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Proposed amendments to Polish RES regulations

The Polish Ministry of Energy announced a draft act amending the Act on Renewable Energy Sources (**RES Act**), introducing a number of modifications to the auction mechanism as well as amending the Act on Investments in Wind Power Plants (**Amendment Act**) and commenced the public consultation phase. At this stage, it is difficult to predict when exactly the Amendment Act will be submitted to the Polish Parliament and passed. However, the Amendment Act itself proposes that most of its provisions would become applicable from 1 September 2017. Below we present key amendments to the RES Act to be introduced in the Amendment Act:

(i) Limit on total funding obtained by RES installation

The Amendment Act presents a different approach to calculating state aid. In contrast to the current RES Act, when calculating the total value of public aid awarded to the given RES installation, the value of green certificates, cogeneration certificates and energy efficiency certificates, CO2 emission allowances will no longer need to be included.

(ii) Change in formulating bid prices – 'gross price'

Currently, when calculating the bid price, the generator should take into account state aid awarded to the given RES installation and reduce the price (i.e. deduct the value of state aid). In consequence, generators operating RES installations awarded state aid might submit lower bids than those who operate RES installations without any state funding.

Under the Amendment Act, the RES operators will offer prices without taking into account the value of any other state aid awarded to the given RES installation. Only once an auction is completed, will the winner be required to recalculate its winning price and reduce it by the amount of state aid already awarded to the given RES installation (if any). This change should result in equal treatment of all RES operators during auctions regardless of whether they obtained any state aid or not.

(iii) New auction baskets

The Amendment Act introduces a completely new structure of auction baskets which will apply to RES technologies listed in the Minister of Energy regulation on reference prices. Under the Amendment Act, there should be the following six auction baskets, for:

1. RES installations: (i) which use landfill gas for the generation of electricity, (ii) which use gas from sewage treatment plants for the generation of electricity, (iii) which use biogas of a type other than those mentioned in points (i) and (ii), (iv) dedicated biomass-fired installations or hybrid systems with a total installed electrical capacity of up to 50 MW, (v) which use biomass, bioliquids, biogas or agricultural biogas in a dedicated multi-fuel plant, (vi) with a total installed electrical capacity of up to 50 MW, for the generation of electricity in a dedicated biomass-fired installation or in hybrid systems in high-efficiency cogeneration, (vii) with a total installed electrical capacity in excess of 50 MW or a total installed thermal capacity of up to 150 MWth, which use biomass in a dedicated biomass firing installation or in hybrid systems in high-efficiency cogeneration for the generation of electricity, and (viii) which use bioliquids for the generation of electricity;
2. thermal waste treatment plants;
3. RES installations which: (i) use hydropower for the generation of electricity, (ii) use geothermal energy for the generation of electricity, and (iii) use off-shore wind energy for the generation of electricity;
4. RES installations which use agricultural biogas for the generation of electricity,
5. (i) onshore wind farms, and (ii) photovoltaic (PV) plants;
6. hybrid installations.

However, in each of these categories, there will be separate auctions for installations:

- a. operating before 1 July 2016; and those
- b. operating after close of relevant auctions and
with total installed electrical capacity:
 - a. not higher than 1 MW;
 - b. higher than 1 MW.

As a consequence of the new auction baskets structure, the Amendment Act will also introduce modified volumes and values of energy from RES that can be sold in auctions in 2017.

(iv) Guarantee of competition among bidders – mechanism to reduce auction supply to 80% of bids

Under the Amendment Act, regardless of the initially planned volume of the given auction, the winners should represent no more than 80% of the total volume of electricity covered by the bids.

(v) Different deposit rates for auction participants

One of the conditions for entering an auction is to provide a bank guarantee or cash deposit. Currently a bank guarantee or cash deposit should equal PLN 30 per kW of installed capacity of a given RES installation. The Amendment Act provides for the following rates:

- a. PLN 30 per 1 kW for existing RES installations;
- b. PLN 60 per 1 kW for planned RES installations.

(vi) Introduction of minimum bid price during auctions

In addition to maximum bid prices (i.e. reference prices), the Amendment Act introduces a minimum bid price which will amount to the so-called price ERO price (where ERO stands for the Energy Regulatory Office) (i.e. average “competitive market” price from the previous calendar quarter).

(vii) Limited pre-qualification requirements for new installations

New RES installations will be admitted to auctions only if they undergo a pre-qualification procedure conducted by the President of the ERO and obtain a certificate (valid for 12 months). Under the Amendment Act, the eligibility criteria for new projects will be limited to the following three documents:

- a. grid connection conditions issued by, or a grid connection agreement executed with, the relevant grid operator;
- b. final and non-revisable (*prawomocne*) building permit (*pozwolenie na budowę*),
- c. schedule for implementing the project.

(viii) Shortened time limits for constructing winning RES installation

The Amendment Act introduces shortened time limits for constructing and launching winning RES installations, i.e. 36 months, save for PV plants (18 months), onshore wind farms (24 months) and offshore wind farms (72 months).

