

Joint and several liability

New offshore wind tenders in Denmark

a general, non-exhaustive overview

Joint and several liability

Any claim arising under the concession contract and all licenses and approvals issued pursuant to the concession contract may be directed in full at any and all companies being part of the winning tenderer consortium (i.e. the concessionaire; in this presentation called the winning tenderer or, in short, the tenderer) or upon whose capacities a winning tenderer rely.

Where a winning tenderer is a not yet established company, the founding companies will also be required to undertake joint and several liability with the tenderer.

Liability for a party being joint and several liable with the tenderer will only become effective upon an un-remediated breach by the winning tenderer of the concession contract or associated licenses and approvals.

Scope

Different Tenderer Constellations

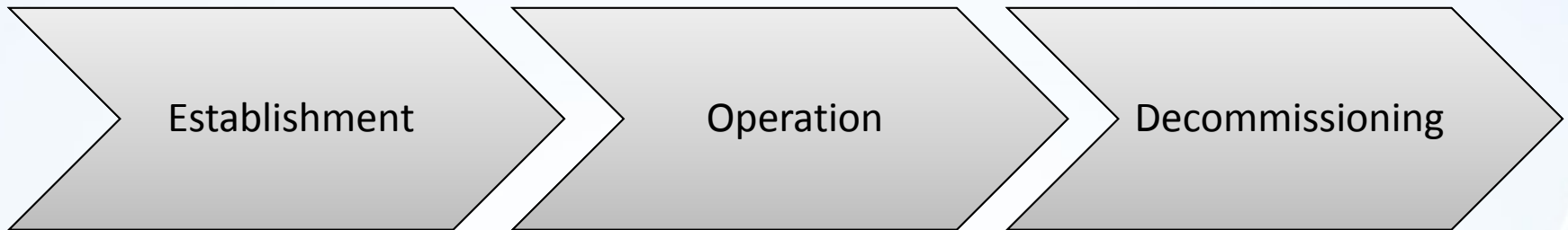
Even in the absence of joint and several liability pursuant to the concession contract members of a consortium/joint venture will always be joint and several liable for all claims against the consortium/joint venture.

Members of a consortium/joint venture will hence also be joint and several liable for claims raised by third parties.

Companies upon whose capacities a tenderer rely and founding companies will not be joint and several liable with the tenderer in the absence a requirement for joint and several liability pursuant to the concession contract.

Such parties will hence not generally be joint and several liable with the tenderer in respect of claims from third parties.

Scope



The requirement for joint and several liability pursuant to the concession contract and associated licenses and approvals will be in force from the time of signing the concession contract and until decommissioning is completed.

The scope of the joint and several liability will however vary in the different phases of the contract term.

Scope

Potential claims during the establishment phase

The concession contract grants the winning tenderer both a right and an obligation to establish (and operate) the offshore wind farm.

Failure to establish the offshore wind farm is subject to a fixed penalty, which will constitute full and final settlement of any claims from DEA in that respect, and for the large offshore wind farms also potential claims for any consequential loss suffered by Energinet.dk.

The winning tenderer will be required to provide financial security for the fulfillment of this obligation. Such financial security will be released at the earlier of:

- When the concessionaire has paid expenses in a certain amount on the establishment of the wind farm (300 mill. DKK for the nearshore tender, and 1 billion DKK for Horns Rev 3 and Kriegers Flak) or,
- When the first kWh from the first turbine has been delivered to the collective grid.

During the *establishment phase* the *liability for defective performance* towards the DEA of the winning tenderer and any party joint and several liable with him is hence limited to the amount of the penalty.

Scope

Potential claims during the establishment phase

Pursuant to the concession contract the tenderer is liable for paying the cost of preliminary investigations undertaken by Energinet.dk. Such obligation will also be comprised by the joint and several liability in the establishment phase.

