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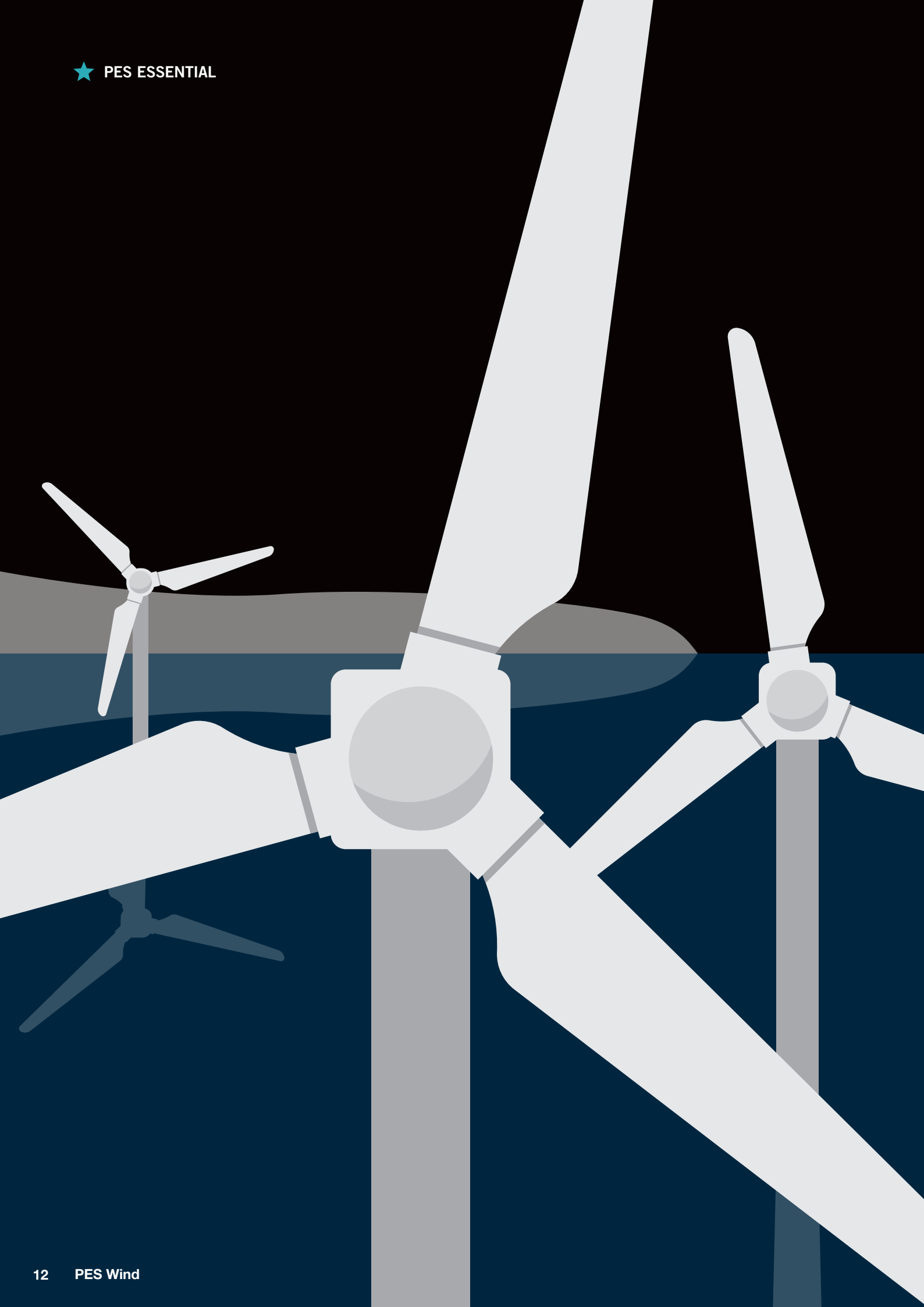

Can bidders in the recent and upcoming German tender process, for offshore wind power, enforce the award?

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Project developers of offshore wind power have concerns, even anxieties, which mirror their apprehension about a basic injustice which just took place during the tendering process pursuant to the new German Offshore Wind Energy Act (WindSeeG).

Linda Blunk

This apprehension has already led to numerous legal inquiries which focus on the following question: Is the tendering procedure pursuant to the WindSeeG unconstitutional, more specifically, can a project developer, who has lost a bid, correct the tender procedure or can he even enforce the award?

I. Tendering Process during the Transition Period

There are numerous examples in German jurisdiction, where tender results have been set aside by a court. For example, Landgericht Köln (Regional Court, Cologne) recently ruled in favour of a utility company, providing energy, water and waste disposal, that had alleged that the tender process had been 'opaque and discriminatory' because at an early stage a certain bidder ("ENWOR") had been favoured, thus robbing other bidders of their chance of success and stage managing the process.

In the realm of offshore wind energy there were also numerous bidders with scant chance of success who were in competition with handful of bidders with good prospects. This is the fault of the tendering process of the transitional regime evolved by WindSeeG.

