

2009 No. 1340

ELECTRICITY

**The Electricity (Competitive Tenders for Offshore Transmission
Licences) Regulations 2009**

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The Gas and Electricity Markets Authority(a), with the approval of the Secretary of State(b), makes the following Regulations in exercise of the powers conferred by sections 6C, 6D and 60 of the Electricity Act 1989(c).

PART 1
INTRODUCTORY

Citation and commencement

1.—(1) These Regulations may be cited as the Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2009 and shall come into force on 2 June 2009.

Interpretation

2.—(1) In these Regulations—

“the 1989 Act” means the Electricity Act 1989;

“applicant” means any person who submits a pre-qualification questionnaire to the Authority in accordance with these Regulations;

“the Authority” means the Gas and Electricity Markets Authority;

“best and final offer” means a submission by a qualifying bidder to the Authority in response to the best and final offer documentation sent in accordance with regulation 15(3);

“bidder group” means two or more persons approved by the Authority acting together for the purposes of any submission to the Authority in accordance with these Regulations;

(a) The Gas and Electricity Markets Authority was established under section 1(1) of the Utilities Act 2000(c.27).

(b) In accordance with section 6C(4) of the Electricity Act 1989 (c.29).

(c) 1989 c.29: section 6C was inserted by section 92 of the Energy Act 2004 (c.20) and section 6D was inserted by section 44 of the Energy Act 2008 (c.32).

“connection offer” means an offer by the holder of a co-ordination licence of a connection to or modification of a connection to the transmission system;

“cost recovery methodology” means the methodology for calculating and recovering the Authority’s tender costs in relation to a particular tender exercise published by the Authority in accordance with regulation 23(2);

“data room” means a secure store of information in respect of a qualifying project to be maintained by the Authority;

“developer” means any person within section 6D(2)(a) of the 1989 Act;

“entry conditions” means the conditions specified in paragraph 1 or 2 of Schedule 2;

“information memorandum” means a memorandum of that description issued by the Authority to a qualifying applicant containing in summary form information in respect of a qualifying project;

“preferred bidder” has the meaning given in paragraph 35(1) of Schedule 2A to the 1989 Act;

“pre-qualification questionnaire” means a questionnaire of that description published by the Authority in accordance with regulation 9(2);

“qualification to tender questionnaire” means a questionnaire of that description published by the Authority in accordance with regulation 9(2);

“qualifying applicant” means an applicant determined as a qualifying applicant in accordance with regulation 10(2);

“qualifying bidder” means a qualifying applicant determined as a qualifying bidder in accordance with regulation 12(1);

“qualifying project” means a project as determined in accordance with regulation 5(3);

“reserve bidder” means a qualifying bidder determined as a reserve bidder in accordance with regulation 15(5) in relation to the best and final offer stage or regulation 14(4) in any other case;

“security” includes a charge over a bank account or any other asset, a deposit of money, a performance bond or bank guarantee, an insurance policy or a letter of credit;

“tender” means a submission by a qualifying bidder to the Authority in response to the invitation to tender documentation sent in accordance with regulation 13(2);

“tender rules” means the rules in relation to a particular tender exercise published by the Authority in accordance with regulation 7(4);

“transfer agreement” means the agreement to transfer any property, rights or liabilities in or relating to transmission assets from a developer to a successful bidder in respect of a particular qualifying project;

“transmission assets” has the meaning given in paragraph 1(3)(a) of Schedule 2A to the 1989 Act; and

“transmission services” has the meaning given in the standard conditions of a transmission licence.

(2) Any notice required to be given by the Authority in accordance with these Regulations shall be given by publication in such manner as the Authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them.

PART 2

CALCULATION AND PAYMENT OF COSTS INCURRED IN CONNECTION WITH TRANSMISSION ASSETS FOR A TRANSITIONAL TENDER EXERCISE

Calculation of costs

3.—(1) Prior to commencing a transitional tender exercise in relation to a qualifying project, the Authority shall calculate the economic and efficient costs which ought to be, or ought to have been, incurred in connection with developing and constructing the transmission assets, based on all relevant information available to the Authority, in accordance with paragraph (2).

