

## **Offshore wind farm development: Guarantee for penalty for defective performance**

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Recently the Danish Energy Agency announced the tender conditions for the Thor offshore wind farm project.

Tenderers should be cognizant of the requirements of demand guarantees and parent company guarantees for certain penalties (liquidated damages) under the concession agreement for the Thor project.

The guarantees shall cover the liability for defective performance in connecting the wind park to the grid in a timely fashion or in commencing construction work in accordance with the agreed deadlines. This article describes the legal basis for the penalty and the requirements for financial security.

### **The penalty – legal basis and amount**

In the Concession Agreement for the Thor offshore wind farm tender, point 3.1 states the following:

*“3.1 If, despite the above obligations, see point 1.1, the Concessionaire reports that, regardless of the reason, the Concessionaire will not after all construct and connect to the grid the offshore wind farm with the associated internal collection grid, hereunder if circumstances show that this is so, or if the construction work is not commenced before 1 January 2026, see point 1.6, a penalty for defective performance will become payable immediately upon demand.”*

According to point 3.3, the penalty for defective performance (contractual penalty) will amount to DKK 1,200,000,000 immediately after establishment of this Concession Agreement. The guarantee for the penalty for defective performance is described in section 4.

### **The penalty – which liabilities does it cover?**

According to point 3.4, the penalty covers full and final settlement of any claim the Danish TSO Energinet may have against the Concessionaire pursuant to section 31(1) of the Promotion of Renewable Energy Act (the RE Act) in the event that the Concessionaire fails to construct the offshore wind farm and connect it to the grid in accordance with the Concession Agreement.

Section 31 establishes a strict (no-fault) liability for not establishing an offshore wind farm by a power producer who had promised to do so pursuant to a concession agreement.

Thus, the penalty for defective performance covers the Concessionaire's objective liability in pursuance of section 31(1) and (3) of the RE Act for Energinet's losses, including additional costs in connection with possible cancellation by Energinet of orders on onshore installations.

The Concessionaire may not be held liable for damages pursuant to section 31(1) of the RE Act that exceed the penalty for defective performance. According to section 31(3), second sentence, any disagreements on liability and the extent of damages must be settled by the Danish courts.

According to point 3.5, the penalty for defective performance covers full and final settlement of any claim the Danish Energy Agency may have against the Concessionaire according to the Concession Agreement and the associated licences and authorisations in the event that the Concessionaire fails to construct the offshore wind farm and connect it to the grid in accordance with the terms and conditions of the Concession Agreement.

## **Financial security / guarantee**

Section 4.1-4.3 of the Concession Agreement reads as follows:

*4.1 Upon conclusion of the Concession Agreement for construction and connection to the grid of the offshore wind farm, the Concessionaire must provide a guarantee of DKK 1.2 bn. as guarantee for payment of the above mentioned penalty for defective performance, see point 3.3.*

*4.2 One part of the guarantee must be provided as a demand guarantee amounting to at least DKK 400 million. The guarantee must be provided on the terms stated in annex 3.5 (model demand guarantee). Linguistic clarification may be made to the wording of the annexes, but not changes to the content that impair the guarantee for the Danish Energy Agency.*

*4.3 The guarantee for the remaining DKK 800 million up to the full amount of the penalty for defective performance of DKK 1.2 bn. can be provided as a parent-company guarantee of DKK 800 million, see annex 3.6 (model parent company guarantee) [...]. Should the Concessionaire not have a parent company (according to the mentioned definition), the full guarantee of DKK 1.2 bn. must be placed as a demand guarantee, cf. point 4.2 and 4.4.*

## **Model Demand Guarantee – operational provisions**

The operational provisions of the model Demand Guarantee are points 5 - Payment under the guarantee and 6 - Expiry (release) of the guarantee.

### **Payment:**

According to point 5 of the model Demand Guarantee, the guarantee amount must be paid to the Danish Energy Agency upon the first written demand for payment to the Guarantor stating that the Danish Energy Agency is entitled to the amount demanded pursuant to the Concession Agreement.

The guarantee must be paid on demand without examination or other documentation of the legitimacy of the demand. Payment must be by no later than seven calendar days after receipt of the demand for payment.

### **Release:**

Pursuant to point 6 of the model Demand Guarantee, the guarantee will be valid until the Danish Energy Agency informs the Guarantor in writing that the guarantee has been released.

The Danish Energy Agency is obligated to release the guarantee no later than one month after Energinet has confirmed that Energinet has received payment for the cost of the grid connection and the preliminary investigations, however, with the possibility of reductions (partly release) according to the terms of Concession Agreement.

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The guarantee will be returned to the Guarantor with an endorsement of release as soon as the guarantee has been released in full.

## Summary and conclusion

Penalties for non-compliance with terms for connecting to the grid etc. are not uncommon and have also been applied in earlier Danish offshore wind tenders. However, consequences of late performance can be serious unless a negotiated extension of the deadlines is achieved from the Danish Energy Agency.

The penalty is strict and will be DKK 1,200,000,000 if the event of breach of contract. The tenderer/concessionaire must provide acceptable financial security for this potential liability prior to the signature of the concession agreement with the Danish state / Danish Energy Agency.

Part of the guarantees shall be provided by a bank guarantee that typically can be costly and another part by a parent company with sufficient financial strength.

WSCO law firm will continue to monitor and report on the legal framework of offshore wind projects in Denmark.

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For questions or comments to this newsletter or energy and offshore in general, please contact Bo Sandroos on +45 4088 5422 or [bos@wsko.dk](mailto:bos@wsko.dk).

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