

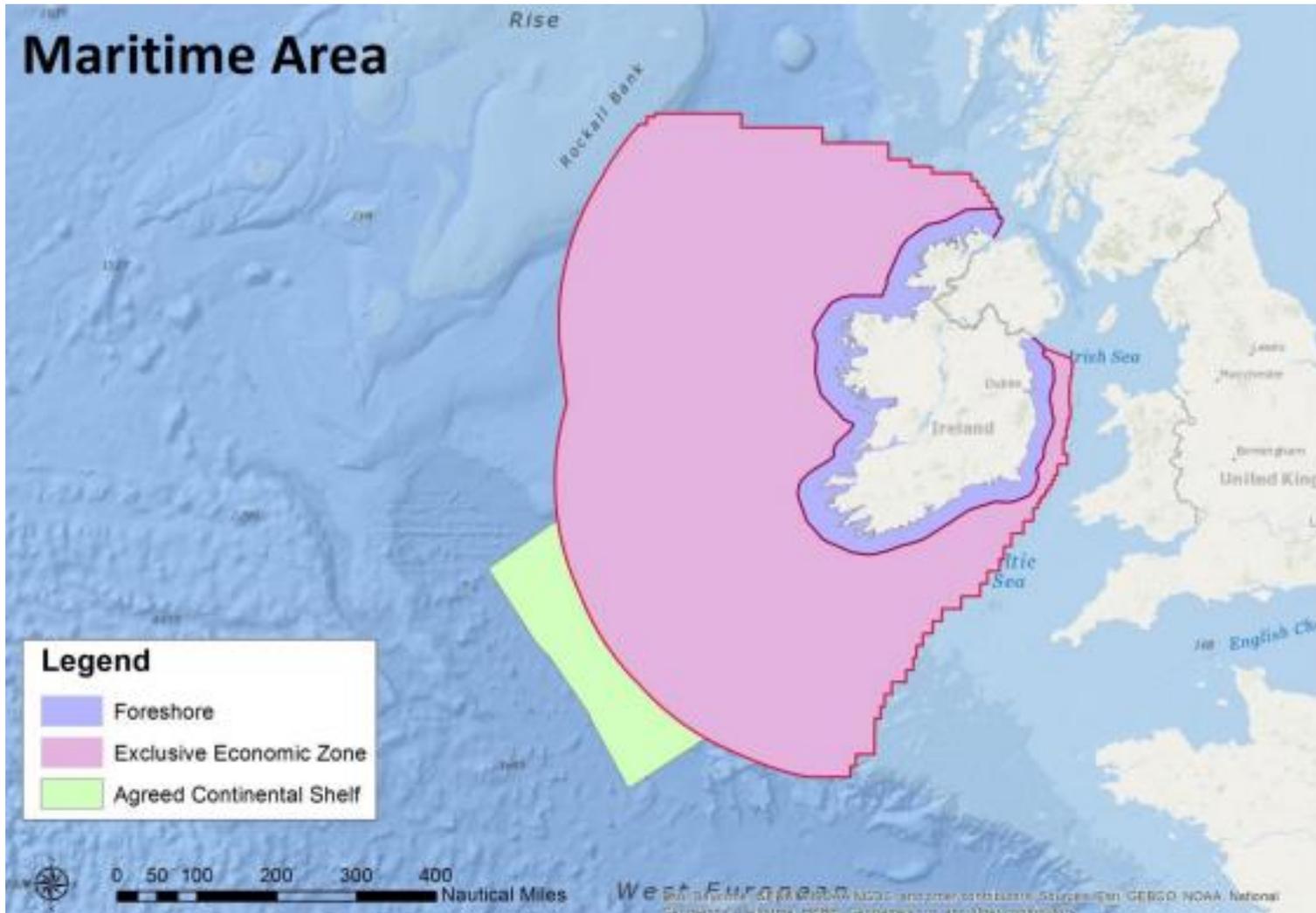
Offshore Construction and the Contracts: *Overview of Irish Market*

