existing community level institutional platforms are to be mobilized to build capacity of potential users/buyers to boost the adoption of the DRE technologies.
- **Public Information and Awareness:** The Central and the State Governments, Ministries/Departments are to take up public awareness campaigns to push the adoption of DRE livelihood applications.
- **Programmes of various Ministries/Departments:** It is proposed that opportunities for DRE livelihood applications under schemes of various Ministries and Departments would be identified and exploited in order to augment benefits to rural entrepreneurs and beneficiaries.

Our view: The successful application of the Draft DRE Policy may see the development of grassroot level businesses and employment opportunities at the rural levels. With the increasing demand for electricity and high burden on State distribution companies, the self-sustaining nature of these applications appears to be a much-needed solution to the power needs of rural areas and regions. Collective efforts would be required by various agencies to identify, develop and promote appropriate DRE livelihood applications through multi-disciplinary research and innovation.

Judgement of the National Company Law Appellate Tribunal on Termination of Power Purchase Agreements during Corporate Insolvency Resolution Process

Background:

In an order dated October 20, 2020, the National Company Law Appellate Tribunal (**NCLAT**) opined on the validity of termination of PPAs during the corporate insolvency resolution process in the matter of *Gujarat Urja Vikas Nigam Limited vs. Yes Bank Limited and Mr. Savan Godiawala*[2].

[2] Company Appeal (AT) (Insolvency) No. 601 of 2020 (Arising out of Impugned Order dated May 6, 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Hyderabad Bench, in Company Petition No (IB) No. 111/07/HBD/2017)

What were the facts of the case?

- The National Company Law Tribunal (**NCLT**) had admitted an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**IBC**) filed by IDBI Bank Limited against Lanco Infratech Limited (**Corporate Debtor**) Savan Godiawala as the liquidator (**Liquidator**).
- In its application before the NCLT, Yes Bank Limited (**YBL**) averred that the Corporate Debtor had availed a loan of INR 63,50,00,000 from YBL and had created an exclusive charge over certain assets (including the moveable and immoveable assets pertaining to a 5 MW grid connected solar photovoltaic power generating plant situated at Bhadrada Village, Sami Tehsil, Patan District, Gujarat (**Solar Project**)).
- Pursuant to the NCLT's order appointing the Liquidator, YBL apprised the Liquidator regarding realization of its secured asset as per the provisions of the IBC. Thereafter, YBL initiated proceedings and took possession of the secured asset under Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. It was indicated that the Solar Project was functioning and supplying power to Gujarat Urja Vikas Nigam Limited (**GUVNL**) in accordance with a PPA dated April 29, 2010 between the Corporate Debtor and GUVNL (**GUVNL PPA**).
- In its application, YBL also averred that GUVNL had issued a default notice under the GUVNL PPA due to initiation of liquidation proceedings against the Corporate Debtor[3]. Whilst YBL requested GUVNL to not terminate the GUVNL PPA, GUVNL issued a subsequent notice and terminated the GUVNL PPA.
- Accordingly, YBL contended before the NCLT as follows:
  - The GUVNL PPA was terminated by GUVNL without considering the fact that the secured asset is an independent, viable power generating asset;
  - If the GUVNL PPA is allowed to be terminated, it will be an obstacle for the secured creditors in exercising their rights under Section 52(1)(b) of the IBC;
  - GUVNL was posing a hindrance in the sale of the secured asset by the terminating the PPA with *mala fide* intention as the Corporate Debtor had not defaulted on the supply of solar power as required under the GUVNL PPA despite initiation of the corporate insolvency resolution process;
  - GUVNL should not be allowed to take undue advantage of the standard contractual provision of the PPA as it imposes a hindrance in the maximization of the value of the asset and that the fundamental aim of the IBC is to resolve the insolvency of the corporate debtor while securing the financial interest of all the stakeholders and simultaneously taking all necessary steps for maximizing the value of the assets of the Corporate Debtor.
- GUVNL contended as follows:
  - The Gujarat Electricity Regulatory Commission would be the appropriate forum to adjudicate all issues under the PPA and the jurisdiction under the IBC would be limited to matters specified under Section 14 of the IBC;
  - the GUVNL PPA provides for termination on account of the Corporate Debtor's default and empowers the GUVNL to terminate the GUVNL PPA;
  - GUVNL was within its right to issue the termination notice for the GUVNL PPA;

[3] Clause 9.2.1(e) of the GUVNL PPA stipulated as follows: "*If the Power Producer becomes voluntarily or involuntarily the subject of proceeding under any bankruptcy or insolvency laws or goes into liquidation or dissolution or has a receiver appointed over it or liquidator is appointed, pursuant to law, except where such dissolution of the Power producer is for the purpose of a merger, consolidated or reorganization and where the resulting entity has the financial standing to perform its obligations under the Agreement and credit worthiness similar to the Power producer and expressly assumes of obligations under the agreement and is in a position to perform them.*"

  - The Liquidator was only liquidating the assets of the Corporate Debtor and was not taking action to continue the business of the Corporate Debtor and that the objective of maximization of value of the assets of the Corporate Debtor does not imply that contracts entered into by the Corporate Debtor be necessarily continued;
  - GUVNL cannot be forced to continue the contract for the benefit of YBL.
- The NCLT passed an order dated May 6, 2020 setting aside the termination notice sent by GUVNL. GUVNL appealed the NCLT order before the NCLAT.