Failure to comply with the terms of the licence for preliminary studies and the licence for construction will also be covered by the joint and several liability, e.g. claims raised by the DEA for administrative fees/costs or fines imposed for non-compliance with the terms of the licences, including terms on technical requirements, environmental protection, coordination with third parties and providing of information and documentation.

Throughout the term of the concession contract the joint and several liability will also include liability for potential penalties in respect of the winning tenderer's failure to comply with the labour clause of the concession contract.

Scope

Potential claims during the establishment phase

In respect of companies upon whose technical capacities a tenderer relies the joint and several liability towards the DEA is limited *only to claims arising out of project development and management of construction.*

Hence the joint and several liability undertaken by such parties does not extend to e.g. liability for decommissioning or any claims which may arise during the operation phase, provided however that such claims do not relate to matters relating to project development and management of construction.

Joint and several liability for companies upon whose technical capacities a tenderer relies is only required for the large offshore wind farms.

Scope

Potential claims during the operation phase

Primary obligations towards the DEA in the operation phase concerns the duty to provide documentation and data required pursuant to the concession contract and associated licenses and approvals.

Claims from third parties raised against the concessionaire such as:

- Claims arising from pollution
- Claims arising from damage to ships
- Claims arising from work related injuries etc.

are excluded from the joint and several liability as such claims will not be based on the concession contract or any associated licenses and approvals.

The risk of joint and several liability towards the DEA pursuant to the concession contract in the operation phase is hence considered limited and will primarily concern claim arising out of the winning tenderer's failure to comply with the terms of the production license, e.g. claims raised by the DEA for administrative fees or fines imposed for non-compliance with the terms of the license.

Scope

Potential claims in the decommissioning phase

The concession contract obligates the winning tenderer to re-establish the previous conditions in the area and dismantle the offshore wind farm at the tenderer's own expense, if for instance:

- the license for electricity production expires
- the facility is not maintained or is destroyed
- the facility is no longer used as a wind farm, or
- the terms of the licenses are not fulfilled or complied with

The winning tenderer will be required to provide financial security for this obligation.

To the extent that the winning tenderer fails to fulfill this obligation, the DEA will be entitled to claim from the winning tenderer – and/or any party joint and several liable with him, excluding joint and several liable companies upon whose technical capacities a tenderer rely, any consequential losses suffered by the DEA as a result hereof, to the extent the amount of the financial security is not sufficient to cover the total loss of the DEA.

Joint and several liability

Common misconceptions

FAQ

Will the joint and several liability of a company pursuant to the concession contract and associated licenses and approvals also include subcontractors?



Will the joint and several liability of a company pursuant to the concession contract and associated licenses and approvals also include shareholders of the company?



Will the joint and several liability of a company pursuant to the concession contract and associated licenses and approvals also include the financier?



DEA Answer

No, joint and several liability pursuant to the concession contract and associated licenses and approvals only applies to the companies, who directly undertake such liability.

No, only the company will be joint and several liable. The risk of shareholders is limited to the capital invested in the company, unless the legal form of the company entails direct and personal liability of the shareholders (e.g. partnerships) or if the shareholders undertake personal liability (e.g. parent company guarantee).

No, only the company will be liable. The risk of a financier will be limited to the loan amount.

Joint and several liability

Common misconceptions

FAQ

Does the joint and several liability also include liability for the continued operation of the wind farm for 25 years?



Does the joint and several liability apply also to third party claims against the concessionaire as a result of pollution , damage to ships, or due to work related injuries, etc.?



DEA Answer

No, the concession contract obligates the concessionaire to build the wind farm, but does not require the concessionaire to operate the wind farm for its entire lifetime. However, if operation ceases the joint and several liability will include the decommissioning obligation.

No, the joint and several liability pursuant to the concession contract only applies to claims made by the DEA pursuant to the concession contract and associated licenses and approvals. Where such incidences also constitute non-compliance with the terms of for instance the license, the joint and several liability will, however, apply to claims raised by the DEA for imposed fines.