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THE INTERNATIONAL ADR MOOTING COMPETITION

HONG KONG 2013

MEMORANDUM FOR RESPONDENT

On behalf of

CFX Ltd

26 Amber Street, Circus Avenue, Catalan

Chairman of Board: Peter Yuen

Tel. (008)54269877

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RESPONDENT

Against

Energy Pro Inc.

28 Ontario drive, Aero Street, Syrus

Head of Company: Andre Li, CEO

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CLAIMANT

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INDEX OF ABBREVIATIONS

Abbreviation	Explanation
Agreement	An agreement between CFX Ltd, Energy Pro Inc. and Future Energy Inc.
CFX	CFX Ltd
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules (2012)
DR1	the 1st Design Review held on 17 September 2011
DR2	the 2nd Design Review held on 16 January 2012
Default notice s	the first and second notice of default on 20June 2012 and20 August 2012
Energy Pro	Energy Pro Inc.
Future Energy	Future Energy Inc.
JV	Syrus-Catalan Wind Turbine gearboxes joint Venture Company
Parties	CFX Ltd and Energy Pro Inc.
Contract	an exclusive purchase contract between CFX Ltd and Energy Pro Inc.
PICC	UNIDRIOT Principles of International Commercial Contract 2010
TurboFast	TurboFast Ltd
Termination Notice	a notification of termination of the Contract from Energy Pro Inc.

STATEMENT OF FACTS

Energy Pro (a company incorporated in Syrus) and CFX (a company registered in Catalan by Mr. Yuen around February 2010) entered into a joint venture agreement to establish a "Syrus-Catalan Wind Turbine Gearbox Joint Venture Company" (the "JV") for sale in Catalan more generally after discussions in mid-2010.

On 10 April 2011, Energy Pro and CFX entered into an exclusive purchase contract of manufacture and assembly of the 1.5MW wind turbine gearboxes. The Contract was concluded between Energy Pro, instead of JV, as the seller and CFX as the buyer as Energy Pro was the owner of all the gearboxes manufactured under the JV.

On 17 September 2011 and 16 January 2012, 1st Design Review and 2nd Design Review were performed in the meetings held between Energy Pro and CFX. CFX's chief engineer had informed Mr. Yuen, CFX's Chairman of Board, about the severe manufacturing flaws in 1st Design Review he attended. Then Mr. Yuen informed Mr. Li, Energy Pro's CEO, the existing problems on the telephone call on 18 September 2011 and were given promises of modification by 2nd Manufacturing Review. However, the flaws remained unchanged in 2nd Design Review.

On 13 March 2012, CFX transferred the first part payment of USD 2 million to Energy Pro after receiving the gearboxes. On 18 April 2012, Future Energy, a company which must certified conformity approval of the gearboxes manufactured by Energy Pro due to the Contract, notified both Energy Pro and CFX the wrong

certificate approved by one of its engineer.

On 16 May 2012, CFX reemphasized the significance of the certification of the gearboxes issued by Future Energy and the failed performance of Energy Pro. Correspondingly, CFX firmed demanded the remedy from Energy Pro.

On 18 May 2012, Energy Pro rejected to remedy the situation. On 21 May 2012, CFX wrote to Energy Pro to suspend the Contract, pending satisfactory proof of Energy Pro's legal exemption since Energy Pro has neither provided goods in conformity nor took appropriate remedy actions after its breach of the Contract.

On 20 June 2012 and 20 August 2012, CFX refused to make the second and third part payment due to the suspension of the Contract.

On 28 December 2012, Energy Pro sent a notification of termination of the Contract to CFX.

On 1 January 2013, Energy Pro requested Future Energy to join as a third party to the arbitration.

On 18 February 2013, Claire Perry, on behalf of CFX, alleged the unlawfulness of the termination penalty and denied the participation of Future Energy.

