

NEW GEOTHERMAL WORKING AREAS TENDER RULES

An Overview

The Minister of Energy and Mineral Resources (“MEMR”) has recently issued MEMR Regulation No. 37 Year 2018 on Offering of Geothermal Working Areas, Issuance of Geothermal License and Geothermal Business Assignment (“MEMR 37/2018”) which provides detailed provisions on, among other things, geothermal working areas tender procedures.

Through MEMR 37/2018, the MEMR clarifies, among other things: (a) steps and procedures for geothermal working area tender; (b) criteria of bidding participants, (c) criteria for determining the winners of successful tenders, and (d) detailed procedures for issuance of Geothermal Licenses (*Izin Panas Bumi/IPB*).

Background

The new geothermal law - which introduces some new legal frameworks for geothermal development in Indonesia - Law No. 21 of 2014 (“**New Geothermal Law**”) – was issued in 2014. Under the Old Geothermal Law (Law No. 27 of 2003), the Geothermal Mining Business License was issued by the MEMR, governor, or regent/mayor, depending on the location of the geothermal working areas. Under the New Geothermal Law, however, issuance of Geothermal Licenses (*Izin Panas Bumi/IPB*) - which is a license required for an indirect use of geothermal for producing electricity - is within the authority of the central government.

In general, a geothermal working area must be offered to business entities by the central government through a tender process, and a direct appointment is only allowed after a retender where there is only one bidder who participates or only one bidder is qualified. But, under the new regime, the MEMR is now allowed to directly assign a public service institution (*Badan Layanan Umum/BLU*) or a state-owned entity having line of business of geothermal to conduct geothermal activities in a geothermal working area.

MEMR 37/2018 – which is an implementing regulation of Government Regulation No. 7 of 2017 on Indirect Utilization of Geothermal Energy (“**GR 7/2017**”) and is the focus of our newsletter - provides detailed provisions on those matters.



Kirana D. Sastrawijaya

Power & Infrastructure Industry Head

+62 819 3246 4089

kirana@umbra.law

Pramudya A. Oktavinanda

Managing Partner

+62 811165906

pramoctavy@umbra.law

Enrico Denis Sihotang

Associate

enrico@umbra.law

Adya Sepasthika

Legal Assistant

adya@umbra.law

UMBRA – Strategic Legal Solutions

Telkom Landmark Tower,

Tower 2, 49th Floor

Jl. Gatot Subroto Kav. 52

Jakarta 12710 – Indonesia



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Geothermal Working Areas Tender

Tender Committee

Members of the tender committee shall consist of representatives from the Ministry of Energy and Mineral resources and may involve representatives from the relevant regional governments. Interestingly, MEMR 37/2018 does not require involvement of representatives from PT PLN (Persero) (“PLN”) as the electricity offtaker in the tender committee though MEMR 37/2018 indicates that PLN will be involved during the preparation stage of the tender as the tender plan must be coordinated with PLN; and as part of the tender planning, MEMR 37/2018 mandates PLN to submit: (i) electricity tariff proposal; (ii) model of power purchase agreement; and (iii) draft pre-transaction agreement, to the MEMR.

Procedures

The geothermal working areas tender comprises of two stages which are: (i) first stage tender to determine the qualified bidder based on completeness of administrative requirements, and ‘pass and fail’ assessment of financial and technical aspects; and (ii) second stage tender to choose the winning bidder to be granted the IPB.

Please see Attachment A for a flowchart showing the working area open tender procedures.

- First Stage Tender

The assessment of the first stage bid is conducted in chronological order of (i) administrative requirement stage; (ii) financial aspect stage; and (iii) technical aspect stage, and is based on the ‘pass or fail’ method. This means that if a bidder does not pass the administrative stage, the bidder cannot step up to the financial aspect stage. The administrative stage assessment is based on the completeness of the required documents. Meanwhile, the financial and technical aspect evaluation will be based on the weighted average of the total weighting score where the total scoring of each financial aspect and technical aspect is at least 70. MEMR 37/2018 provides the following details of the weighting score:

Table of Weighting Score in the First Stage Tender

No.	Financial Aspects	Total weight	Weighted value
1.	Financial Soundness of the Bidder and its affiliate	10%	10
2	Ability to fund development of the geothermal working areas of the Bidder and its affiliate	90%	90

No.	Technical Aspects	Total weight	Weighted value
1.	experience of the bidder and its affiliate	50%	50
2.	qualification of personnel and experts	50%	50

- Second Stage Tender

The second stage bid documents are submitted through two envelopes method - the project development proposal will be included in the first envelope and the exploration commitment proposal in the second envelope. Both envelopes shall be submitted at the same time. The assessment also will be done in chronological order.

