



Hogan
Lovells

Japan's offshore wind market

Third Joint Meeting

March 2019

Japan's offshore wind market – Third Joint Meeting

The third joint meeting was held on February 28, 2019 (the "**Third Joint Meeting**")¹. The **main purpose** of the Third Joint Meeting: To set specific standards and procedures for:

- (a) Designation of promotion zones; and
- (b) Selection of a business operator (i.e., project company) through a public auction system under the New Act².

This alert summarizes the **outcome** of the Third Joint Meeting and the **future direction** of discussion surrounding the selection of business operators for the promotion zones based on the proposal³ shared by the Secretariat of the Third Joint Meeting. The Secretariat's proposal addressed the following topics:

- evaluation criteria;
- matters to be addressed in the Guidelines for Public Auction and the Exclusive Use (the "**Guidelines**");
- information to be disclosed to the business operators at the time of public auction;
- review and evaluation methods for selecting business operators; and
- schedule of public auction.



Joseph Kim
Partner, Tokyo
T +81 3 5157 8260
joseph.kim@hoganlovells.com



Michael Lynch
Senior Associate, Tokyo
T +81 3 5157 8171
Michael.lynnch@hoganlovells.com



Chiyokazu Shindo
Senior Associate, Tokyo
T +81 3 5157 8301
Chiyokazu.shindo@hoganlovells.com

¹ The Working Group on Offshore Wind Power Promotion within the Subcommittee on Mass Renewable Energy Introduction, Next Generation Electricity Network in the Energy Conservation and New Energy Subcommittee of the Advisory Committee on Natural Resources and Energy; and the Offshore Wind Power Promotion Subcommittee within the Environment Subcommittee in the Port Policy Council.

² The Promotion of Use of Sea Areas to Develop Offshore Renewable Energy Facilities Act (Act No.89 of December 7, 2018) (*Kaiyou Saiseikanou Energy Hatsudensetsubi no Seibi nikakaru Kaiiki no Riyou no Sokushin nikansuru Houritsu*) (the "**New Act**").

³ The outline of the proposal by the secretariat (the "**Secretariat**") of the Joint Meeting composed of the Agency for Natural Resources and Energy of the Ministry of Economy, Trade and Industry and the Port and the Harbor Bureau of the Ministry of Land, Infrastructure, Transport and Tourism.

1. Evaluation Criteria

Under the New Act, METI and MLIT⁴ will select a business operator who (a) submits the Plan for Exclusive Use by Public Auction and (b) is considered most appropriate in enabling the long term, stable, and efficient implementation of Offshore Renewable Energy Business⁵. As for the specific evaluation criteria, the Secretariat acknowledged that the supply price (i.e., tariff) is the most important factor, but proposes to conduct a **comprehensive evaluation** by taking into account (i) the business operator's ability to implement the project and (ii) the factors related to the feasibility of the project in terms of coordination with local communities and the overall impact of the project⁶.

Ability to Implement a Project: The following attributes were cited for evaluation: (i) project performance, (ii) conformity of the project plan, (iii) existence of measures for early recovery in the event of a failure, (iv) appropriateness of the funding plan and (v) the income and expenditure plan⁷.

Business Feasibility: The following attributes were cited for evaluation: (i) coordination with the heads of relevant administrative organs, etc., (ii) overall impact on the local and domestic economy and (iii) co-operation and co-existence with relevant fishery companies, etc.

Supply Price: The supply price being the most important factor is consistent with the nature of a public auction and one of the overarching goals which is to reduce the electricity price for consumers as much as possible.

On this basis, it is reasonable to make a comprehensive evaluation that takes into account the ability to implement the project as well as the feasibility of the project.

2. Matters to be Stated in the Guidelines

The matters to be included in the Guidelines were raised at the Third Joint Meeting. Here is what you need to know:

Standard of Output: the following elements were proposed to measure the Standard of Output prior to the designation of promotion zones:⁸

- Decide on the expected output based on the size of the relevant area and other factors and through consultation with the relevant prefectures;
- Secure sufficient grid connection for the purpose of designating promotion zones;

⁴ The Minister of Economy, Trade and Industry and the Minister of Land, Infrastructure, Transport and Tourism has the authority to select the winning business operator.

⁵ Article 15.3 of the New Act.

⁶ February 28, 2019, Port and Harbor Bureau, Ministry of Land, Infrastructure, Transport and Tourism, Ministry of Economy, Trade and Industry, on Selection of Business operators by public auction to Begin Operation of the Re-Energy Sea Area Utilization Act

⁷ (https://www.meti.go.jp/shingikai/enecho/denryoku_gas/saisei_kano/yojo_furyoku/pdf/003_01_00.pdf) page 6
Page 7 and 8 above

⁸ Article 13.2(4) of the New Act; page 14 above.

- Provide some degree of discretion for the business operator to realize efficient offshore wind power generation; and
- Determine the most effective use of the promotion zones.

In conclusion, **the business operator will be given discretion to increase or decrease its output by 20 percent from the agreed standard of output** set forth for the promotion zone⁹.

Qualifications of Bidders: Proposals give consideration to qualifications set forth in the **FIT Law**¹⁰ and the **Port and Harbor Act**, which also grants permission for exclusive use. A candidate for public auctions should have a domestic legal entity status (i.e., *kabushiki kaisha* or *godo kaisha*). This is not intended to exclude foreign developers or equity investors from participating in public auctions.

In addition, the winning business operator will be required to:

- Take measures such as third party guarantees to ensure decommissioning occurs (including in the event of bankruptcy etc.); and
- Maintain reserves for decommissioning from operating cash flow. (Further discussion will be held on the mandatory decommissioning issue by referencing the precedents from Europe as many diverse views exist (i.e., a complete removal or permitting a partial retention of the sub-seabed base structure))¹¹.