In Germany the central 'Danish' model will be introduced in the future. According to this model, bidders compete for the building of a specific wind park, prescribed by the Federal Grid Agency (Bundesnetzagentur) at a site pre-examined by the Federal Maritime and Hydrographic Agency (Bundesamt für Seeschifffahrt und Hydrographie). However, this central model will apply only after a transition period, due to the long lead times needed for planning and approval procedure.

During the transition period, for wind farms that will be commissioned between 2021 and 2024, there will be a different model.

There are two tendering dates for 2017 and 2018, each for a capacity of 1.550 MW. Project developers can apply provided the planning and approval procedure for their wind farms is at an advanced stage. On April 1st 2017, the first tendering date, projects with a total capacity of 6–7 GW were allowed to bid. This lead to a scenario of fierce competition between bidders who, as will be shown later, had hardly any possibility to influence their chances of success.

It is this non influenceable chance of success which could lead the courts to conclude that the tenderings conducted this way cannot be upheld, as will be shown later.

II. Freedom of competition and equal opportunities as guaranteed by the German Constitution

In Germany, although the contract award is part of civil law, it is undisputed that contract awarders who belong to the state, or are dominated by it, are subject to the German Constitution (GG), which according to Article 1 section 3 GG prohibits the state to act in an arbitrary way. Therefore, bidders can claim that during the tendering process their fundamental right to freedom of occupation and competition (Article 12 GG) and the right of equal opportunities during competition (derived from Article 3 GG) were violated, as the latter undoubtedly includes the right of equal opportunities during tendering procedures.

1. German Act against Restraints of Competition

These constitutional rights, principles and freedoms as well as EU awarding regulations, were implemented in Part Four, Awarding Provisions, of the German Act against Restraints of Competition (GWB). Accordingly, the GWB contains provisions ensuring fair, transparent, non-discriminatory and market-based allocation procedures.

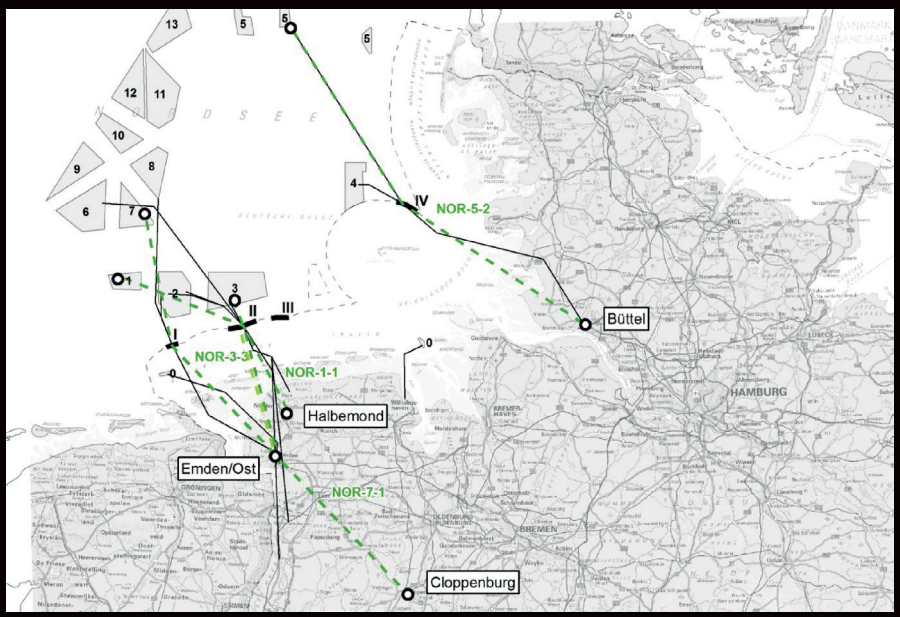
The Act applies to all public procurement procedures falling within its scope. The GWB enshrined the principles of competition, transparency, and equal treatment as the main pillars of the awarding process. These guiding principles are of significance for the awarding decision itself as well as for the legal protection of bidders against it.

2. WindSeeG Tendering Process unlike GWB

The tendering procedure of the WindSeeG differs significantly from the regulations of the GWB. As noted, constitutional law requires tendering procedures conducted by the state to be clear, transparent, and non-discriminatory, wherefore all admitted tendering participants must have a genuine chance of competing successfully. In traditional tendering procedures, including the Danish model, this is the case, because only one contract or licence is awarded, not several. However, the tendering procedure during the transition period pursuant to WindSeeG does not provide a level playing field for all participants.

Offshore wind farm projects, provided they have planning approval for a designated cluster, although they are totally different, have to participate in an undercutting-type of competition, whereby the lowest bid is awarded ‘pay-as-bid’. It is extremely problematic that projects participating in the tendering procedure differ from each other and therefore have different cost structures.