PLEADINGS

I. Energy Pro cannot bring Future Energy into the arbitration proceedings as a third party.

Energy Pro cannot bring Future Energy into the arbitration proceedings as a third party because Future Energy is not a signatory to the arbitration clause in the Contract (1) meanwhile Future Energy has no legal interest in this case (2). Even if Future Energy is allowed to join in this arbitration as a third party, the arbitral award made by the arbitral tribunal may be refused to be recognized and enforced by the competent authority according to Article 5 (1) of New York Convention (3).

1. Future Energy is not a signatory to the arbitration clause in the Contract.

The Article 5 (1) of CIETAC stipulates that an arbitration agreement is an arbitration clause in a contract or any other form of a written agreement concluded between the parties providing for the settlement of disputes by arbitration and in the Article 2 (2) that the term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. Currently, the Contract was exclusively concluded and signed between both Parties on 10 April 2011 and was only binding to Energy Pro and CFX. Future Energy is not a signatory to the Contract hence shall not be bound by the arbitration clause of the Contract.

Furthermore, the Article 20 of the Contract regulated in the arbitration clause was under the consensus of Energy Pro and CFX. Both parties expressly stipulated no any party except Energy Pro and CFX should be bound under the

arbitration clause. Besides, CFX, in any case, strongly opposed the participation of Future Energy as a third party.

2. Future Energy has no legal interest in this case.

Even if Future Energy was partially blamed for not approving the correct certificate, it was Energy Pro who defaulted on manufacturing wrong gearboxes essentially. *(Claimant's Exhibit No.3)* Future Energy, as an independent certification company, has no vital interest in the case and should not bear all the damages, which was originally procured by Energy Pro. Regardless of Future Energy's negligence, Energy Pro still defaulted under the Contract. In any case, Future Energy cannot change the entire defaulting situation and therefore should not be allowed to enter as a third party.

3. Even if Future Energy has legitimacy of participation, the arbitral award would be refused to be recognized and enforced by the competent authority under Article 5 (1) of New York Convention.

The Article 4 (1) of New York Convention requires obtaining the recognition and enforcement of the arbitral reward, a party shall supply the agreement referred to Article 2 which requires the agreement shall be in writing and signed by parties. If the applying party fails to do that, the competent authority could refuse to recognize and enforce this arbitral reward under Article 5 (1) of New York Convention. Currently, Future Energy is not a signatory to the arbitration clause in the Contract. Once Future Energy was considered to be responsible for this case, this arbitral reward may be rejected by Andestein as

Future Energy has not signed up in the arbitration clause.

II. Ms. Arbitrator 1 cannot resign during the arbitration proceedings.

Ms. Arbitrator 1 cannot resign during the arbitration proceedings because her resignation does not accord with the requirements stipulated in Article 31 (1) of CIETAC Rules (1) and will inevitably lower the efficiency of this arbitration meanwhile result in injustice to this case (2).

1. Ms. Arbitrator 1's resignation does not accord with the requirements stipulated in Article 31 (1) of CIETAC Rules.

Article 31 (1) of CIETAC Rules stipulate that arbitrator may voluntarily withdraw from his/her office only in the event that he/she is prevented *de jure* or *de facto* from fulfilling his/her functions, or he/she fails to fulfill his/her functions in accordance with the requirements of these Rules or within the time period specified in these Rules.

Nevertheless, under Article 72 (2) of CIETAC Rules, Energy Pro has the obligation to pay its nominated arbitrator (Ms. Arbitrator 1) actual cost, such as travel and accommodation expense in advance. The actual cost shall be counted in the consideration of the time period that arbitration proceedings will take. After subsequent discussion with the arbitral tribunal and both counsels, the issue of quantum would take 5 days rather than 2 days. Therefore, Energy Pro shall pay Ms. Arbitrator additional fees accordingly in accordance with Article 72 (2) of

CIETAC Rules, but it refuses.