(2) The calculation of costs in paragraph (1) shall be—

- (a) where the construction of the transmission assets has not reached the stage when those transmission assets are available for use for the transmission of electricity, an estimate of the costs which ought to be incurred in connection with the development and construction of those transmission assets, or
- (b) where the construction of the transmission assets has reached the stage when those transmission assets are available for use for the transmission of electricity, an assessment of the costs which ought to have been incurred in connection with the development and construction of those transmission assets.

(3) Where the Authority—

- (a) has previously estimated the costs in accordance with paragraph (2)(a); and
- (b) is satisfied with the evidence provided by the developer that those transmission assets are available for use for the transmission of electricity,

the Authority shall, as soon as reasonably practicable, assess the costs which ought to have been incurred in connection with the development and construction of those transmission assets.

(4) The developer shall provide such further information to the Authority as the Authority reasonably requires to enable it to estimate, in accordance with paragraph (2)(a), or assess, in accordance with paragraph (2)(b) or (3), the costs which ought to be, or ought to have been, incurred in connection with the development and construction of those transmission assets.

Payment of costs

4.—(1) Where the Authority has estimated the costs in accordance with regulation 3(2)(a), it shall, as soon as reasonably practicable, give notice to the developer to make a payment to the Authority of a sum determined in accordance with the Authority's cost recovery methodology in relation to estimating those costs.

(2) Where the Authority has assessed the costs in accordance with regulation 3(2)(b) or 3(3), it shall, as soon as reasonably practicable after the transitional tender exercise has been held in accordance with these Regulations, give notice to the successful bidder to make a payment to the Authority of a sum determined in accordance with the Authority's cost recovery methodology in relation to assessing those costs.

PART 3

QUALIFYING PROJECTS AND DEVELOPER'S PAYMENT AND SECURITY

Qualifying projects

5.—(1) A developer who wishes the Authority to publish a notice in accordance with regulation 7 in order to commence a tender exercise, shall make a request to that effect in writing to the Authority.

(2) Where the Authority has received one or more requests in accordance with paragraph (1), the Authority shall, as soon as reasonably practicable thereafter, determine whether each of those requests relate to a qualifying project.

(3) A qualifying project is a project of which the Authority is satisfied—

(a) in the case of a transitional tender exercise, it is one where either—

(i) the requirements specified in paragraph 2 of Schedule 1 have been met; or

(ii) the provision specified in paragraph 3 of Schedule 1 applies; or

(b) in any other case, it is one where the requirements specified in paragraph 1 of Schedule 1 have been met.

(4) For the purposes specified in paragraph (3)(b), the Authority may determine that the requirement in paragraph 1(a) of Schedule 1 is met where—

(a) the connection offer has been referred to the Authority for determination in accordance with the provisions of a transmission licence; and

(b) the matter that has been referred to the Authority would not, in the opinion of the Authority, have a material impact on the design of the changes required to be made to the transmission system as specified in that connection offer.

(5) The Authority may request the developer to provide any other information it considers necessary in order to carry out its assessment in relation to paragraphs 1, 2 or 3 of Schedule 1.

(6) Where the Authority determines that a request relates to a qualifying project in accordance with paragraph (2), it shall give notice of that fact to the developer who made the request.

(7) Where the Authority determines that a request does not relate to a qualifying project in accordance with paragraph (2), it shall give notice of that fact to the developer who made the request and give reasons for its determination.

(8) Where the developer disagrees with the Authority's determination as notified to the developer in accordance with paragraph (7), the developer may make representations in writing to the Authority within seven days from receipt of the notice.

(9) The Authority shall consider any representations received from a developer in accordance with paragraph (8) and decide whether to amend its determination made in accordance with paragraph (2).

(10) The Authority shall give notice to the developer of the decision made in accordance with paragraph (9) and give reasons for its decision.

Developer's payment and security

6.—(1) Prior to publishing a notice in accordance with regulation 7, the Authority shall give notice to the developer of—

(a) the amount of payment that the Authority requires to be paid by the developer in relation to the Authority's tender costs as calculated in accordance with the Authority's cost recovery methodology for that tender exercise; and

(b) the security that the Authority requires to be provided by the developer or such other person with whom the developer has made arrangements and has been approved by the Authority, in relation to the Authority's tender costs as calculated in accordance with the Authority's cost recovery methodology for that tender exercise.