1. *First Envelope – Project Development Proposal*

The committee will assess the first envelope based on the ‘pass or fail’ method with the minimum passing score of 70.

Table of Weighting Score in the Second Stage Tender (First Envelope)

No.	Aspects	Total weight	Weighted Average value	For Working Areas which already have Exploration Well Data	
				Total weight	Weighted Average value
1.	Technical Assessment of Geothermal Reserves	25%	25	10%	10

No.	Aspects	Total weight	Weighted Average value	For Working Areas which already have Exploration Well Data	
				Total weight	Weighted Average value
2.	Exploration Strategy and Plan	25%	25	15%	15
3.	Exploitation Strategy and Plan and Utilization	20%	20	40%	40
4.	Investment Plan	20%	20	25%	25
5.	Innovation	5%	5	5%	5
6.	Commercial Operation Date Commitment of Target Achievement	5%	5	5%	5
Total		100%	100	100%	100

2. *Second Envelope – Exploration Commitment*

The committee will assess the second envelope based on the amount of the proposed exploration commitment. Basically, the bidder with the highest exploration commitment will be determined as the winning bidder. MEMR 37/2018 provides minimum exploration commitment amount as follows: (i) U\$10 million for the geothermal power plant capacity greater or equal to 10 MW; or (ii) U\$5 million for geothermal power plant capacity less than 10 MW.

Scoring by Considering Affiliates of the Bidder

MEMR 37/2018 expressly provides that the bidders are allowed to also submit financial and technical data of their affiliates and such data will be considered in calculating the scores.

MEMR 37/2018 defines an affiliate as: (i) a company which directly or indirectly controls or is being controlled by the bidder; (ii) a company which is being controlled either directly or indirectly by the same party that controls the bidder; or (iii) the main shareholder of the bidder. Unfortunately, MEMR 37/2018 is

silent on the meaning of “control” and “main shareholder”. This therefore will need to be clarified during the tender process.

Foreign Entity in the Geothermal Working Areas Tender

MEMR 37/2018 defines a “bidder” as an Indonesian entity in the form of either a limited liability company, a state/regional owned enterprise, or a cooperative – with the line of business of geothermal activities. This seems to indicate that only Indonesian entities (which arguably shall include an Indonesian foreign investment (PMA) company) can participate in the bid. However, MEMR 37/2018 also further allows the bidder to form a consortium. It is not clear as to whether a consortium member can be in the form of a foreign entity. However, MEMR 37/2018 seems to suggest that a bidder is allowed to form a consortium with a permanent establishment. Based on our discussion with officials of Directorate General of Geothermal, this means a foreign entity can participate as a member of consortium as a bidder, provided that if the consortium is determined as the winning bidder, the consortium will need to establish a new Indonesian limited liability company to hold the IPB.

Winning Bidder

Unlike under the previous regime where determination of geothermal working area winning bidder will be based on the lowest electricity tariff offered (by also considering work program and exploration commitment), under MEMR 37/2018, the bidder with the highest exploration commitment will be basically determined as the winning bidder.

If there are at least two bidders which submit the same highest exploration commitment, the determination of the winning bidder will be based on the scoring result of the first envelope in the second stage tender (the project development proposal envelope).

Bid Bonds

Under Article 7 of MEMR 37/2018, the bidders shall deposit the bid bond with the following provisions:

No.	Minimum Bid Bond	Notes
1.	IDR 2 Billion	for tender with unexpected reserves or proven reserves greater than or equal to 100 MW
2.	IDR 1 Billion	for tender with unexpected reserves or proven reserves less than 100 MW
3.	IDR 1 Billion	In the working area in East Nusa Tenggara, Maluku, North Maluku, Papua, and West Papua.

Limited Offer Based on the PSPE Result

Under GR 7/2017, the MEMR can assign a business entity to conduct a Preliminary Surveys and Exploration Assignment (*Penugasan Survei Pendahuluan dan Eksplorasi* “PSPE”) (“PSPE Business Entity”) for assessing the considerations in stipulating a geothermal working area.

For areas resulting from this assignment process, the tender will be conducted as a limited tender, in which the working area will only be offered to the PSPE Business Entity and state-owned enterprises having a line of business in geothermal.