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24 June 2021





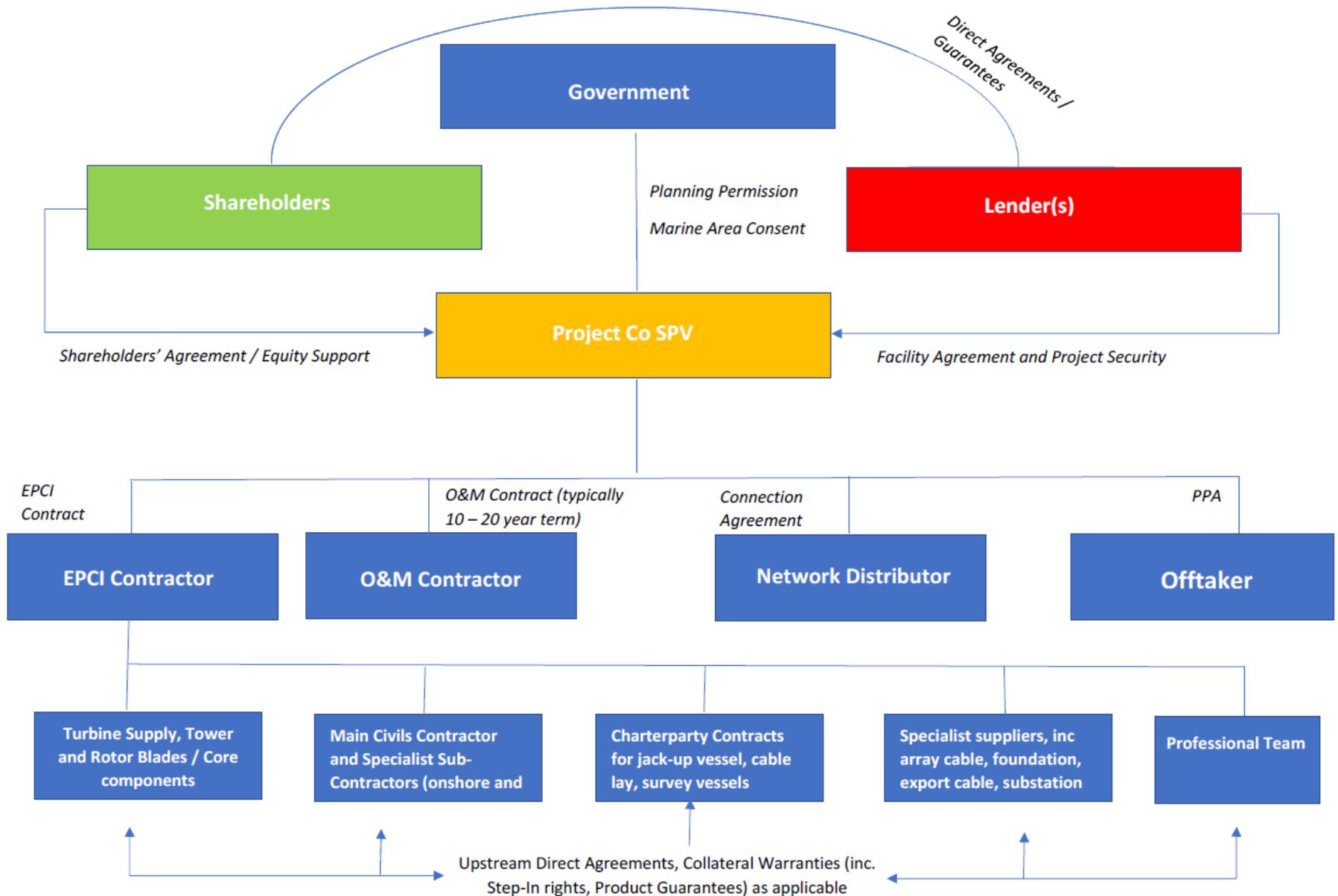
The Developing Market

- Ireland's 250 wind farms (368 all-island) are almost exclusively onshore, with only the 25 MW Arklow Bank Wind Park situated offshore as of 2021
- 7 renewables projects granted “relevant status” last year: Oriel Wind Park; Bray and Kish Banks; Codling Wind Park I and II; Skerd Rocks; and North Irish Sea Array.
- In the past 24 months there have been over 50 site investigation applications in relation to offshore wind farm activity
- Critical to delivering the 70% renewable energy target by 2030, Green Deal, RESS
- Ireland needs 1 GW of offshore wind by 2025 to meet 5 GW by 2030 target.