What were the main issues before the NCLAT?

- Whether the moratorium declared under Section 14 of IBC applies to the GUVNL PPA along with other immovable and moveable properties of the Corporate Debtor?
- Whether the contractual provisions of the GUVNL PPA permit either of the contracting parties to terminate the GUVNL PPA in view of the liquidation process of the corporate debtor which is underway under IBC?

What did the NCLAT observe?

- The NCLAT observed as follows:
  - Section 14.1 (b) of the IBC prohibits transferring, encumbering, alienating or disposing off by the corporate debtor of any of its assets or any legal right and beneficial interest therein. As GUVNL wanted to terminate the GUVNL PPA, which is in the nature of beneficial interest of the Corporate Debtor in the Solar Project, this would have a direct bearing on the assets of the Corporate Debtor.
  - GUVNL has relied upon Clause 9.2.1(e) to terminate the GUVNL PPA. However, it noted the same sub-clause provides an exception to the event of default if such dissolution of the power producer is for the purpose of a merger, consolidation or reorganization and where the resulting entity has the financial standing to perform its obligations under the GUVNL PPA and creditworthiness similar to the power producer and which expressly assumes of obligations under the agreement and is in a position to perform them. Hence, this exception provides saving of the GUVNL PPA when some other entity is able to take over the responsibility of the defaulting power producer.
  - There is no breach of contract on the part of the Corporate Debtor in supply of solar power.
  - It is clear that the IBC relates to reorganization and insolvency resolution of corporate persons among other entities for maximization of value of their assets and to take care of the interest of all the stakeholders in the resolution process.
  - The GUVNL PPA entered into between the power producer and the purchaser of power provides a long-term and steady stream of revenue accrual from the power project which forms the basis for repayment of any credit sourced by the power producer and provides necessary comfort to the financial creditor to give such credit. This is the economics behind such projects and this economic value of the project of the corporate debtor the IBC seeks to maximize during the resolution process.
  - It is, therefore, succinctly clear that the solar power project, which generates and supplies solar power turns into an economic entity with the help of an instrument such as PPA, thereby converting the physical entity i.e. solar power plant into an economically useful entity for production of solar power.
  - The proposition that the solar power plant and the PPA related to the plant form one integrated economic asset appears to be a rational one and hence, the asset needs to be kept intact and preserved during the process of corporate resolution and liquidation so that the liabilities of creditors and other stakeholders can be taken care of.

- Thus, the NCLAT held that as the Corporate Debtor had not suspended the supply of solar power, it stands to reason that the Solar Project should be allowed to function as a going concern, so that revival of the power project as suggested under Section 230 of the Companies Act, 2013 becomes possible. The Solar Project would realize its full economic value only if it functions in conjunction with the GUVNL PPA.
- The NCLT held that the steady and assured revenue stream resulting from the existence of the GUVNL PPA is the *sine qua non* for the long-term economic and financial viability of the Solar Project since it provides comfort and security to the financial creditors who feel encouraged to provide credit for the project.
- Accordingly, the NCLAT held that the termination of the GUVNL PPA was not justified and dismissed the appeal.

Our view: The above order of the NCLAT assumes great significance in respect of power producers undergoing the corporate insolvency resolution process. It is standard for PPAs and other project documentation to have a termination right in favor of the power procurer upon initiation of insolvency/liquidation proceedings against the power producers. However, the NCLAT's order goes beyond the contractual agreement between the Parties in order to maximize the value of the assets for resolution of the Corporate Debtor. Whilst one can argue that this order raises further doubts as regards the sanctity of contracts in India, it would be considered as a welcome relief for potential bidders of such stressed assets. Perhaps, amendments to the standard PPAs could be considered to align the same with such order and the provisions of the IBC. However, it remains to be seen whether projects have stopped supplying power, whether by reason of financial difficulties or otherwise, would stand on the same footing. In the present case, it was acknowledged that the plant in question continued to supply power in accordance with the terms of the PPA. However, it is common for the operations of projects to be impacted due to financial stress and in such an event, the power procurer may have a stronger case to terminate.

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