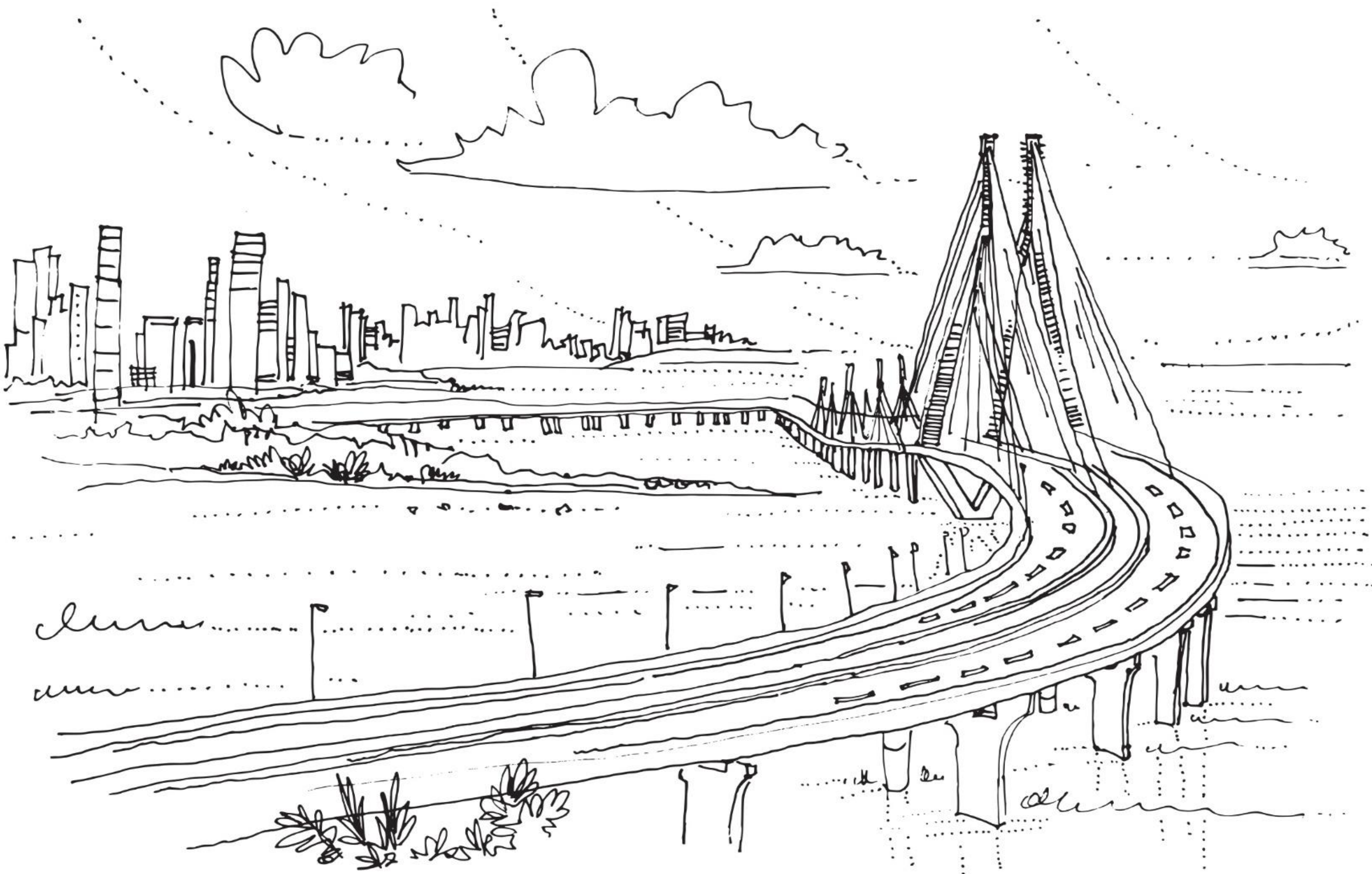

Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

April 2021

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RENEWABLE ENERGY

Production Linked Incentive (PLI) Scheme

National Programme on High Efficiency Solar PV Modules

Background of PLI Scheme

- Government has announced PLI Scheme for 13 Target Sectors, including High Efficiency Solar Photo Voltic (**PV**) Modules.PLI Scheme for Solar PV Modules was approved on April 7, 2021 with financial outlay of INR 4,500 crore. The scheme will be implemented by Ministry of New & Renewable Energy ('MNRE') through Indian Renewable Energy Development Agency ('IREDA') as Implementing Agency.
- PLI Scheme intends to provide financial incentive to eligible applicants proposing to set-up or expand manufacturing capability in India.