Any candidate committing any of the following acts will be disqualified from participating in public auction for a certain period of time:¹²

- A person having an access right to a grid connection fails to assign it to the winning business operator without reasonable grounds after the public auction;
- A person providing falsified data to Japan in the collection of information to determine the designation of promotion zones; or
- A person participating in bid rigging in a public auction, or who was imprisoned or fined pursuant to Articles 32 to 36 of the New Act.

⁹ *Id.*

¹⁰ The Act on Special Measures Concerning Electricity from Renewable Energy as amended and in effect (the "**FIT Law**").

¹¹ Article 13.2(12) of the New Act; page 19 above.

¹² Article 13.2(5) of the New Act; page 15 above.

3. Bid Package for Public Auction

The bid package for public actions will include, among others, the following information in order to reduce the risks of business operators and encourage business operators' participation:¹³

- Wind conditions (an element affecting income): 1-year wind conditions data based on at least actual measurements (accumulation of 10-minute average data and observation over 12 consecutive months); and
- Bottom sediments (an element affecting expenditures): geological data inquiry by at least actual **measurement (boring survey and acoustic wave survey for each area)**.

Concerns were raised by the other participants that 12 months spent collecting wind conditions could delay the launch of public auctions, but the Secretariat wishes to add such wind conditions in order to increase and broaden the participation by many new participants in public auctions. Further discussions will be held regarding the level of data provided in bid packages.

4. Review and Evaluation Methods for Selecting Business Operator

Two Step Process to Select a Winning Business Operator:

- (a) First Stage: Conformance review of bidders' Plans for Exclusive Use by Public Auction based on the evaluation criteria which is intended to evaluate **satisfaction of the minimum standards** required for the implementation of the project (i.e., focusing on the administrative and technical aspects of bid). Bidders satisfying this process will be considered for the second stage of the evaluation¹⁴.
- (b) Second Stage: Assessment of bidders' Plans for Exclusive Use by Public Auction based on the evaluation criteria which are intended to evaluate the qualitative and relative implementation of the project "in a long-term, stable and efficient manner". The results of the evaluation are from a third party committee. Using the evaluation results and considering the opinion of the relevant prefectural governor and local

¹³ Page 22 above.

¹⁴ The following criteria are set forth in Article 15.1 of the New Act:

- (i) The Supply Price is not more than the Supply Price Upper Limit, and the Plan for Exclusive Use by Public Auction is appropriate in light of the Guidelines for Public Auction and the Exclusive Use;
- (ii) The occupation of the sea area within the area for promotion pertaining to the Plan for Exclusive Use by Public Auction does not fall under the case where the permission set forth in Article 10, paragraph (2) shall not be granted;
- (iii) The Marine Renewable Energy Power Generation Equipment pertaining to said public auction Occupancy Plan and the method of its maintenance and management conform to the standards specified by the Ordinance of the Ministry of Economy, Trade and Industry and the Ordinance of the Ministry of Land, Infrastructure, Transport and Tourism; and
- (iv) The person who has submitted the Plan for Exclusive Use by Public Auction is not obviously likely to commit any wrongful or unfaithful act.

stakeholders (i.e., fisheries, etc.), **METI and MLIT will select the winning business operator.**¹⁵

5. Public Auction Schedule

Generally, it should take a **six month period** to complete a public auction process. Completing a public auction involves the following process:

- (a) Designation of promotion zones;
- (b) Preparation of the Guidelines for Public Auction and the Exclusive Use (by seeking opinions of prefectural governors, industry experts and Procurement Pricing Committees);
- (c) Decision on the Guidelines for Public Auction and the Exclusive Use;
- (d) Implementation of the public auction (Public Notice of the Exclusive Use by Public Auction Guidelines → Submission of Plan for Exclusive Use by Public Auction by business operators → Review of Plans for Exclusive Use by Public Auction (First Phase: Conformance Review) → Evaluation of the Plans for Exclusive Use by Public Auction (Second Phase), seek opinions of Prefectural Governors, evaluation by the Third Party Committee); and
- (e) Selection of the business operator.

In order to start and finish the public auction process, two or more months should be added to the overall timeline to complete items (b) and (c) above¹⁶. Some participants suggested reducing the auction period from six months to two to three months whilst others suggested a six month period is a more reasonable timeframe to attract new entrants who will bid on **large scale of offshore wind power generation facilities in territorial sea areas.** More discussion is anticipated.

Summary

As a result of discussions at the Third Joint Meeting, matters concerning the selection of business operators by public auction have become concrete to some extent, but there still remains room for discussion, such as evaluation standards, matters concerning decommissioning, and schedules until the selection of business operators. The Secretariat is expected to submit an interim report based on the opinions from the Third Joint Meeting in the near future (before the implementation of the New Act), and we anticipate the discussion to pick up its pace as the enforcement of the New Act is scheduled for 1 April 2019. It is vital that attention is paid to the discussion at joint conferences, METI and MLIT, and other relevant bodies, in order to understand how government policy is developing and official consensus is building in relation to the roll out of this revolutionary new source of renewable energy for Japan.

¹⁵ Pages 27 above.

¹⁶ Page 29 above.

Alicante
Amsterdam
Baltimore
Beijing
Birmingham
Boston
Brussels
Budapest*
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta*
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Riyadh*
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ*
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar*
Warsaw
Washington, D.C.
Zagreb*

*Our associated offices

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

©Hogan Lovells 2019. All rights reserved.