Nature and form of contracts

- There is no specific standard form contract which is universally used across offshore projects (which creates a myriad of challenges)
- Depends heavily on the nature of the project, the risk-profile and the structure to be utilised (ie EPCI vs Multi-Contracting).
- Disproportionate capital costs are often a key factor in determining risk apportionment
- Main standard forms used in offshore sector are:
 - FIDIC (1999 yellow book now superseded by 2017 edn)
 - OGUK LOGIC
 - NEC4
 - SAJ Norwegian 2000
 - AWES
 - BIMCO's SUPPLY TIME and WINDTIME

Example Structure Offshore Wind Project in Ireland



Current Foreshore Lease / Licensing Regime

- The section of route in Irish waters from the mean high water mark to the 12 nautical mile limit is governed by the Irish Foreshore Act 1933.
- A lease is generally issued for a development that requires exclusive occupation of the foreshore. Developments requiring a lease would include for example: jetties, bridges, piers, marinas, windfarms and reclamation of any foreshore.
- A licence is generally issued for a development that does not require exclusive occupation of the foreshore. Examples would include repair work, some coastal protection work, undersea pipelines, cables, site investigation works, dredging works and harvesting of wild seaweed.
- In order to develop an offshore energy project (wind, wave, tidal, oil, gas) it is first necessary to obtain a foreshore site investigation licence to assess the suitability of the site for the intended renewable energy project.
- Depending on the results of the site investigation, the applicant may then apply for a foreshore lease to develop and operate the project though it should be borne in mind that other consents also need to be acquired such as planning permission, consent from the CRU.

- It has long been recognised that the existing system for approving maritime infrastructure projects under the Foreshore Acts 1933-2011 is outdated and no longer fit for purpose.
- This new regime will replace the existing State and development consent regimes and streamline arrangements on the basis of a single consent principle
- This will involve one state consent (Maritime Area Consent) to enable occupation of the Maritime Area and one development consent (planning permission), with a single environmental assessment.
- The relevant minister will have responsibility for issuing MACs in connection with developments in the exclusive economic zone (EEZ) and on the continental shelf.

MAP Bill Continued...

- Planning interest and initial proposal submitted or declared by relevant Minister
- Following receipt of Planning Interest, Developer may seek leave to apply to An Bord Pleanála
- Existing foreshore licenses / leases to carry over under transitional arrangements
- Minister of Environment, Climate and Communications will be responsible for Renewables Projects
- Foreshores will remain the context of existing transitional projects
- The Foreshore Act will also remain in force to enable the continuation of foreshore functions of the Minister for Agriculture, Food and Marine such as marine fisheries and subaquaculture
- Minister of Housing will have responsibility for all other projects
- New concept of nearshore, greater local authority involvement

Construction Contracts Act?

- The Construction Contracts Act 2013 applies to agreements to carry out “construction operations”, or the arranging for or the provision of labour towards the carrying out of same.
- “Construction operations” in short, encompasses various construction activities as listed under Section 1 of the CCA 2013, all of which must expressly relate to works, buildings or structures which form “part of the **land**”
- “Land” is defined in the Interpretation Act 2005 as including tenements, hereditaments, houses and buildings, **land covered by water** and any estate, right or interest in or over the land.
- Note, **Staveley Industries plc v Odebrecht Oil and Gas Services (2001) ALL ER (D) 359**
 - applicants sought a declaration that a sub contract for the supply and installation of precast steel modules intended be installed was a construction contract for the purposes of HGCR.
 - This was argued on the basis that the modules were to form “part of the land” for the purposes of the 1996 Act, as the platforms’ feet were founded in the sea bed and the Interpretation Act 1978 defined land as including land covered by water.
- The applicant’s case failed largely due to the jurisdictional point that the installation element did not occur within the jurisdiction. However, the court noted that the work did not fall within the Act as structures which are, or are to be, founded in the sea bed below low water mark are not structures forming, or to form, part of the land.

The Energy Carve Out

- Engie Fabricom v MW High Tech Projects [2019]
- Project was known as Energy Works Hull
- Section 105 of HGCRA sets out what falls within the meaning of ‘Construction Operations’ and specifies certain exemptions. One such exemption relates to the assembly, installation or demolition of plant or machinery (or erection or demolition of steelwork for supporting or providing access to plant or machinery) on a site **where the primary activity is power generation**.
- Ultimately, the court held that the primary activity was power generation
- Accordingly, there was no statutory or contractual right to adjudicate and Fabricom’s claim for enforcement of the adjudication decisions was dismissed.
- Note, CCA states that references in the Act to construction operations do not include the manufacture or delivery to a construction site of— (a) building or engineering components or equipment, (b) materials, plant or machinery, or (c) components for systems of heating, lighting, air-conditioning, ventilation, **power supply**, drainage, sanitation, water supply or fire protection, or for security or communications systems

