

## International Project Development & Finance Update

### German Federal Cabinet Publishes Delegated Legislation on Competitive Tenders for Ground-Mounted Solar Arrays

Under the Regulation Introducing Tenders for Financial Support of German Solar Arrays as well as Amending other Regulations Aimed at Promoting Renewable Energies (*Verordnung zur Einführung von Ausschreibungen der finanziellen Förderung für Freiflächenanlagen sowie zur Änderung weiterer Verordnungen zur Förderung der erneuerbaren Energien*—“Solar Tender Regulation”) passed this week by the German Federal Cabinet (*Bundeskabinett*), the German Federal Grid Agency (*Bundesnetzagentur*) is tasked with holding three tenders per year for ground-mounted solar arrays: one in April, August and December each. The 2015 tenders will cover a total nominal output of 500 MW (150 MW/150 MW/200 MW), and the tenders in 2016 and 2017 will be for a total of 400 MW (125 MW/125 MW/150 MW) and 300 MW (100 MW each), respectively. Amounts not tendered in any particular tender and amounts not built within the relevant deadlines will be carried forward to future tenders. Requests for tenders will be published on the German Federal Grid Agency website no later than six weeks, and no earlier than nine weeks, prior to each tender deadline. Bidders can thus expect the first request for tenders for solar arrays to be published between the second full week of February 2015 and the first week of March 2015 for the first tender deadline on April 15, 2015.

Historically, German grid operators were obligated to take off, transmit and distribute the entire available amount of renewable energy electricity, and to pay the project operator a fixed statutory feed-in-tariff (FIT). While this system has proved very effective in creating new capacity, under the 2014 German Renewable Energies Act (*Erneuerbare-Energien-Gesetz* (EEG)), the German Government is looking to implement a shift away from FITs to competitive

tenders from 2017 onward for most renewable energy sources (other than offshore wind, which will continue to benefit from FIT until 2019) due to:

- pressure from the European Commission through a State aid procedure opened in 2013, and the Commission's intention to introduce competitive tenders as the main instrument for determining the price of renewable energy electricity;
- the hope that competitive tenders will (further) reduce the cost of renewable energy electricity, in light of the still relatively high level of FITs (which has already been significantly reduced in the 2014 EEG from 13.5ct/kWh to 9.23ct/kWh for solar installations with a nominal output of up to 10 MW); and
- the intention to keep the renewable energy industry open to a broad variety of market players.

In a nutshell, the Solar Tender Regulation provides that:

- bidders are required to post an initial security deposit (sometimes also referred to as a "bid bond") of €4.00 per kilowatt tendered, and an additional security deposit of €50.00 per kilowatt tendered once the National Grid Agency has accepted their bid, in each case, unless the land where the solar installation is planned has already been set aside for this purpose under relevant public planning laws, in which case the security deposit will be reduced by 50% to €2.00 and €25.00 per kilowatt tendered, respectively;
- bidders have to post the initial security deposit not later than the tender deadline and the additional security deposit within 10 business days of publication of the acceptance of their bid;
- bidders may submit multiple bids, but no single bid for solar installations may be smaller than 100 kW and larger than 10 MW;
- acceptances of bids may not be traded or otherwise transferred by a bidder prior to grid connection of the solar installations and issuance of the relevant production grant (*Förderberechtigung*); and
- bidders shall be liable vis-à-vis grid operators in an amount equivalent to the initial security deposit for bid acceptances that have expired (*Zuschlag erloschen*) and in an amount equal to the additional security deposit for bid acceptances that have been voided (*entwertet*), the latter subject to a five percent *de minimis* threshold.

The Solar Tender Regulation additionally addresses:

- how the National Grid Agency has to accept all eligible bids in cases where tenders fall short of or exceed the total nominal output covered in the relevant tender;
- that the National Grid Agency shall arrange for automatic entries (*Nachrückverfahren*) of bidders whose bids were not accepted in the initial tender in cases where acceptances of bids for a nominal output of more than 30 MW have expired (*Zuschlag erloschen*);
- the means of publication of the acceptance of bids (i.e., the National Grid Agency website);

- the circumstances in which the National Grid Agency has to repay the initial security deposit and the additional security deposit, respectively; and
- that unsuccessful bidders can neither (i) appeal decisions of the Federal Grid Agency with the agency itself nor (ii) challenge bid acceptances by the Federal Grid Agency or the issuance of the relevant production grant vis-à-vis third parties; rather, unsuccessful bidders can only take action against the Federal Grid Agency itself by asking the courts to order the Federal Grid Agency to accept their bid (*Verpflichtungsklage erheben*).

The Solar Tender Regulation will enter into force upon its publication in the German Federal Gazette (*Bundesgesetzblatt*); publication is scheduled for February.

## Contact Us

Be on the lookout for additional Kaye Scholer *International Project Development & Finance Updates*. In the meantime, please do not hesitate to speak with your usual Kaye Scholer contact or one of the members of our International Project Development & Finance team.

### Sandra Pfister

+49 69 25494 240

sandra.pfister@kayescholer.com

### Ingrid Kalisch

+49 69 25494 250

ingrid.kalisch@kayescholer.com

### Simon Firth

+44 20 7105 0583

simon.firth@kayescholer.com

### Irv Hepner

+1 310 788 1177

irv.hepner@kayescholer.com

### Madeleine M.L. Tan

+1 212 836 7547

madeleine.tan@kayescholer.com

### Sydney E. Unger

+1 212 836 8471

sydney.unger@kayescholer.com

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