PART 4

COMMENCEMENT OF A TENDER EXERCISE

Commencement of a tender exercise

7.—(1) As soon as reasonably practicable after the Authority has—

- (a) determined that one or more requests relate to a qualifying project in accordance with regulation 5; and
- (b) received payment and security from the developer in accordance with regulation 6,

the Authority shall publish a notice of its intention to commence a tender exercise in respect of those determined qualifying projects specifying the date on which the tender exercise shall be commenced in a given calendar year.

(2) The Authority may, after consulting a developer in respect of a particular qualifying project, publish a notice specifying the date on which that particular tender exercise in respect of that particular qualifying project shall be commenced (which may be earlier or later than the date specified in accordance with paragraph (1)).

(3) Where the Authority has published a notice in accordance with paragraph (1) or (2) and the Authority subsequently determines that it is impracticable to commence a tender exercise on the date specified in that notice, the Authority shall publish a notice specifying a revised date on which that tender exercise shall be commenced.

(4) The Authority shall publish the tender rules no later than the date on which the tender exercise is to be commenced as specified in a notice published in accordance with paragraph (1), (2) or (3).

PART 5

ENTRY CONDITIONS

Entry conditions in respect of qualifying projects

8.—(1) As soon as reasonably practicable after the Authority has published a notice in accordance with regulation 7 it shall give notice to the developer of—

- (a) the information that the Authority requires in order to be satisfied—
 - (i) in the case of a transitional tender exercise, that the conditions specified in paragraph 2 of Schedule 2 have been met in respect of that particular qualifying project; or
 - (ii) in any other case, that the conditions specified in paragraph 1 of Schedule 2 have been met in respect of that particular qualifying project; and
- (b) the date by which each of the conditions specified in paragraph 1 or 2 of Schedule 2 must be met by the developer in respect of that qualifying project.

(2) The Authority may request the developer to provide any other information it considers necessary in order to satisfy itself that the conditions specified in paragraph 1 or 2 of Schedule 2 have been met.

PART 6

PRE-QUALIFICATION STAGE

Pre-Qualification

9.—(1) In relation to a tender exercise, there shall be a pre-qualification stage in respect of all qualifying projects within that tender exercise in order to determine which applicants shall become qualifying applicants.

(2) On the date specified in the notice published in accordance with regulation 7, the Authority shall commence the pre-qualification stage by publishing the qualification documentation, which shall include the information specified in Schedule 3.

Determination of qualifying applicants

10.—(1) The Authority shall evaluate each completed pre-qualification questionnaire submitted to it by an applicant in accordance with the selection criteria set out in the qualification documentation.

(2) Where the Authority determines that an applicant has met the pre-qualification questionnaire selection criteria set out in the qualification documentation, that applicant shall become a qualifying applicant.

(3) The Authority may decline to consider a pre-qualification questionnaire submitted to it by an applicant where the Authority determines that the submitted pre-qualification questionnaire does not comply in any material respect with the requirements specified in the qualification documentation issued in accordance with regulation 9(2).

(4) The Authority shall give notice to each applicant of its determination in accordance with paragraph (2) or (3).

PART 7

QUALIFICATION TO TENDER STAGE

Qualification to tender

11.—(1) In relation to a tender exercise, there shall be a qualification to tender stage in order to determine which qualifying applicants shall become qualifying bidders in respect of each qualifying project within that tender exercise.

(2) The Authority shall invite all qualifying applicants who have submitted a signed confidentiality agreement in accordance with paragraph 1(d)(iv) of Schedule 3 to submit a completed qualification to tender questionnaire for one or more qualifying projects in accordance with the requirements set out in the qualification documentation issued in accordance with regulation 9(2).

Determination of qualifying bidders

12.—(1) The Authority shall evaluate each completed qualification to tender questionnaire submitted to it by a qualifying applicant in accordance with the selection criteria set out in the qualification documentation, in order to determine which qualifying applicants shall become qualifying bidders.

(2) The Authority may decline to consider a qualification to tender questionnaire submitted to it by a qualifying applicant where the Authority determines that the submitted qualification to tender questionnaire does not comply in any material respect with the requirements specified in the qualification documentation issued in accordance with regulation 9(2).