In fact, the possible resignation of Ms. Arbitrator 1 is exclusively resulted from Energy Pro's refusal to pay her additional fees. Once Energy Pro pays her additional fees, Ms. Arbitrator 1 would not resign from her office during the arbitration proceedings. It is totally Energy Pro's wrongful act that cause Ms. Arbitrator 1's possible resignation during the arbitration proceedings, which shall not be deemed as some requirement, stipulated in Article 31 (1) of CIETAC Rules.

2. Ms. Arbitrator 1's resignation will inevitably lower the efficiency of this arbitration meanwhile result in injustice to this case.

The Article 31 (4) of CIETAC Rules has stipulated that after the replacement of an arbitrator, the arbitral tribunal shall decide whether and to what extent the previous proceedings in the case shall be repeated. In the present case, if Ms. Arbitrator 1 resigns after the completion of the oral hearings and another arbitrator is nominated by Energy Pro for the issue of quantum, the arbitral tribunal has to consider whether and to what extent the previous proceedings in this case shall be repeated. However, the previous proceedings shall be repeated once the arbitral considers seriously that the new arbitrator has no knowledge in this case, or the new arbitrator will make his wrong decision on the issue of quantum. Under this circumstance, loss of great time and money will occur inevitably for both Energy Pro and CFX, which will violate the efficiency principle of arbitration.

Furthermore, if Ms. Arbitrator is replaced by another arbitrator for the issue of quantum, this case would be arbitrated unjustly due to new arbitrator's no knowledge in this case. That would result in injustice to both Energy Pro and CFX de facto.

III. Energy Pro did not validly terminate the Contract.

Energy Pro did not validly terminate the Contract since CFX has already suspended the contract according to Article 7.1.3 (2) of PICC (1) and claims that the "Suspension/termination" Clause in the Contract is of gross disparity hence CFX avoids this clause (2).

1. CFX has already suspended the contract according to Article 7.1.3 (2) of PICC.

The Article 7.1.3 (2) of PICC has stipulated that where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed. In the present case, CFX shall perform its contractual obligation of payment after Energy Pro's full performance of its contractual obligation of delivering the gearboxes *(Clause 1.2 of the Purchase Contract)*. However, Energy Pro made its non-performance of delivering as a matter of facts.

And the Article 7.1.1 of PICC has stipulated that non-performance is failure by a party to perform any of its obligations under the contract, including defective

performance or late performance meanwhile the Article 35 (1) of CISG provides that the seller must deliver goods which are of the quantity, quality and description required by the contract. In the present case, Energy Pro should deliver the gearboxes in conformity with Clause (A) and Clause 10 of the Contract, which actually requires it deliver the gearboxes of GJ 2635 for use in 1.5 MW wind turbine. However, Energy Pro delivered 100 gearboxes of GH 2635 certified as GJ 2635 by Future Energy which were absolutely not in conformity with the requirements of the Contract and were totally no use for CFX *(Claimant's Exhibit No. 4)*. Therefore, Energy Pro has breached the Contract by non-performance of delivering the gearboxes of GJ 2635.

Furthermore, though Energy Pro submits that those it had obtained from Future Energy certified approval for those gearboxes which should be considered as proof of conformity of wind turbine to Clause (A) , there is no doubt that Energy Pro has made its wrongful act of delivering the gearboxes of GH 2635 to Future Energy for certification. In other words, Energy Pro had made its non-performance under the Contract before Future Energy wrongly certificated these gearboxes as GJ 2635.

Since Energy Pro made it non-performance of delivering the GJ 2635 gearboxes to CFX under the Contract, CFX suspended the contract on 21 May 2012 according to Article 7.1.3 (2) of PICC, pending Energy Pro's full performance of its contractual obligation *(Claimant's Exhibit no. 6).*

And after suspension of the Contract, this contract is not under performance,

which leads the Default Notices and notification of termination of the Contract from Energy Pro invalid.