Geothermal Business Assignment

GR 7/2017 introduces the concept of assignment by the MEMR to BLUs or state-owned enterprises to conduct geothermal activities. MEMR 37/2018 elaborates the criteria for such assignment, which are the following: (i) there was previous exploration activities conducted by state-owned enterprises or the central government in such geothermal working areas, (ii) the working area has been operated by state-owned enterprises or the central government, (iii) the working area has been returned by the relevant business entity, (iv) the assignment is intended for accelerating the supply and utilization of geothermal energy, (v) the assignment is intended for increasing the electrification ratios around the working areas, and/or (vi) there has been a tender for such working area but there was no winner stipulated.

MEMR 37/2018 provides that the state-owned enterprise which receives such assignment can cooperate with a BLU which also receives the assignment from the MEMR. It is not clear as to whether the state-owned enterprise can cooperate

with other third party entities to implement the assignment. Meanwhile, MEMR 37/2018 seems to indicate that a BLU can cooperate with a third party with respect to the assignment.

Geothermal Licensing

The winning bidder will be granted an IPB. If the winning bidder is in the form of a consortium, the bidder will need to establish a new entity specifically to manage the working areas with the shares composition of at least 95% owned by the winning bidder's consortium members.

Additionally, specifically for the geothermal business assignment, the assignment itself will be deemed as the IPB.

Other Issues

Pre-Transaction Agreement to Replace Power Purchase Agreement during Exploration Stage

MEMR 37/2018 introduces a new concept of a pre-transaction agreement as an additional document to the power purchase agreement. Based on MEMR 37/2018, during the preparation stage of the tender, PLN is mandated to submit a pre-transaction agreement draft to MEMR. This draft pre-transaction agreement will be a part of the stage one tender documents.

While MEMR 37/2018 does not provide any detailed elaboration on the terms that must be incorporated in the pre-transaction agreement, MEMR 37/2018 indicates that the pre-transaction agreement shall contain clauses which provide certainty on the power purchase. Based on our discussion with officials of the Directorate of Geothermal of MEMR, the pre-transaction agreement will essentially govern the relationship between PLN and the IPB holder during the exploration stage and shall comprise of the sale prices of the electricity and PLN's commitment to purchase the power from the IPB holder upon successful exploration. The officials further explained that this means the power purchase agreement will only be signed by PLN after successful exploration.

Purchase Price of Electricity by PLN

Pursuant to MEMR 37/2018, PLN shall submit the proposed price of electricity purchased from geothermal energy to MEMR during working area tender preparation stage. This proposed electricity tariff must be approved by the MEMR.

It is not clear from MEMR 37/2018 as to: (i) when the MEMR will need to approve the proposed tariff, (ii) whether such approved electricity price will be informed to the bidders during the tender process, and (iii) whether or not the proposed price will be binding to the winning bidder.

Based on MEMR Regulation No. 50 of 2017 on the Utilization of Renewable Energy Resources for Electricity Supply (“MEMR 50/2017”), the tariff determination for geothermal projects shall be based on business-to-business (B2B) arrangement if the local Electricity Generation Cost (*Biaya Pokok Penyediaan Pembangkitan/ “BPP”*) is less than or equals to the national BPP or for the regions of Sumatera, Java and Bali. If the local BPP is higher than the national BPP, the tariff shall refer to the local BPP. Further, based on MEMR 50/2017, the BPP shall refer to the BPP in the previous year.

This raises a question as to the adjustment mechanism for determination of the electricity price if for example exploration period requires three years to complete while the PLN’s proposed tariff is approved during the tender preparation stage (around three years before). In this example, it is unclear whether parties will need to adjust the tariff to refer to the applicable BPP one year before the PPA signing date, or whether the parties can simply refer to the approved PLN’s proposed tariff (which was based on the BPP three years before the PPA signing date).

Based on our consultation with the officials at the Directorate of Geothermal of MEMR, though the electricity tariff will need to be proposed by the PLN in advance during the tender preparation stage, the tariff may still be changed through negotiation after exploration phase by considering the exploration result.

Closing

As per May 2018, media reported that the installed power generation capacity in Indonesia has reached 1,924.5 MW in the first quarter of 2018.¹ MEMR 37/2018 is a good milestone for achieving the geothermal development target of 7.241,5 MW in 2025 as stipulated in the Presidential Regulation No. 22 of 2017 on General Planning for National Energy (*Rencana Umum Energi Nasional*/"RUEN") as this regulation provides fairly clear guidelines and procedures for the geothermal working area tender process.

However, further details, in particular with respect to the content of the pre-transaction agreement and the clarity on the electricity tariff determination mechanism will be needed to further boost geothermal development in Indonesia.

¹<https://www.esdm.go.id/id/media-center/arsip-berita/ini-dia-sebaran-pembangkit-listrik-panas-bumi-di-indonesia>, accessed 26 July 2018.

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Geothermal Working Area Tender Flowchart