(3) The Authority shall give notice to each qualifying applicant of its determination in accordance with paragraph (1) or (2).

PART 8

INVITATION TO TENDER STAGE

Invitations to tender

13.—(1) The Authority shall give notice to all qualifying bidders of the amount of payment payable to the Authority as calculated in accordance with its cost recovery methodology in relation to the invitation to tender stage of that tender exercise.

(2) Where a qualifying bidder has made the payment referred to in paragraph (1), the Authority shall, as soon as reasonably practicable thereafter, send to that qualifying bidder the invitation to tender documentation, which shall include the information specified in Schedule 4.

(3) The Authority shall invite all qualifying bidders in respect of a particular qualifying project within that tender exercise, to submit a tender for providing offshore transmission services for that qualifying project.

(4) The submission of a tender by a qualifying bidder is an application for the grant of an offshore transmission licence to that qualifying bidder where that qualifying bidder becomes the successful bidder in accordance with these Regulations.

PART 9

EVALUATION STAGE

Evaluation of tenders

14.—(1) The Authority shall evaluate each tender in respect of a particular qualifying project submitted to it by a qualifying bidder in accordance with the evaluation criteria set out in the invitation to tender documentation, in order to determine which qualifying bidder shall become the preferred bidder in respect of that qualifying project.

(2) The Authority may decline to consider a tender submitted to it by a qualifying bidder where the Authority determines that the submitted tender does not comply in any material respect with the requirements specified in the invitation to tender documentation sent in accordance with regulation 13(2).

(3) Where the Authority considers that it is unable to determine the preferred bidder in accordance with paragraph (1), it may commence a best and final offer stage in accordance with regulation 15.

(4) The Authority may evaluate each tender in respect of a particular qualifying project submitted to it by a qualifying bidder in accordance with the evaluation criteria set out in the invitation to tender documentation, in order to determine which qualifying bidder shall become the reserve bidder in respect of that qualifying project.

(5) The Authority shall give notice to each qualifying bidder of its determination made in accordance with paragraph (1), (2), or (4) or its action in accordance with paragraph (3) as applicable.

Best and final offer

15.—(1) Where regulation 14(3) applies, the Authority shall determine in accordance with the evaluation criteria set out in the invitation to tender documentation, which qualifying bidders shall be invited to participate in a best and final offer stage.

(2) The Authority shall give notice to each qualifying bidder as to whether they have or have not been invited to participate in a best and final offer stage.

(3) The Authority shall send to the selected qualifying bidders the best and final offer documentation, which shall include the information specified in Schedule 5.

(4) The Authority shall evaluate each best and final offer in respect of a particular qualifying project submitted to it by a qualifying bidder in accordance with the evaluation criteria set out in the best and final offer documentation, in order to determine which qualifying bidder shall become the preferred bidder in respect of that qualifying project.

(5) The Authority may evaluate each best and final offer in respect of a particular qualifying project submitted to it by a qualifying bidder in accordance with the evaluation criteria set out in the best and final offer documentation, in order to determine which qualifying bidder shall become the reserve bidder in respect of that qualifying project.

(6) The Authority may decline to consider a best and final offer submitted to it by a qualifying bidder where the Authority determines that the submitted best and final offer does not comply in any material respect with the requirements specified in the best and final offer documentation sent in accordance with paragraph (3).

Notification of preferred bidder and reserve bidder

16.—(1) As soon as the Authority has determined the preferred bidder in respect of a particular qualifying project in accordance with regulation 14(1) or 15(4), it shall publish a notice to that effect.

(2) As soon as the Authority has determined the reserve bidder in respect of a particular qualifying project in accordance with regulation 14(4) or 15(5), it shall give notice of that fact to that reserve bidder.

(3) The notice referred to in paragraph (1) must—

- (a) specify the name and address of the preferred bidder; and
- (b) describe, in general terms, the matters to be resolved by the preferred bidder to the Authority's satisfaction as specified in paragraph (4), before that preferred bidder becomes the successful bidder in accordance with regulation 21(1).