Eligibility & Selection

- Beneficiaries will be selected through a transparent bidding process, as follows:

Short-listing

Applications will be shortlisted basis parameters such as extent of integration, manufacturing capacity, minimum module performance

Assigning Marks

- Marks will be assigned to shortlisted applicants for determining ranking
- Ranking criteria is defined and depends on extent of manufacturing & manufacturing capacity

Selection Process

- Selection is based on applicant getting highest marks on bucket filling method
- Preference to manufacturers proposing to set up a fully integrated solar PV plant

Eligible Person

- Single company / Joint Venture/ Consortium of more than 1 company
- Both Greenfield & Brownfield projects, subject to conditions
- Waiting list will be maintained in case of over subscription

Ineligible Person

- Benefit has been availed under (a) MNRE's tender(s) for solar PPA linked to PV manufacturing; or (b) SIPS/ M-SIPS programme; or (c) imported capital goods for setting up the module manufacturing facility before the last date of bid submission

Incentives

- Eligible applicants will be eligible for fiscal incentives. Incentives will be computed based on
  - Sales volume: Amount committed by Applicant, subject to ceiling limit prescribed
  - Base rate: Determined as per Performance Matrix
  - Tapering factor: Prescribed ratio to applicant remains competitive after 5 years
  - Local value addition: Ratio of value addition determined on sales turnover
- PLI rate for Brownfield projects will be 50% of the rate for Greenfield projects.
- The Scheme also prescribes ceiling limit on sales volume, for which incentives that can be claimed by individual applicant.
- Incentives will be available for a period of 5 years post commissioning of the Project.
- Scheme also proposes to levy penalty for failure to meet manufacturing commitments by an applicant.

Procedure

- Procedure to claim benefit involves making an application before the Implementing Authority, which will be examined, and final decision will be communicated in consultation with MNRE.
- Application for incentive can be made on annual basis, after commencement of commercial production.

Way Forward

- Any person investing in manufacture of solar PV modules should undertake a detailed review of PLI Scheme. Time bound evaluation & decision making to opt for the scheme is of essence.
- Comprehensive preparation of the application *inter-alia* building up a convincing 'company cum product profile' is key to secure benefits under the scheme. These efforts shall go a long way to address various ranking criterion.

Our view: Introduction of PLI Scheme will foster the AtmaNirbhar Bharat initiative and scale up domestic manufacturing. The intent of Scheme for Solar PV Modules is to reduce imports of solar modules and cells and make India self-sustaining in its renewable energy requirement. Additionally, Telecom & Networking Products and Specialty Steel are also covered as Target Sectors for PLI Scheme, which have the potential to give boost to India's infrastructure sector.

TANGEDCO Directed to pay Wind Dues with Interest to Wind Developers

Background:

In two separate orders pronounced on April 15, 2021, the Tamil Nadu Electricity Regulatory Commission (**TERC**) in the case of *Ratedi Wind Power Private Limited vs. Tamil Nadu Generation and Distribution Corporation Limited and Another*[1]and *Wind Urja India Private Limited vs. Tamil Nadu Generation and Distribution Corporation Limited and Another*[2] directed TANGEDCO to pay Ratedi Wind Power Private Limited and Wind Urja India Private Limited (collectively, **Wind Developers**), the outstanding principal amount along with the late payment interest as per the terms of the respective Energy Purchase Agreement (**EPA**).

What are the facts of the case?

- The Wind Developers approached TANGEDO with proposals to sell power generated from their wind projects (**Facility**) commissioned under the Renewable Energy Certificate Scheme.
- TANGEDO accepted the Wind Developers proposal and agreed to buy the power and executed separate EPAs.
- The Wind Developers contended that since the commencement of the supply of wind energy from their respective Facilities still the date of filing of the petition in 2017, TANGEDO did not raise any objection/dispute in relation to any non-fulfillment of Wind Developers obligations as per the EPAs.
- In view of the continuous supply of wind energy as per the EPAs, Wind Developers were raising monthly invoices for the wind energy supplied by them in terms of Clause 6(1) of the EPAs, which was received by TANGEDO without any demur or dispute.
- However, TANGEDO failed to honour the monthly invoices raised for the wind energy supplied from October 2017 without any specific reason.
- The Wind Developers also offered a one- time rebate of 2% on the unpaid energy bills as on that date because despite several reminders and requests for release of payments, no payments were forthcoming.
- As per Clause 6(2) of the EPAs, TANGEDO was required to make payment of the amounts due under the energy bills within 30 days from the date of the receipt of monthly energy bills. In the event of any payment that is delayed beyond the due date of payment, late payment interest (**LPI**) at the rate of 1 % per month was payable by TANGEDO on the amount due.
- TANGEDO failed to respond all the letters which were issued by the Wind Developers and took no concrete steps to pay the total outstanding dues till date of filing the petition comprising of (i) principal amount towards unpaid energy bills; (ii) outstanding LPI; and (iii) past outstanding LPI.
- TANGEDO stated that there were delays in payments due to financial constraints. It made some payments as and when loans were received from financial institutions.

