

Position Paper

of the

Federal Association Wind Energy Offshore e.V. (BWO)

on the draft of the European Commission implementing regulation specifying the non-price criteria used in auctions for the deployment of energy from renewable sources

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Bundesverband
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1 General Remarks

The European Commission (EC) has published its draft for the implementing regulation setting out the pre-qualification and award criteria for auctions for the deployment of energy from renewable sources and launched a stakeholder consultation.

We welcome the opportunity to comment on the draft.

On the one hand, we consider the implementing regulation a necessary step to

1. support the objective of developing and maintaining an industrial base for the deployment of renewable energy in the EU
2. facilitate the application of the non-price criteria (NPC) by the Member States (MS)
3. harmonize the widely differing tendering systems in the EU, thereby ensuring uniform application of the law throughout the European Union.

However, in order to achieve a competitive supply chain and efficient auction conditions, we recommend keeping the complexity and bureaucracy effort as low as possible. The general premise of the Net-Zero Industry Act (NZIA) is to strengthen the European value chain - in line with this, the European Commission has set itself the goal of reducing bureaucracy across the board. Some of the implementing and enforcement regulations proposed in the framework of NZIA could be counterproductive to this and discourage companies from expanding their European facilities or operations. We therefore ask for a review of the documentation requirements with the aim of reducing bureaucracy not only on the side of Commission or Member States, but also on the side of the industry.

We consider the implementation of non-price auction criteria to be a valuable step to support European supply chains – still, this should only be part of a broader set of measures aimed at increasing local manufacturing capacities, such as investment protection schemes or regulatory simplification initiatives.

In the following, we will comment on the draft following the structure of the legislative proposal.

2 Assessment of the Single Provisions in the Draft Document

Article 5: Cyber-security and data security

We welcome the EC's confirmation of cyber- and data security as a mandatory pre-qualification criterion. Cybersecurity is essential for the safety of offshore wind farms, and we support a clearer and more uniform approach on the level of European regulation for energy providers. However, we do not support stricter regulation concerning the location of data usage and storage. The preferred location for data usage and storage would be states that are equivalent to GDPR-Level standards. Countries with a similar legal framework on data protection should be permitted to host data storage and usage facilities.

Article 6: Ability to deliver the project fully and on time

In general, we support the EC's approach to introduce pre-qualification criteria related to the ability to deliver projects fully and on time.

However, the key challenge here is to make sure that the required evidence listed in the article is available at the time of bidding.

Article 6, Paragraph 1, letter b stipulates that *"bidders shall be required to provide documentation showing compliance with the applicable laws, including any relevant permits that are required to build and operate the project"*.

We strongly object to this provision. It cannot sensibly be applied to the German tendering system for offshore wind, where the established and well-working procedure to obtain the permit starts only **after** the bidding process.

Furthermore, Article 6 paragraph 1, letter c obliges the bidder to provide documentation *"on the company's financial and economic situation proving their financial capability"*. The information which indeed can be provided at the time of the bid and demonstrates financial capability are Bank Guarantees, Letters of Credit and parent company guarantees. These instruments provide strong assurance of available funds, mitigate financial risks and ensure project continuity without delays.

Article 6 paragraph 1, letter e imposes an obligation on the bidder *"to provide information about service providers, suppliers and any other contractors relevant to the project, such as the manufacturer of the renewable energy equipment"*. It should be noted that offshore wind projects require long lead times. Therefore, this information is usually not yet available at the time of the tender, meaning they are usually not even known to the developer. The implementing regulation should not impose data queries that are difficult, if not impossible, to fulfil at the time of the bid.

We are also concerned that the requirement to provide *"evidence"* of the technical feasibility (6f) (at the time of the bidding) may create insurmountable entry barriers for new market entrants and increase the cost of participating in such a project.

Proven experience in a neighboring market such as offshore platforms or grid installation should be sufficient to demonstrate the required technical expertise.

A clarification should be added in Art.6 f., to ensure that proven experience in projects in the European Economic Area and UK is recognized.