The differences in parameters are caused primarily by different prevailing currents, different water depths, different wind conditions including interferences by neighbouring wind parks, wake-effect, different distances from shore, varying soil conditions, crossing of underwater cables and pipelines within the building site, price disadvantages for smaller wind farms etc.



Owned by Federal Grid Agency

These differences, which become obvious when comparing locations in the North Sea with the Baltic, are beyond the control of the project developer; they are preconditions he must submit to. An strategic building site location results in a significant advantage in cost and/or profits compared with a location that suffers from interferences or is more difficult to develop. The situation is further aggravated by the dominance of the market leaders, as the bids of 0.0 cent by Dong Energy and EnBW have shown. Especially by companies who can afford such bids and who will pass on the true cost to the consumer in other ways. Thus, the tendering process, which was supposed to prevent the passing on of costs to the consumer, became a farce. Project developers, who do not have a monopolistic structure and therefore cannot pass on the costs outside the EEG apportionment, have no real chance to win a bid.

Consequently it is considered that the tendering process during the transition period of the WindSeeG, in the way it is applied, does not guarantee freedom of competition or equal opportunities. To achieve this, the German legislator or at least the Federal Grid Agency, would have had to implement a more differentiated tendering procedure which would take into account the market dominance of certain companies and also the difference in cost structures of competing wind farm projects.

The latter assessment was implemented for onshore projects where, in case of different wind conditions, the reference yield model (Referenzertragsmodell) applies. This model corrects any imbalances arising from locations with strong or weak wind speeds, by introducing a correcting factor that lowers or raises the bidding price. Lowering it for a project location with sluggish wind and raising it for a location enjoying strong winds.

A similar concept hasn’t been put in place for the offshore auction system, although offshore projects are subject to a much larger number of price factors than onshore projects. To sum up, there must be grave misgivings whether the transitional tendering procedure can be deemed fair and non-discriminatory. There are even serious indications that it violates constitutional law because even before the publishing of the tendering results the probable winner of the bidding process could have been predicted.

III. Possible legal remedies

Various legal remedies are available to an unsuccessful bidder.

1. Constitutional complaint

One possibility is the filing of a Constitutional Complaint. Indeed, there are numerous examples where the Constitutional Court repealed an enacted law, the most recent and widely publicised case being the Law of the Federal Criminal Agency (BKA-Gesetz) of which large parts were declared unconstitutional.

This often occurs when the legislator resorts to a hasty legislative procedure which leads to an insufficient impact assessment. German laws providing tendering procedures for offshore wind energy (WindSeeG, EEG 2017) were rushed through Parliament in July 2016 in a hasty fashion because the European Commission had opined that the promotion of renewable energies constitutes a case of state aid, so the German legislator felt obliged to provide for tender procedures as soon as possible.

However, the constitutional complaint suffers from the disadvantage of being an extraordinary remedy that is inadmissible, unless all other legal remedies have been exhausted, thus necessitating lengthy and costly procedures in several instances. This would cause a long period of uncertainty with negative consequences for the offshore market as a whole.

Furthermore, a constitutional complaint that is successful could lead to the abolishment of the whole transitional tendering regime of WindSeeG: For it is highly likely that the legislator would repeal the transitional tendering process as a whole and would implement the central model without any transitional period. Obviously, neither successful nor unsuccessful bidders would profit from this.

2. Complaint pursuant to § 72 WindSeeG

Therefore, project developers favour the complaint pursuant to § 72 WindSeeG. The complaint has to be brought to the Higher Regional Court (Oberlandesgericht) for a ruling. If it deems the complaint well-founded, it will not however pronounce that the Federal Grid Agency has an obligation to accept the complainant's bid, but an obligation to make a new decision, taking into consideration the Court's reasoning.

The jurisdiction of the Higher Regional Court, instead of the Regional Court, has the advantage of reducing the legal remedy to one instance; therefore unsuccessful bidders can look forward to a comparatively speedy and efficient procedure. They are however obliged to provide evidence to the court that they would have won the tendering, if the tendering criteria had considered the specific conditions of the project.

If the court deems a complaint well-founded, the Federal Grid Agency, pursuant to § 83a Abs.1 S.3 EEG 2017, would have to make an award even if the prescribed tender volume would thereby be exceeded. Because this would add newly awarded projects to already existing ones, the power generated by offshore wind farms is likely to increase much faster than planned by the legislator.

However, the Higher Regional Court will deal with the complaint only if the unsuccessful bidder complains within the time limit for appeal, which is one month from the publication of the tendering results and therefore ends on the 20th of May 2017 (§ 78 Abs. 1 EnWGi.V.m. § 35 Abs. 2 EEG 2017). If the deadline is missed, the decision by the Federal Grid Agency is final and it will not be possible to dispute it.

IV. Conclusion

The gong has sounded for the transitional tendering procedure to enter an exciting second round which will take place in court. Remarkably, large law firms are exercising restraint in advising clients about the possibility of making a complaint pursuant to § 72 WindSeeG, such advice is mainly provided by smaller law firms that specialise in renewable energies.

These are already in full swing preparing to file such complaints.

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