What was TERC's judgement?

- TERC stated that TANGEDO did not dispute its liability to pay the outstanding dues to the Wind Developers. It had only pleaded financial constraints faced by them as the reason for not making the payment in time.
- TERC stated that TANGEDO was liable to pay interest at 1% per month (i.e., 12% per annum) for the delayed payment of invoices beyond 30 days of its submission by the Wind Developers to TANGEDO.
- TANGEDCO was directed to verify the claim made by the Wind Developers and after deducting the amount already paid, settle the same within 30 days from the date of the order together with interest at 12 % per annum from the date of filing of the petition till the date of realization.

Our view: It is a settled principle of contract law that a party would not be absolved from performance of a contract merely because the performance became onerous or burdensome. The TERC has upheld this principle by requiring TANGEDCO to make payment to the Wind Developers despite the financial constraints faced by it.

Jurisdiction of CERC for adjudicating tariff adoption for solar power project in Uttar Pradesh

The Central Electricity Regulatory Commission (**CERC**) vide its order dated April 15, 2021 (**Order**)[3] has ruled on the question of its jurisdiction for adjudicating tariff adoption for solar power project in Uttar Pradesh.

What were the facts of the case?

- A petition was filed by the Solar Energy Corporation of India (**SECI**) under Section 63 of the Electricity Act, 2003 (**Act**) for adoption of tariff for 150 MW grid-connected floating solar power projects selected through competitive bidding process as per the 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects' dated August 3, 2017 (**Guidelines**).
- SECI had, at the behest of Uttar Pradesh Power Corporation Limited (**UPPCL**), issued request for selection (**RfS**) along with draft power purchase agreement (**PPA**) and draft power sale agreement (**PSA**) for selection of solar power developers (**SPDs**) for setting up of 150 MW grid-connected floating solar power project at Rihand Dam in the State of Uttar Pradesh.
- Pursuant to the issuance of RfS and other tender documents, certain developers were awarded the project.
- Subsequently, SECI filed a petition before the CERC for adjudicating tariff adoption for the solar power project.
- SECI contended that CERC had jurisdiction to adjudicate on the matter due to following reasons:

  (a) PPAs and PSA entered into by SECI as the nodal agency of Central Government and as an inter-State trading licensee were in the nature of a 'composite scheme' falling within the scope of Section 79(1)(b) of the Act.

  (b) The PSA permitted SECI to sell UPPCL's allocation of solar power to third parties including any licensee under the Act. Also, the PPAs executed with SPDs defined the 'Appropriate Commission' as CERC.

  (c) The parties, namely, UPPCL as well as the power project developer, including where the PPAs provide for generation and sale of electricity only in the State of Uttar Pradesh, have duly acknowledged, accepted, acted upon and implemented various projects on the basis that CERC had the jurisdiction.

What did the CERC rule?

- The CERC analyzed the provisions of Section 79(1)(a) of the Act which grants jurisdiction to the CERC to regulate the tariff of the generating companies owned or controlled by the Central Government. Further the CERC took note of the judgement of the Supreme Court in the case of *Energy Watchdog and Others vs. Central Electricity Regulatory Commission* (**Energy Watchdog Case**)[4], as regards 'composite scheme' and the jurisdiction of the CERC in regulating the tariff of the project meeting the 'composite scheme'.
- Having taken note of Section 79 of the Act and the judgement in the Energy Watchdog Case, the CERC observed that that the jurisdiction of the CERC can only be invoked in respect of the adoption of tariff under Section 63 of the Act if such generating companies have a composite scheme for generation and sale of electricity in more than one State.
- As regards the composite scheme of the project, the CERC observed that mere involvement of an inter-State trading licensee as an Intermediary Procurer does not render the generating company to qualify as a composite scheme for generation

[3] Petition No. 52/AT/2021

[4] (2017) 14 SCC 80

and sale of power in more than one State in terms of Section 79(1)(b) of Act.