(4) The matters referred to in paragraph (3) shall include—

- (a) that the preferred bidder has established necessary arrangements to provide offshore transmission services for that particular qualifying project;
- (b) that the preferred bidder has in place a bilateral agreement with the holder of a co-ordination licence to provide transmission services for that particular qualifying project;
- (c) that the preferred bidder has acceded to the contractual framework which defines the relationship between the holder of a co-ordination licence and any provider of transmission services that the co-ordination licence requires the holder of a co-ordination licence to have in force; and
- (d) any other matters which the Authority may determine are necessary in relation to that particular qualifying project.

(5) The Authority shall give notice to the preferred bidder as to—

- (a) how the matters referred to in paragraph (4) shall be satisfied and by what date; and
- (b) the amount of payment payable to the Authority as calculated in accordance with its cost recovery methodology in relation to the preferred bidder stage of that tender exercise.

(6) Where—

- (a) the matters referred to in paragraph (4) are not resolved by the preferred bidder to the Authority's satisfaction;
- (b) the preferred bidder fails to make the payment referred to in paragraph (5)(b); or
- (c) the preferred bidder withdraws from the tender exercise in respect of that qualifying project in accordance with regulation 17(1),

the Authority may withdraw the notice published in accordance with paragraph (1) by publishing a further notice to that effect.

(7) Where the Authority has published a further notice in accordance with paragraph (6), it shall discontinue the tender exercise with the preferred bidder and may determine to treat the reserve bidder (where such reserve bidder has been determined in accordance with regulation 14(4) or 15(5)), as if that reserve bidder were the preferred bidder.

(8) Paragraphs (1) and (3), (4), (5) and (6) shall apply in circumstances where the Authority determines to treat the reserve bidder as if it were the preferred bidder.

(9) The Authority shall give notice to any qualifying bidder of the fact that it is not a preferred bidder or a reserve bidder.

PART 10

WITHDRAWAL

Withdrawal

17.—(1) An applicant, qualifying applicant, qualifying bidder, preferred bidder, reserve bidder, successful bidder or bidder group may withdraw from the tender exercise in respect of a particular qualifying project by giving notice of that fact to the Authority.

(2) Where an applicant, qualifying applicant or qualifying bidder withdraws from the tender exercise in respect of a particular qualifying project in accordance with paragraph (1), that applicant, qualifying applicant or qualifying bidder may only be re-admitted to the tender exercise in respect of that or any other qualifying project, where there has been a permitted change to the membership of the bidder group incorporating that applicant, qualifying applicant or qualifying bidder in accordance with regulation 26.

(3) Where a preferred bidder, reserve bidder or successful bidder withdraws from the tender exercise in respect of a particular qualifying project in accordance with paragraph (1), that preferred bidder, reserve bidder or successful bidder may not be re-admitted to that tender exercise in respect of that or any other qualifying project.

(4) Where an applicant, qualifying applicant, qualifying bidder, preferred bidder, reserve bidder, successful bidder or bidder group has withdrawn from the tender exercise in respect of a particular qualifying project in accordance with paragraph (1), any payment provided to the Authority by that applicant, qualifying applicant, qualifying bidder, preferred bidder, reserve bidder or successful bidder in accordance with these Regulations, including any interest which may have accrued on that payment, will only be repaid by the Authority in accordance with the Authority's cost recovery methodology in relation to that tender exercise.

PART 11

CANCELLATION AND TREATMENT OF PAYMENTS AND SECURITY ON CANCELLATION

Cancellation

18.—(1) Where the Authority is satisfied that one or more of the events in Schedule 6 are occurring or have occurred in respect of a qualifying project, it may, in the circumstances specified in paragraph (2), publish a notice cancelling that qualifying project from the tender exercise.

(2) The circumstances in which the Authority may publish a notice in accordance with paragraph (1) are that the Authority has—

- (a) given seven days notice of its intention to cancel the qualifying project from the tender exercise; and
- (b) considered any representations which have been duly made in relation to the notice published in accordance with sub-paragraph (a).

(3) Where the Authority has published a notice in accordance with paragraph (1), the Authority may—

- (a) re-run that tender exercise in respect of that qualifying project, from the beginning or a particular stage of that tender exercise in accordance with these Regulations; or
- (b) determine that the tender exercise in respect of that qualifying project has failed.

