



Deepening Uncertainty of Solar Power Contracts

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The solar sector has been beset with challenges over the last few years, especially with respect to withdrawn or quashed tender processes and authorities renegeing on power purchase agreements. Certain recent developments in this sector may compound challenges already being faced and throw light on certain risks and pitfalls that a solar power developer or investor may have, to consider.

On June 17, 2021, the High Court of Andhra Pradesh (**APHC**) quashed a tender process conducted by the Andhra Pradesh Green Energy Corporation Limited (**APGECL**) for the award of solar power projects in Andhra Pradesh on a petition preferred by Tata Power Renewable Energy Limited (**TPREL**). TPREL sought the quashing of the relevant requests for selection (**RfS**) and the draft power purchase agreements (**PPAs**) on the grounds that they were in gross violation of the provisions of not only the Electricity Act, 2003 (**Electricity Act**) but also of the guidelines for tariff based competitive bidding process for procuring power from grid connected solar photo voltaic power projects.

TPREL claimed that the draft PPA ousted the statutory powers and jurisdiction vested in the Andhra Pradesh Electricity Regulatory Commission (**APERC**). TPREL's averment was that the dispute resolution process under the draft PPA was not in consonance with the Electricity Act. TPREL argued that since bureaucrats were empowered to manoeuvre through disputes, it would give rise to doubts in fair redressal of claims, hence discouraging participation of bidders.

A few months ago (January 2021), the APHC had passed an interim order directing the Andhra Pradesh Government (**AP Government**) not to enter into any agreements with the successful bidders. It has now been reported that the APHC has quashed such RfS and PPAs.

Whilst the order has not been uploaded on the APHC website (as on the date of this article) news reports indicate that the APHC has directed the AP Government to call for fresh tenders and formulate new PPAs. The APHC also required the AP Government to strictly comply with the provisions of the Electricity Act and the guidelines framed thereunder. If the AP Government is desirous of making any deviations from the guidelines, it has been instructed to seek the approval of the APERC.

Courts in India tend to exercise judicial restraint in adjudicating upon administrative actions, including tendering processes since Courts neither have the expertise to correct administrative decisions nor do they sit as courts of appeal for non-adjudicatory matters.

In particular, Courts usually avoid scrutinizing tendering processes so as not to impinge upon the Government's freedom of contract. However, Courts would review tendering processes from the lens of arbitrariness, bias, irrationality, unreasonableness or mala fides or bad faith. Accordingly, tendering process contrary to any provisions of law would be liable to be struck down.

The APHC held that the RfS and the draft PPA issued by APGECL were contrary to the Electricity Act and the guidelines issued thereunder, re-affirming the settled principle of law that the State and its instrumentalities are bound to adhere to the norms, standards and procedures laid down under law and cannot depart from them arbitrarily. They have the public duty to be fair to all concerned.

Whilst the APHC decision will ensure fair play, it would be a dampener on those declared successful pursuant to the RfS. In 2019, the then newly elected AP Government had sought to review high-priced



PPAs and negotiate with solar and wind power producers to bring down the prices. While there is an oft-cited concern relating to the sanctity of contracts, the fact that the tender documents (including the PPA) were contrary to the law seems apparent. It is a principle of contract law that agreements that are contrary to law are void. Therefore, even if no challenge was mounted at this stage against the APGEL's tendering process, the risk of the executed PPA being held as void would have remained.

The other recent development of note is the cancellation by the Uttar Pradesh Government of solar auctions for a capacity of about 500 MW allegedly on account of lower price discovery in subsequent auctions in other states.

Reportedly, industry bodies have requested the Central Government to intervene and the successful bidders are also considering moving relevant judicial fora. Tender documents do usually permit the tendering authority absolute power to cancel or withdraw the tender at any time prior to the letter of award. However, in this case since the successful bidders were declared and were also allegedly asked to extend the validity of their earnest money deposits, they would have a legitimate expectation for the conclusion of the contract.

Government authorities are expected, and in some cases have been judicially required to live up to promises on the basis of certain legal principles of administrative law. Further, the law of contract and evidence also takes into account conduct of the parties to ascertain whether binding obligations are formed, or any other relief is available. However, protracted legal proceedings may only bear fruit long after the remedy is sought. Such cold comfort may not be palatable.

If authorities were to start cancelling tenders in the hope of procuring better tariffs, stakeholders may be deterred from participating in bids. Given India's renewable energy targets, it is important that the Government instrumentalities take steps to preserve the confidence of the stakeholders to boost further investment in the space. One of the measures envisioned in the proposed amendments to the Electricity Act was the constitution of an Electricity Contract Enforcement Authority to adjudicate disputes relating to contract enforcement. However, this would not cover cases where tendering processes are withdrawn. Arguably, successful bidders in such cases are not much worse off. However, successful bidders would have expended time and effort in complying with the tender terms as well as mobilizing resources in anticipation of the formal contract execution.

Given these developments, developers and investors would be well advised to tread with caution and carefully examine tender documents before making a bid.

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