- The CERC went on to observe that since all generating companies are located in the State of Uttar Pradesh and would be selling power to the end-procurer, UPPCL, the present arrangement for generation and sale of power failed the test of 'composite scheme'. The entire transaction was purely intra-State in nature and did not involve any 'composite scheme' of generation and sale of electricity in more than one State.
- The CERC after having analyzed the PPA and PSA observed that the scheme that has been agreed upon between the renewable generating companies, SECI and UPPCL was for generation and sale of power to UPPCL only. The right available to SECI to regulate or sell the allocation of the buying entity to third parties is only a recourse envisaged to address the incidences of payment default. It only triggers upon occurrence of certain eventualities and not otherwise. Further, the provisions of the PPA and PSA did not envisage the composite scheme of generation and sale of power in more than one State as the entire capacity was tied up for sale to UPPCL within the State of Uttar Pradesh and the temporary sale of power to any other entity in case of default did not change the ratio of arrangement of sale of power
- As regards the definition of 'Appropriate Commission' under the PPA, the CERC observed that, it is a well settled principle that the parties cannot confer the jurisdiction on any forum by consent. Unless the jurisdiction of the CERC can be traced to the provisions of the Act and the Guidelines, the definition under the PPAs would not have any bearing while examining the jurisdiction of the CERC.
- The CERC observed that the facts of the case neither involves the sale from the generating companies owned or controlled by the Central Government nor the SECI is acting/ functioning in its capacity of Central Government controlled or owned generating company. SECI's role in the present proceedings and during the bid process was that of an 'Intermediary Procurer' i.e. a trader between the generating company and the end Procurer/ distribution licensee.
- The CERC ruled that the jurisdiction of the CERC under Section 63 read with Section 79(1)(a) of the Act cannot be invoked, particularly when SECI has been functioning in its capacity of an Intermediary Trader as provided in the Guidelines. As the CERC ruled that it did not have appropriate jurisdiction to adjudicate the case, it did not examine the merits of the case.

Our view: The Order assumes significance as it provides clarity on the jurisdiction of the CERC and evaluates what constitutes a 'composite scheme'. The Order also sheds light on the various roles done by SECI as an 'Intermediary Procurer' and the jurisdiction of CERC in such a situation.

INFRASTRUCTURE

Courts cannot second-guess Authority's interpretation of its own tender

Background

- In the case of *M/s. Utkal Suppliers vs. M/s. Maa Kanak Durga Enterprises*[5], the Supreme Court held that Courts cannot second-guess an authority's interpretation of its own tender, unless it is arbitrary, perverse or mala fide.

What are the facts of the case?

- The Office of the Superintendent, SCB Medical College and Hospital, Cuttack Respondent No. 4 issued a Tender Call Notice (**TCN**) dated December 30, 2019 in order to invite tenders for eligible registered diet preparation and catering firms/suppliers etc. The tenderers were required to have a valid labour licence and a food licence with a minimum of 3 years' experience in the field of preparation and distribution of therapeutic and non-therapeutic diet to government or private health institutions having a minimum of 200 beds for the year 2019-2020.
- As per the Technical Committee meeting dated February 17, 2020, Maa Kanak Durga Enterprises (**Respondent No.1**) was *inter alia* disqualified for not having submitted a valid labour licence i.e. a contract labour licence from the competent authority. Respondent No. 1 filed a writ petition dated February 19, 2020 apprehending disqualification, however, this writ petition was dismissed as being premature on February 20, 2020. Thereafter, M/s. Utkal Suppliers (**Appellant**) was found to be lowest bidder.
- Subsequently, the Respondent No. 1 filed another writ petition on March 13, 2020, praying that the Tender Committee proceedings be set aside and that the Respondent No.1 be awarded the tender.
- The Appellant was awarded the tender by a work order dated November 27, 2020 and an agreement dated November 27, 2020 was entered into between the Appellant and Respondent No.4 for a period of 1 year.
- However, the High Court of Orissa allowed the writ petition of the Respondent No. 1 and passed a judgement on March 23, 2021, which stated that:
  - Clause 9 of the eligibility criteria requires a valid license of Labour Department and did not mandate the license to be issued under the Contract Labour (Regulation and Abolition) Act, 1970 (**Contract Labour Act**), but the same is required under the Orissa Shops and Commercial Establishments Act, 1956 (**Orissa Act**). Hence, the contention requiring the labour license under the Contract Labour Act is not justified in view of the stipulation made in the TCN.
  - The bid of Respondent No. 1 had been rejected illegally and contrary to the conditions of the TCN and as claimed Respondent No. 1 his financial bid was the lowest, and hence, such rejection has been deemed to be mala fide.
  - The grant of contract as per order dated November 27, 2020 was quashed. Further, if the financial bid of the Respondent No.1 if found to be lower that the Appellant, then the Appellant may continue his supply till February 28, 2021 and a fresh work order in favour of Respondent No. 1 must be issued in order to commence work with effect from March 1, 2021.
- In light of the above, the Appellant filed an appeal before the Supreme Court of India (**Supreme Court**).

