– Legal framework for citizen-owned energy projects in the context of power auctions in Germany and France – Conference of the German-French Office for Renewable Energies

Development of the legal framework for citizen-owned wind energy projects in Germany

Rechtsanwältin Marion Westphal-Hansen
Kanzlei Müller-Wrede & Partner
Leibnizstraße 53, 10629 Berlin
www.mwp-berlin.de
1. **Development of citizen-owned wind farms**

- Wind energy in Germany originally began with citizen-owned wind farms.
- Northern Frisia is the cradle of the German citizen-owned wind farm.
- Approx. 90% of wind farms in Northern Frisia are citizen-owned wind farms.
- More than 20 years of experience with citizen-owned wind farms.
- Citizen-owned wind farms = crucial for local acceptance.
2. Legal framework of citizen-owned energy projects in Germany in the context of power auctions

- Goal of EEG 2017 inter alia to maintain a high level of diversity of actors by means of relaxed requirements for participation in auctions for citizen-owned energy projects (Bürgerenergiegesellschaften – BEG), as defined by the EEG 2017.

- BEG = small local actors, low creditworthiness ↔ high development cost

- EEG 2017 therefore provides for special conditions
2.1 Special conditions for BEG, § 36g EEG 2017:

- BEG may submit bids prior to having been granted a permit under the Federal Immission Control Act (BImSchG)

- Bid bonds are split in half, § 31 EEG 2017: BEG may deposit 15 €/kWh upon submitting the bid and another 15 €/kWh two months after grant of permit.

- The applicable deadline for construction of the turbines is extended by two years

- Uniform pricing: if their bid is accepted, BEG will receive the same price as the highest bid still accepted in the respective auction round
2.2 Requirements for BEG, § 36 EEG 2017: Special conditions for BEG, § 36g EEG 2017:

- Positive elements:
  - BEG as defined by § 3 No. 15 EEG 2017
  - Max. 6 wind turbines/18 MW
  - Evidence of secured availability of land plots required for the turbine Certified wind report
  - Evidence of proposal for a 10% „financial participation“ of the local community or a company fully owned by such local community
Negative elements:

- No „related projects“: participation of BEG or one of its shareholders in other projects (= barring clause)
  ✓ whose bid has been accepted during a period of 12 months prior to submitting the BEG’s bid or
  ✓ which have submitted bids in the same auction round and which together with the BEG’s bid would exceed the 18 MW limit.

- No „circumvention contracts“:
  ✓ Contracts for the transfer of shares or voting rights and other agreements leading to the result that the BEG-criteria of the definition in § 3 No. 15 EEG 2017 are not fulfilled or circumvented post-bid.
  ✓ Contracts for the transfer of shares or voting rights or for profit-sharing concluded prior to commissioning require the BEG’s prior consent
  ✓ BEG may not issue consent if such contracts lead to the result that the BEG-criteria of the definition in § 3 No. 15 EEG 2017 are not fulfilled or circumvented post-bid.
> Evidence of fulfillment of BEG-criteria by written declaration at the time of submittal of the bid, to be repeated at the time of application for allocation,

> Application for allocation: within 2 months after grant of permit

> Lock-up period, § 36g para (5) sentence 4 EEG 2017: BEG-criteria need to be upheld uninterrupted until two years after commissioning,

> In case of breach:
  
  • Revocation of bid acceptance by the Federal Network Agency (BNetzA)

  • Exclusion from further auction rounds

  • Uniform pricing does not apply anymore, pay-as-bid only
2.3 Requirements for BEG, § 3 no. 15 EEG 2017:

- Shareholder structure of BEG:
  - Minimum 10 natural persons as shareholders with voting power
  - No shareholder may hold more than 10% of the voting rights
  - Minimum 50% of voting rights to be held by natural persons with registered principal residence in the administrative district of the planned turbines since at least one year
  - Companies which in turn also meet the BEG-criteria
2.4 Impact on auctions 2017

<table>
<thead>
<tr>
<th>Auction date</th>
<th>Bid acceptances for BEG</th>
<th>Bid acceptances for non-BEG</th>
</tr>
</thead>
<tbody>
<tr>
<td>May 1, 2017</td>
<td>65 (93%)</td>
<td>5 (7%)</td>
</tr>
<tr>
<td>August 1, 2017</td>
<td>60 (89%)</td>
<td>7 (11%)</td>
</tr>
<tr>
<td>November 1, 2017</td>
<td>60 (98%)</td>
<td>1 (2%)</td>
</tr>
</tbody>
</table>

(data provided by BNetzA)

What we can see is:

- Disproportionately high success of BEGs
- However structure of successful BEGs often does not conform to legislator’s intentions
- Considerable price erosion: average unit-value-related value of bid acceptances has decreased from 5.71 ct/kWh (05/17) to 4.28 ct/kWh (08/17) to 3.82 ct/kWh (11/17) (data provided by BNetzA)
2.5 Consequences of auction results 2017

- Risk of delays and/or missing of targets for additional construction of wind energy turbines due to
  
  • missing permits, impact on expected additional constructions beginning 2019/2020
  
  • extremely competitive bid pricing based on expectations of reduced production cost in the future („gamble on the future“)


- „2 markets in the auction“: projects with and without permit

- Threat to diversity of actors: market distortion in favor of BEG with participation of professional developers
2.6 Reaction of the legislator: § 104 para (8) EEG 2017

- Permits required for BEGs too in the auction rounds February 2018 to June 2020

- § 36 para (1) EEG 2017: permit must be granted at least 3 weeks before the auction date.

- The deadline for construction of the turbines is reduced from 54 months to 30 months

- The limitation to 6 turbines/18 MW is dropped
## 2.7 Impact on auctions

<table>
<thead>
<tr>
<th>Auction Date</th>
<th>Bid acceptances for BEGs</th>
<th>Bid acceptances for Non-BEGs</th>
</tr>
</thead>
<tbody>
<tr>
<td>February 1, 2018</td>
<td>19 (23 %)</td>
<td>64 (77 %)</td>
</tr>
<tr>
<td>May 1, 2018</td>
<td>15 (13,5%)</td>
<td>96 (86,5%)</td>
</tr>
<tr>
<td>August 1, 2018</td>
<td>4 (5 %)</td>
<td>82 (95 %)</td>
</tr>
</tbody>
</table>

(data provided by BNetzA)

What we can see is:

- Shifting of relation between bid acceptance for BEGs and Non-BEGs
- Price erosion has been halted: average unit-value-related value of bid acceptances has developed from 4.73 ct/kWh (02/18) to 5.73 ct/kWh (05/18) to 6.16 ct/kWh (08/18) (data provided by BNetzA)
3. **Outlook:**

- Conceivable modifications:
  - BEGs continue to require price- and bid acceptance security; reason: high development cost, low creditworthiness
  - Amount of shareholders may be higher than 10 if barring clause (= no participations in other projects for 12 months before the relevant auction date, § 36g para (1) no. 3 lit. b EEG 2017) is dropped
  - Lock-up period to be extended beyond 2 years with limited exceptions (e.g. relocation)
  - Uniform pricing possibly unnecessary
Thank you for your attention!

Rechtsanwältin Marion Westphal-Hansen
Fachanwältin für Verwaltungsrecht
Fachanwältin für Miet- und Wohnungseigentumsrecht

westphal-hansen@mwp-berlin.de