(ix) Transfer of rights and obligations under the auction system

The Amendment Act introduces a new mechanism of transferring rights and obligations under the auction system. If a RES installation operator is planning to sell its installation, he may apply to the President of the ERO for consent to transferring the rights and obligations under the auction system to a specified entity. The President of the ERO should issue a decision within 30 days. The President of the ERO may deny consent if:

- a. the purchaser of the RES installation does not meet legal requirements for carrying out electricity generation in a RES installation;
- b. there is a reasonable risk that the given purchaser will not fulfil the obligations under the auction system.

(x) Separate FiT system for biogas and hydro power plants with capacity below 1 MW

The Amendment Act introduces a separate feed-in tariffs (FiT) mechanism for biogas plants and hydro power plants with a total installed capacity of up to 500 kW. Under this mechanism, the operator might decide to adopt a FiT in which the price would amount to 80% of the currently binding reference price for the given RES technology.

Operators of biogas plants and hydro power plants with a total installed capacity of more than 500 kW and less than 1 MW might also decide to join this mechanism. In that case, the RES operators will be entitled to receive compensation for the “negative balance”, i.e. the difference between 80% of the currently binding reference price for the given RES technology and the weighted average price of electricity on a commodity exchange.

Moreover, the Amendment Act proposes certain amendments to the Act on Investments in Wind Power Plants of 20 May 2016 which introduced rules for locating and constructing wind farms (and established a minimum distance requirement) and a definition of a wind power plant (which resulted in significant implications for the calculation of real property tax payable on the real property where a wind turbine is located):

(i) The Amendment Act introduces modifications to the definition of a wind power plant aimed to retract the changes initially implemented by the Act on Investments in Wind Power Plants. Under the Amendment Act, a wind power plant consists of two parts: the building section (*część budowlana*) and technical equipment (*urządzenia techniczne*) which generates electricity. **As a result, the taxable base for calculating real property tax will be again limited to the value of foundations and the tower (just like it was before the Act on Investments in Wind Power Plants came into force). This modification would become applicable as of 1 September 2017.**

(ii) The Amendment Act proposes new provisions on terminating wind power plant operation:

a. Wind power plants which are no longer used should be dismantled by the last wind power plant operator. However, only visible (above ground) infrastructure should be dismantled which means that underground cabling systems may remain in the ground.

b. Under the Amendment Act, Articles 675 and 677 of Civil Code which apply to leases (*umowy dzierżawy*) or tenancies (*umowy najmu*) would be extended also to agreements that would not be classified as leases or tenancies:

- Under Article 675, when the tenancy ends, the tenant (i.e. the wind power plant operator) is obliged to return the real property in a non-deteriorated condition; however, he should not be liable for normal wear and tear. If the tenant has subrented the property or has given it for gratuitous use to another person, that person also has such obligation. It is presumed that the real property was handed over to the tenant in a good state of repair and fit for the agreed use.

- Under Article 677, the landlord’s (landowner’s) claims against the tenant (wind power plant operator) for remedy of damage due to impairment or deterioration of the real property as well as the tenant’s claims against the landlord for reimbursement of expenditures on the property or for reimbursement of the

overpaid rent are barred by the statute of limitations one year after the thing is returned.

- c. It should be underlined that the obligation to return the real property in a non-deteriorated condition (which basically means the obligation to dismantle wind power plants) would apply not only to the given SPV acting as a wind power plant operator but also to all individuals who represented the SPV and were responsible for operating the wind power plants (i.e. management board members).

The SPV and the management board members should be liable jointly and severally for the fulfilment of the above obligation within 90 days from the termination of the agreement securing the location of the wind power plant.

- d. The wind power plant operator would be allowed to return the real property in a “deteriorated condition” only if the landlord agrees to it in a separate agreement executed in the notarial deed form.
- e. The agreements securing the location of wind power plants which do not meet the requirements mentioned in point (b) above might be amended upon the landlord’s request. If the agreement is not amended within 12 months through the wind farm operator’s fault, the landlord will be entitled to terminate the agreement.

(iii) The Amendment Act modifies Article 12 of the Act on Investments in Wind Power Plants under which an existing wind power plant that does not comply with the minimum distance requirement not only may undergo repair or maintenance works but also may be modified in a way that changes its performance parameters (which is currently excluded in this regulation) provided that such actions do not increase its environmental impact.

(iv) Currently, building permits issued before the effective date of the Act on Investments in Wind Power Plants (16 July 2016) remain valid as long as the wind power plants are constructed and the occupancy permit (*pozwolenie na użytkowanie*) is issued not later than three years from the Act’s effective date. The Amendment Act repeals the above provision. In consequence, investors would be entitled to continue construction works and obtain occupancy permits without the three years’ deadline.

CONTACT



Jose Luis Villacampa Varea
 Partner | Infrastructure & Energy Practice
 T: 0048 22 557 94 25
 E: joseluis.villacampa@dzp.pl