[5] Civil Appeal Numbers 1517-1518 Of 2021, arising out of SLP (Civil) Number 4222-4223 Of 2021

What were the contentions?

- It was contended by the Appellant as follows:
  - The High Court could not have second-guessed the authority's reading of its own tender in holding that a registration certificate granted under the Orissa Act could replace a labour licence under the Contract Labour Act as required by the authority.
  - It was perverse to hold that the action of the authority in granting the contract in favour of the Appellant as mala fide.
  - After quashing the work order in favour of the Appellant, the High Court exceeded its jurisdiction in directing the authority to grant the work order to Respondent No.1.
- The Respondent No.1 had the following defences:
  - The Contract Labour Act applies to establishments in which 20 (twenty) or more workmen were employed and as there was no such requirement in the TCN, it was not the Contract Labour Act but it was the Orissa Act, that was being referred to in the TCN.
  - The High Court had not exceeded the parameters of judicial review as it found mala fides attributable to the authority and that High Court has stated that the contract was to be awarded to Respondent No.1 only if it was found that its financial bid was lower than that of the Appellant.

What was the Supreme Courts' judgement?

- The Supreme Court observed that it was clear that the authority concerned read its own TCN to refer to the licence to be submitted by bidders as the labour licence under the Contract Labour Act.
- The Supreme Court observed that it has been repeatedly held that judicial review in these matters is equivalent to judicial restraint in these matters. Citing landmark cases with regard to award of tenders, the Supreme Court observed that the decision itself cannot be reviewed but the manner in which it was made can be. It was held that the writ court does not have the expertise to correct such decisions by substituting its own decision for the decision of the authority.
- Based on the facts of the case, the Supreme Court opined that the High Court had overstepped the bounds of judicial review by second-guessing the authority's requirement of a licence under the Contract Labour Act. Further, a registration certificate under Section 4 of the Orissa Act cannot the equivalent of a valid labour licence issued by the labour department.
- Accordingly, the High Court's judgement was set aside, and the appeals were allowed. The Appellant was directed to be put back, within 1 week from the date of the Supreme Court's judgement, to complete performance under the agreement entered into between the Appellant and the authority.

Our view:

The aforesaid decision of the Supreme Court re-affirms the settled principles of judicial review and restraint with respect of award of tenders. As has been held in earlier cases, the authority which floats a contract or tender, and has authored the tender documents would be the best judge as to how the documents have to be interpreted. Where there are two possible interpretations, the author i.e. the authority's interpretation would gain weightage.

The principles laid down in the celebrated case of *Tata Cellular vs. Union of India*[6]are as follows:

(i) The modern trend points to judicial restraint in administrative action.

(ii) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(iii) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(iv) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(v) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Extension of validity of FAME-II Certificates for all Vehicle Models

The Ministry of Heavy Industry and Public Enterprises has *vide* its notification dated April 12, 2021 extended the validity of FAME II eligibility certificates issued by testing agencies.

What was the earlier validity period?

The FAME II eligibility certificates issued by testing agencies and approval of models of electric vehicle by the National Automotive Board/Department of Heavy Industries were earlier valid till March 31, 2021. All vehicles approved under the scheme were required to submit re-validation certificate in accordance with the operational guidelines dated March 22, 2019 for availing demand incentives under Fame India Scheme Phase II.

What is the new validity period?

The FAME II certificates are now valid for a period of 1 year from the date of its issue for all approved vehicle models (e – 2W, e – 3W and e – 4W). As per the notification all approved vehicles are now required to submit the re-validation certificate within 1 month from the last date of the validity of the certificate.

[6] (1994) 6 SCC 651

What is the consequence of failure to re-validate within the stipulated time?

If the vehicle model(s) are not re-validated within the stipulated period, its registration with FAME – India Scheme Phase II online web portal would be cancelled. The demand incentive for the vehicle model(s) sold after one year of certification would be admissible only if re-validation is done within an additional time of 1 month, as per the operational guidelines issued by the Department of Heavy Industries.

Upon the re-certification/re-validation of the vehicle model(s), it would be approved by the National Automotive Board/Department of Heavy Industries.

Our view: The move comes in light of recommendations of the stakeholders of the electric mobility industry. This is a welcome step as it would help streamline the process of certification and re-validation for all electric models.

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