(4) In the event that no preferred bidder, reserve bidder or successful bidder is determined pursuant to a tender exercise run as a consequence of a decision taken in accordance with paragraph (3), the Authority may—

- (a) re-run a further tender exercise in respect of that qualifying project, from the beginning or a particular stage of that tender exercise in accordance with these Regulations; or
- (b) determine that the tender exercise in respect of that qualifying project has failed.

(5) Where the Authority determines that the tender exercise has failed in accordance with paragraph (3)(b) or (4)(b), that tender exercise is finished in respect of that qualifying project.

Treatment of payments and security on cancellation

19.—(1) This regulation applies where the Authority cancels a qualifying project from a tender exercise in accordance with regulation 18(1) (whether or not that tender exercise in respect of that qualifying project is re-run or is determined as failed).

(2) Where one or more of the events in paragraphs (b), (c), (d), (e), (f), (g), (h), (i), (j) and (q) of Schedule 6 are occurring or have occurred in respect of a qualifying project, the Authority shall, in accordance with its cost recovery methodology—

- (a) not repay wholly or in part any payment that has been made by an applicant, qualifying bidder or preferred bidder in accordance with these Regulations, including any interest which may have been accrued on the whole or part of that payment;
- (b) repay to the developer wholly or in part the payment that has been made in accordance with regulation 6(1)(a), including any interest which may have been accrued on the whole or part of that payment; and
- (c) release to the developer or person approved by the Authority with whom the developer has made arrangements, wholly or in part the security that has been provided in accordance with regulation 6(1)(b), including any interest which may have been accrued where that security provided is a monetary deposit.

(3) Where one or more of the events in paragraphs (a), (k), (l), (m), (n), (o) and (p) of Schedule 6 are occurring or have occurred in respect of a qualifying project, the Authority shall, in accordance with its cost recovery methodology—

- (a) repay to an applicant, qualifying bidder, preferred bidder or successful bidder wholly or in part any payment that has been made by that applicant, qualifying bidder, preferred bidder or successful bidder in accordance with these Regulations, including any interest which may have been accrued on the whole or part of that payment;
- (b) not repay wholly or in part the payment that has been made in accordance with regulation 6(1)(a), including any interest which may have been accrued on the whole or part of that payment; and
- (c) determine that the security provided in accordance with regulation 6(1)(b) shall be forfeited wholly or in part, including any interest which may have been accrued where that security provided is a monetary deposit.

PART 12

DISQUALIFICATION FROM A TENDER EXERCISE

Disqualification

20.—(1) Where the Authority is satisfied that one or more of the events in Schedule 7 are occurring or have occurred and that the occurrence would materially affect the outcome of the tender exercise, it shall disqualify that developer, applicant, qualifying applicant or qualifying bidder from that tender exercise by giving notice of that fact to that developer, applicant, qualifying applicant or qualifying bidder.

(2) Where the developer has been disqualified in accordance with paragraph (1), the Authority shall in accordance with its cost recovery methodology—

- (a) not repay wholly or in part the payment that has been made in accordance with regulation 6(1)(a), including any interest which may have been accrued on the whole or part of that payment; and
- (b) determine that the security provided in accordance with regulation 6(1)(b) shall be forfeited wholly or in part, including any interest which may have been accrued where that security provided is a monetary deposit.

(3) Where an applicant, qualifying applicant or qualifying bidder has been disqualified in accordance with paragraph (1), the Authority shall in accordance with its cost recovery methodology not repay wholly or in part any payment that has been made by that applicant or qualifying bidder in accordance with these Regulations, including any interest which may have been accrued on the whole or part of that payment.

(4) Where an applicant, qualifying applicant or qualifying bidder is disqualified from the tender exercise in accordance with paragraph (1), no document, tender or any information submitted by that applicant, qualifying applicant or qualifying bidder to the Authority shall be taken into consideration for the purpose of determining the successful bidder in respect of that qualifying project.

PART 13

NOTIFICATION OF SUCCESSFUL BIDDER

Notification of successful bidder

21.—(1) Where the Authority is satisfied that the preferred bidder has resolved the matters described in the notice published in accordance with regulation 16(1), that preferred bidder shall become the successful bidder.

(2) As soon as reasonably practicable after the Authority has determined to grant an offshore transmission licence to the successful bidder in respect of a particular qualifying project it shall publish a notice to that effect.