2. CFX claims that the "Suspension/termination" Clause in the Contract is of gross disparity hence CFX avoids this clause.

It is clearly stipulated in the Article 3.2.7 (1) of PICC that a party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. In the present case, the "Suspension/termination" Clause in the Contract awards the right to suspend and terminate the contract to Energy Pro unilaterally, which shall be considered excessive and unjust. That leaves CFX the right to avoid the "Suspension/termination" Clause in the Contract. Besides, CFX also submits that the great majority of the contractual terms of this Contract are proposed and adopted by Energy Pro and most of the proposals put forward by CFX are either ignored or rejected (statement of defense from CFX).

For the reasons above, CFX claims that the "Suspension/termination" Clause in the Contract is of gross disparity hence CFX avoids this clause.

IV. In any case, Energy Pro cannot claim the termination penalty.

In any case, Energy Pro cannot claim the termination penalty because the Contract is suspended by CFX on 21 May 2012 (1). In case the suspension is invalid, CFX claims that the "Suspension/Termination" Clause in the Contract is of gross

disparity hence avoid this Clause (2). Even if the "Suspension/Termination" Clause in the Contract is valid and in force, CFX submits that the termination penalty sum should be reduced to USD 2,000,000 in accordance with Article 7.4.13 (2) of PICC (3).

1. The Contract is suspended by CFX on 21 May 2012.

As analyzed on the issue 3 (1), due to Energy Pro's non-performance of delivering the gearboxes GJ 2635 required under the Contract, CFX has already suspended the Contract on 21 May 2012 *(Claimant's Exhibit No. 6)*. Since the Contract is suspended, it is not under performance, which leads the Default Notices and notification of termination of the Contract from Energy Pro invalid.

Therefore, the termination penalty clause in the Contract has not been in force hence Energy Pro cannot claim the termination penalty.

2. In case the suspension is invalid, CFX claims that the "Suspension/Termination" Clause in the Contract is of gross disparity hence avoid this Clause.

As analyzed on the issue 3 (2), since the "Suspension/termination" Clause in the Contract awards the right to suspend and terminate the contract to Energy Pro unilaterally, which shall be considered excessive and unjust, CFX claims that "Suspension/termination" Clause is of gross disparity hence avoid this Clause.

After CFX's avoidance of the "Suspension/termination" Clause, it will be invalid hence Energy Pro cannot claim the termination penalty.

3. Even if the "Suspension/Termination" Clause in the Contract is valid and in force, CFX submits that the termination penalty sum should be reduced to USD 2,000,000 in accordance with the Article 7.4.13 (2) of PICC(3).

The Article 7.4.13 (2) of PICC has stipulated that the notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.

In the present case, Energy pro claims the termination penalty sum for USD8, 000,000 *(Claimant's Exhibit no. 2)*, which is grossly excessive compared with its harm since Energy Pro delivered only 100 gearboxes to CFX for the first year *(Claimant's statement, Para.9)*. Besides, the gearboxes produced by JV are not only for sale to CFX but also for sale in Catalan *(Claimant's Exhibit no. 1)*, which suggests that these gearboxes delivered to CFX could be sold in Catalan. Therefore, Energy Pro only encounters a little loss hence it cannot claims a termination penalty for s sum of 8, 000,000.

And CFX submits that the termination penalty sum should be reduced to USD 2,000,000.

CONCLUSION AND PREAYER FOR RELIEF

For the forgoing reasons, the claimant respectfully requests this Honorable Arbitration Tribunal to adjudge and declare that:

1. Energy Pro Inc. cannot bring Future Energy Inc. into the arbitration proceedings as it is a third party.
2. Ms. Arbitrator 1 cannot resign during the arbitration proceedings.
3. Energy Pro Inc. did not validly terminate the Contract.
4. In any case, Energy Pro Inc. can claim the termination penalty.

Respectfully Submitted,

AGENTS FOR THE RESPONDENT