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More clarity on tender conditions 2015 and risks for offshore wind parks

Recent developments have created more certainty with regard to the development and exploitation of offshore wind parks. There is greater clarity on the conditions for the first tender (late 2015) and on where the risks lie of late completion and malfunctions. First, the Minister of Economics Affairs has published the Offshore Wind Energy Tender Conditions 2015. Second, the STROOM Bill has been submitted to the Second Chamber of the Dutch parliament. This bill regulates TenneT's responsibility for the offshore transmission system and apportions risks and liability in the case of late completion or malfunctions. In this Legal Alert, we discuss both developments.

The intention is for the Bill on offshore wind energy to come into force on 1 July 2015. This provides a new legislative framework for the development of offshore wind parks. Wind parks may only be built on certain locations or plots, which are designated by a Plot Decision. For the first tender, the relevant plots are Borssele I and II. Each of these plots offers a minimum capacity of 350 MW and a maximum capacity of 380 MW. Under the current timetable, the final plot decisions for these locations will be published at the end of November 2015. Draft decisions will be made available at the beginning of August 2015.

In the Bill on offshore wind energy, the granting of licences and subsidies for these tenders are linked: it is only possible to obtain a licence for an offshore wind park if a subsidy has also been granted for the same project. In the current planning, the first tender will open on 1 December 2015. This tender will close on 31 March 2016 at 17:00.

In a letter to the Second Chamber of 19 May 2015, the Minister sets out the conditions for the first Tender in Borssele. In short, the tender conditions are:

- Any party wishing to apply for a subsidy may submit a tender for each plot. The tender is the amount per kilowatt-hour (kWh) which the party wants to realise the offshore wind park for.
- The tender may not exceed the maximum tender amount. The maximum tender amount of Borssele I and II is 12.4 euro cent per kWh. In addition, a basic electricity price applies of 2.9 euro cent per kWh - this minimum threshold effectively sets a cap for the subsidy per kWh.
- The lowest tender (in euro cent/kWh) wins the subsidy for the plot and is granted the corresponding licence.
- The design of the wind park has to meet the conditions set out in the plot decision.
- It is also possible to bid on both plots at the same time.
- Parties may indicate how much full-load hours they expect to produce. This has to be

substantiated by a wind report. Only the kilowatt-hours actually produced are subsidised. Production not achieved but eligible for a subsidy, may be included in future years (*banking*).

- An equity requirement of 10% of the investment costs applies (the Minister previously mentioned a threshold of 5%). There is no specific requirement with regard to debt.
- In the first year, a EUR 10 million bank guarantee has to be provided (in the earlier draft this was EUR 5 million). Before the end of the first year, a second bank guarantee of EUR 35 million has to be provided (in the earlier draft this was EU 25 million). If the winner of the tender asks for withdrawal of the subsidy decision within a year, a EUR 10 million fine applies. If the wind park is not built within the mandatory period, further fines may apply.
- The subsidy period starts running no later than 5 years from the granting of the subsidy, regardless of whether the wind park is producing electricity. This is an additional measure to stimulate the completion of the wind park on schedule.

The costs of connection to the grid do not have to be incorporated in the tenders, because TenneT will be designated as the offshore network operator and the costs of this will be covered separately: through a subsidy to TenneT or as part of the transport tariffs (on the basis of the STROOM Bill).

The tender conditions will be anchored in regulation. Drafts of the regulations were submitted to online consultation earlier this year.

STROOM Bill

Under the STROOM Bill, TenneT will be designated as the offshore network operator. This designation is an important factor in developing the offshore wind parks - and their connection to the grid - on schedule.

The bill also apportions risks and liability with regard to late completion of the offshore transmission systems and malfunctions. In this context, the government attaches great importance to the coordination of planning between the wind park operator and TenneT.

If damage is nonetheless caused by late access to the wind park, the wind park operator may receive compensation. In that case, the starting point is that consequential damage and lost or delayed revenue are eligible for compensation. This only applies if it is clear that the wind park operator could have completed the wind park or part of it on time. Damage arising from unavailability of the offshore network is also eligible for compensation, except for unavailability during a limited period each year due to normal maintenance. Both issues will be regulated in further detail in an Order in Council. A draft of this was submitted for online consultation earlier this year. Any compensation paid by TenneT will be included in the tariffs, except in the case of gross negligence, which is subject to a maximum excess of EUR 10 million. The bill also provides that wind park operators have a duty to restrict damage as much as possible.