(3) The notice shall specify the name and address of the successful bidder.

(4) The Authority shall give notice to the successful bidder of the amount of payment payable to the Authority as calculated in accordance with its cost recovery methodology in relation to the offshore transmission licence grant stage of that tender exercise.

Information in respect of successful bidder

22.—(1) Subject to paragraph (6), the Authority shall as soon as practicable after a determination has been made in accordance with regulation 21(2), give notice to all qualifying bidders of its determination in relation to the successful bidder in respect of that qualifying project.

(2) The notice referred to in paragraph (1) shall include—

- (a) the evaluation criteria applied by the Authority in evaluating tenders;
- (b) the score obtained by—
 - (i) each qualifying bidder which is to receive the notice; and
 - (ii) the successful bidder; and
- (c) the name of the successful bidder.

(3) The Authority shall allow a period of at least ten working days to elapse between the date of publication of the notice referred to in paragraph (1) and the date on which the Authority proposes to grant an offshore transmission licence to the successful bidder.

(4) Subject to paragraph (6), if by midnight at the end of the second working day of the period referred to in paragraph (3), the Authority receives a request in writing from a qualifying bidder who was sent a notice in accordance with paragraph (1), for the reasons why that qualifying bidder

was unsuccessful, the Authority shall inform that qualifying bidder of those reasons, including, where applicable, the characteristics and relative advantages of the successful tender.

(5) The Authority shall give the information set out in paragraph (4) at least three working days before the end of the period referred to in paragraph (3), or where that is not possible, the period referred to in paragraph (3) shall be extended to allow at least three working days between the provision of the information set out in paragraph (4) and the date on which the Authority proposes to grant an offshore transmission licence to the successful bidder.

(6) The Authority may withhold any information to be provided in accordance with paragraph (1) or (4) where the disclosure of such information—

- (a) would impede law enforcement;
- (b) would otherwise be contrary to law;
- (c) would otherwise be contrary to the public interest;
- (d) would prejudice the legitimate commercial interests of any qualifying bidder; or
- (e) may prejudice fair competition between qualifying bidders.

(7) Subject to any interim or final findings of proceedings brought within the ten working days period referred to in paragraph (3) in relation to the Authority's determination in accordance with regulation 21(2), the Authority shall determine whether or not to grant an offshore transmission licence to the successful bidder and shall publish a notice to that effect.

(8) Where the Authority determines to grant an offshore transmission licence in accordance with paragraph (7), that tender exercise is finished in respect of that qualifying project.

PART 14

COST RECOVERY

Recovery of tender costs

23.—(1) The Authority shall recover its tender costs in relation to a tender exercise undertaken in accordance with these Regulations.

(2) The Authority shall publish its cost recovery methodology no later than the date on which the tender exercise is to be commenced as specified in a notice published in accordance with regulation 7.

(3) The Authority shall give notice to the developer in respect of any payment or security required in accordance with these Regulations of—

- (a) the amount of the payment or the nature of the security;
- (b) the date and time by which it is to be made or provided; and
- (c) the manner in which it is to be made or provided,

as calculated in accordance with the Authority's cost recovery methodology in accordance with paragraph (2).

(4) The Authority shall give notice to an applicant, qualifying bidder, preferred bidder or successful bidder in respect of any payment required in accordance with these Regulations of—

- (a) the amount of the payment;
- (b) the date and time by which it is to be made; and
- (c) the manner in which it is to be made,

as calculated in accordance with the Authority's cost recovery methodology in accordance with paragraph (2).

(5) As soon as reasonably practicable after a tender exercise is finished, the Authority shall—

- (a) calculate its total tender costs in relation to that particular tender exercise; and

- (b) undertake an aggregation of—
 - (i) the payments made in accordance with these Regulations by a developer, applicant, qualifying bidder, preferred bidder or successful bidder and not repaid; and
 - (ii) the value of any security forfeited in accordance with these Regulations by the developer or person approved by the Authority with whom the developer has made arrangements in accordance with regulation 6(1)(b),

in order to identify whether the total of the payments made and the security provided exceeds the Authority's total tender costs in respect of that particular tender exercise.