Importance of harmonization with Technical Schedules

- MT Højgaard A/S (“MTH”) v. E.ON Climate & Renewables UK Robin Rigg East Limited
- Express exclusions often included in Specifications
- Language barrier
 - Many suppliers have standard form conditions of supply which vary by country and may include foreign law concepts and require translation (ie. Dutch METAALUNIE TERMS AND CONDITIONS)

Bespoke clauses for managing risk

- Proximity arrangements
- Clearly set out what the roles are at the outset so no confusion (ie. subsea specialist, project manager, structural engineer etc, supplier, turbine supplier etc), including project objectives
- Responsibility for licensing, permits etc
- Brexit and COVID
- Definition of Sea Area: "Irish Sea" means the extent of sea and seabed from the mean high-water mark in the Republic of Ireland or Northern Ireland to the mean high-water mark in the United Kingdom and anywhere in between
- Bespoke Amendments required such as the vessel spread (including the right to remove the spread in the event of project delay), burial performance criteria (where the scope includes subsea cabling), UXOs, rely upon information, a knock for knock indemnity regime, and the involvement of the marine warranty surveyor.
- Many of the contractual framework is negotiated through the conceptual stage and is conditional on requisite consents from government
- If A Contractor, be careful of overexposure to orders etc.
- Usually exclusivity agreements knocking about in the background
- Dovetailing contractual provisions downstream in EPC structure, particularly in relation to payment

Force Majeure typically more bespoke.

- "**Force Majeure**" means any cause outside the control of a party, its servants, agents or subcontractors (without its or their fault or negligence) and which it or they could not have reasonably avoided or prevented including acts of God, or acts of or failure to act of any governmental authority, war, or warlike operations, insurrections, sanctions, terrorist acts or riots, fires, floods, epidemics, quarantine restrictions, freight embargoes, nuclear or radioactive emissions, contamination or pollution related to hazardous substances, **uncharted subsea wrecks, uncharted explosives dumping grounds, abnormal sea and/or tidal conditions, unforeseen subsea military or naval activity, or adverse weather conditions rendering it impossible or unsafe to carry out work, maritime emergencies,** strikes or lockouts by the affected party's workforce (or that of its agents or contractors), and failure by a party's servants, agents, or subcontractors to perform its obligations (except by reason of the foregoing causes), shall be considered within that party's control;

Typical inputs

- Delivery Port defined within contract
- Meaning of Delivery: shall mean the point in time when the Equipment is offloaded from the ship or vessel transporting the Equipment to the Project Country upon such ship or vessel docking in the Delivery Port and **Delivery** and **Deliver** shall be construed accordingly
- PPA cross referenced or interplay conditional
- Electricity supply agreements?
- Commodities Indexation Clause may be required.

Typical inputs cont.

- Site Conditions – surveying and the method of survey to be expressly outlined.
- Corrosion protection, leakage, condensation and sealings protocols
- Excusable delays, Concurrency clauses, knock-on delays
- Factory Acceptance Tests (FAT) or equivalent to be carried out and Taking Over Certs
- Warranty periods (be very careful)
- Base Performance Benchmark
- Design Lifetime / Systematic Failure
- Onshore Civil Works clearly identified
- Grid Connection and Substations
- Inspection and Testing plans
- Marine Substation and cabling
- Tests on Completion
- Financial Modelling!

Interface Coordination

- EPCI vs Multi-Contract
- Contractual approaches to mitigating the risk of interface coordination delays include obligations for all contractors to:
 - participate in the preparation of a detailed interface matrix and
 - to attend regular interface meetings as well as early warning notice and risk register obligations.
 - Practical or commercial mitigants include perhaps most importantly the establishment of an experienced project development and management team

Conclusion

- Offshore projects represent one of the biggest opportunities for the Irish Construction sector over the next decade and beyond
- Understanding the contractual framework and being mindful of the key risks in these projects will be essential to doing business in this sector
- Be mindful of how much upstream risk you are taking on, particularly in conditional arrangements
- Marrying the technical and commercial inputs with the legals is often the greatest challenge (and poses the greatest risk)

Thank you

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