

Polish PV feels impact of war in Ukraine

It appeared that 2022 would be another impressive year for PV investment in Poland. However, Russian aggression in Ukraine has been a game-changer. Unprecedented price increases, uncertainty in financial markets regarding investment in a “frontline” country, and more serious material and labor availability issues than during the pandemic have conspired to darken the mood. Piotr Mrowiec of Rödl & Partner examines the tools available to investors and contractors developing PV projects in Poland, to ensure that they do not suffer losses on their investments.

Uncertainty over investments in a country bordering Ukraine are already putting a dampener on what was set to be another strong year for solar in Poland.



Photo: Lightsource BP

Even before the war, both investors and contractors in the PV space pointed to the drastic increase in prices of individual components: transformer stations, cables of various cross-sections, support structures, and finally modules and inverters. The war in Ukraine put even stronger pressure on prices, and a ban on imports of iron and steel products caused significant problems with steel availability. In light of this, it is crucial to answer the question as to the sustainability of engineering, procurement and construction contracts (EPC), which oblige contractors to complete a project at a given time and usually at a given price.

EPC contracts in Poland are usually based on Polish law, which includes institutions known in other legal systems as “force majeure” and “extraordinary change of circumstances.” Force majeure is a phenomenon that makes it completely impossible to fulfill an obligation. Examples of force majeure include war in the territory in which the obligation is to be performed, terrorist attacks or natural disasters such as fires and floods. For the legal concept of force majeure to apply, a situation must arise in which the debtor is unable to fulfill the obligation.

In the current situation, we usually cannot speak of the occurrence of “force majeure.” Contractors have the opportunity to perform the contract, but often incur much higher costs while doing so. However, the institution of an extraordinary change of relations, the so-called “rebus sic stantibus” clause, which also occurs in other jurisdictions, may be applied. This clause, in a nutshell, refers to the influence of a change of circumstances on a contractual obligation and constitutes a kind of counterbalance to another principle: *pacta sunt servanda* (contracts should be kept).

According to this legal principle, if due to an extraordinary change the fulfillment of the service would be connected with excessive difficulties or would threaten one of the parties with a gross loss, the court may determine the way of fulfilling the obligation, the fees for the provision of service, or even decide to terminate the agreement. The court would make this determination in light of whether the parties could foresee the circumstances when concluding the agreement, and after considering the interests of the parties, in accordance with the principles of social co-existence. When terminating the agreement, the court may, if necessary, decide on the settlements of the parties.

Auction system

Poland’s auction system allowed for the development of large-scale PV. The entities developing projects could, after setting a break-even point for their projects, indicate the price at which energy produced would be sold (to be more precise, how much of a surcharge they were to receive for the – by definition – lower market price). The simple and transparent auction mechanism, enhanced by the mechanism of annual adjustment of the auction price to reflect inflation, made it possible to obtain financing for project construction.

However, in recent years more and more developers have decided not to participate in the organized auctions. The drastic increase of energy prices in Poland, not


only for wind energy, but also for solar, mean that participation in the auction and being bound by the auction price, caused the necessity of returning a part of the obtained price of sold energy, as a “positive balance.” The war in Ukraine, causing an even greater increase in energy prices in Poland, accelerated this trend.

On the other hand, the auction support system is a kind of guarantee of the amount of income for the producer, and only a few years ago, obtaining long-term financing for a solar installation not covered by the auction was practically impossible. Nowadays, banks finance non-equity projects (secured by a long-term PPA), but having the support of an auction can assist with the obtaining of financing.

It is worth looking at the situation of photovoltaic installations that have already “entered” the auction system before the deadline of 24 months after the auction closes, or possibly 36 months if a so-called “Covid extension” is obtained. Such installations cannot simply exit the auction system. In light of the RES Act, however, a solution of not declaring the offered volumes for sale for set-

tlement seems possible. The possibility of not declaring the energy volumes and selling them outside the support system has been confirmed by the Settlement Administrator in its position, indicating that it does not examine whether the declared volume in the monthly declarations submitted to the Settlement Administrator includes the energy volume actually produced.

Failure to declare a given volume will result in it not being included in the positive balance settlement. That is, a generator who sells energy on the market for PLN 540 (\$125)/MWh and which obtained an auction price of PLN 240/MWh will not be obliged to return PLN 300/MWh after each three-year settlement period.

The Polish Act on Renewable Energy Sources does, however, provide for the obligation to pay a penalty if a generator fails to sell the volumes it offered in its auction bid. Taking into account that the penalty is only half of the auction price (in our example, it is 0.5 x PLN 240, or PLN 120), it is more profitable for the generator to pay the penalty than to settle the positive balance. 

Piotr Mrowiec



About the author

Piotr Mrowiec is an associate partner at Rödl & Partner. He is the head of the office in Gdansk, Poland, and the head of the renewables team. As a specialist in renewable energy sector regulations, he advises numerous clients and conducts legal due diligence for wind and PV projects. Mrowiec has been involved in studies for dozens of wind and solar projects, with a total capacity of several hundred megawatts.

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