Summarizing, Article 6 should focus on the information which the bidder **is able to provide** at the time of bidding.

Article 7: Resilience Contribution

We welcome the emphasis on European harmonization with regard to the resilience criterion, as well as the aspects of reliable supply chains, a competitive bidding process and the general progress of renewable energy expansion.

On the other hand, we are concerned that paragraph 7.3, which explicitly applies a restriction to components manufactured in China, may not be in line with international free trade guidelines. The current heavy reliance on permanent magnets from China raises further concerns regarding the security of supply – thus, we recommend a thorough impact assessment before including paragraph 7.3 in the final version of the resilience contribution.

Furthermore, we find the current wording of the resilience requirements rather complex and open for different interpretations. In order to achieve a resilience contribution which could be harmonized EU-wide, we would welcome a more stringent formulation, as well as further guidance on how the mixed sourcing of components could be realized in an economically viable way.

Regarding the point in time for demonstrating compliance with non-price criteria, we recommend the requirement to demonstrate **at the time of project delivery**, as there are years between submission of a bid and project delivery in the offshore wind industry.

Article 15: Energy system integration

We welcome the EC's recognition that energy system needs cannot be addressed by NPCs in renewable auctions alone, emphasizing the necessity for systemic solutions (including regulatory aspects, market signals and network tariffs). In our view, the burden of proof should be on the MS to demonstrate that the chosen criteria can be adequately and cost-effectively addressed by the operator of the renewable energy installation (in our case the offshore wind farm), if the MS decides to introduce such an NPC for energy system integration.

The current wording of the article gives the impression that national tenders applying the "energy system integration criteria" **must take into account** the contribution of the participating projects to all three system needs (project's temporal flexibility, locational impact on system, ability to creating connections) mentioned. Such a requirement is much too ambitious and will increase the complexity to apply this criterion.

Again, we doubt that these criteria can sensibly be part of a prequalification process. The evaluation of energy system integration necessitates meticulous examination which is both time-consuming and costly and therefore cannot be imposed on the company intending to submit a bid.

Therefore Article 15 should be revised to stipulate that, in the event that a single MS chooses to implement these criteria, only one of the three options delineated must be applied in a tender.

Article 16: Ensuring compliance

We welcome the EC's requirement that MS shall introduce appropriate monitoring mechanisms and "sufficiently high" guarantees to ensure compliance with the criteria.

Assessment of the auctions' pre-qualification or award criteria and compliance aspects: In order to increase legal certainty, we support the EC's approach of **favoring a quantitative rather than a qualitative assessment** of the criteria based on a scoring method established and published in advance of the bidding process.

Art. 16 paragraph 1 sentence 4 allows "*to set the scoring for a given aspect by reference to the highest bidder when the relevant authorities do not have information to set the scoring upfront*". We strongly object to this stipulation and suggest its deletion because it creates legal uncertainty. The optimum of a given criterion must be known at all times, otherwise it becomes arbitrary. In instances where the relevant authorities lack regarding the extent to which the criterion may be fulfilled, the application of this provision is not only inappropriate but also raises significant concerns regarding its suitability.

Article 17: Penalties

The draft proposes that MS shall set **penalties** for instances of non-compliance. The provision stipulates that these penalties should be set at a level that strikes a balance between the necessity of ensuring competitive bidding while simultaneously discouraging companies from bidding without a firm intention to carry out and complete the project. In general, we consider this stipulation to be necessary.

However, the EC must acknowledge that non-compliance with the criteria (as well as delays in realization of the renewable projects) can be attributed to the developer, the Transmission System Operator or the supplying industry. It is not unlikely that in the coming years, non-compliance issues will be caused by delays in the supply chain or struggling key suppliers. The developer cannot be held to account for such developments.

Therefore, the implementing regulation should introduce a provision that in their national legislation the MS take due account of **the appropriate allocation of responsibilities** between these parties. Penalties should only be applied to the individual developer where delays or non-delivery can be clearly and solely attributed to them.

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