(6) Where the total amount identified as a result of the aggregation undertaken in accordance with paragraph (5)(b) exceeds the total tender costs incurred by the Authority in respect of that particular tender exercise, the Authority shall as soon as reasonably practicable after that tender exercise is finished—

- (a) repay wholly or in part any payment that has been made which exceeds the tender costs to any person in paragraph (5)(b)(i) who made the payment, including any interest which may have been accrued on the whole or part of that payment; and
- (b) release wholly or in part the security that has been provided which exceeds the tender costs to any person in paragraph (5)(b)(ii) who provided that security, including any interest which may have been accrued where that security provided is a monetary deposit,

in accordance with the Authority's cost recovery methodology in relation to that tender exercise, so as to ensure that the Authority's total tender costs have not been exceeded.

PART 15

MISCELLANEOUS

Failure to make payments or provide security

24.—(1) Where the developer fails to make the payment or provide the security in accordance with regulation 6, the Authority may permit that payment or security to be made or provided within a further period specified by the Authority by notice to the developer, such period to be no later than the date on which a notice is published in accordance with regulation 7.

(2) Where the developer fails to make the payment or provide the security in accordance with regulation 6 within the further period specified in accordance with paragraph (1), the Authority may cancel that qualifying project from that tender exercise in accordance with regulation 18.

(3) Where either an applicant or a qualifying bidder fails to make any payment in accordance with these Regulations, the Authority may disqualify that applicant or qualifying bidder from that tender exercise in accordance with regulation 20 if that failure is not remedied within a period not exceeding ten days specified by the Authority by notice to that applicant or qualifying bidder.

Application for a decision by the Authority

25.—(1) An applicant, qualifying applicant or qualifying bidder may apply to the Authority for a decision as to the effect of any—

- (a) restriction applied as a result of these Regulations on the making of an application for the grant of an offshore transmission licence; or
- (b) requirement applied by virtue of these Regulations that operates so as to prevent an application for the grant of an offshore transmission licence from being considered or further considered.

(2) Where an applicant, qualifying applicant or qualifying bidder makes an application in accordance with paragraph (1), the Authority may charge that applicant, qualifying applicant or qualifying bidder a fee in accordance with the Authority's cost recovery methodology for any decision given in response to it.

Changes to bidder groups

26.—(1) Where a bidder group, which is an applicant or qualifying applicant, seeks to change the membership of that bidder group between the pre-qualification and qualification to tender stages of a tender exercise, the Authority shall permit that change provided that the new membership of that bidder group meets the pre-qualification selection criteria set out in the qualification documentation issued in accordance with regulation 9(2).

(2) Any change to the membership of a bidder group after a qualification to tender questionnaire has been submitted to the Authority shall be considered by the Authority on a case by case basis and will be subject to the Authority's discretion to determine whether or not to allow that change would be fair and equitable to all other qualifying bidders participating in the tender exercise in respect of that particular qualifying project.

(3) Where the Authority has permitted any change to the membership of bidder group in accordance with paragraph (1) or (2), it shall give notice to an applicant, qualifying applicant or qualifying bidder of the amount of any payment payable to the Authority as calculated in accordance with its cost recovery methodology in relation to its bidder group determination.

Changes to delivery of documents or actions

27.—(1) Where the Authority determines that it is impracticable—

- (a) for any document or notice which is to be delivered to or published by the Authority in accordance with these Regulations to be delivered or published by the time, date or in the manner specified in accordance with these Regulations; or
- (b) for any action which is required to be undertaken in accordance with these Regulations, to be completed by the time, date or in the manner specified,

then paragraph (2) applies.

(2) Where this paragraph applies, the Authority shall take reasonable steps to give notice to a developer, applicant, qualifying applicant, qualifying bidder, preferred bidder, reserve bidder or successful bidder (as the case may be) that—

- (a) delivery or publication shall be made by a different time or date or in a different manner; or
- (b) the action shall be completed by a different time or date or in a different manner.

Disapplication of certain provisions

28.—(1) No application for an offshore transmission licence shall be considered or granted by the Authority other than in accordance with these Regulations.

(2) Sections 6A and 6B of the 1989 Act and any regulations made under them shall be dispensed with insofar as they relate to an application for an offshore transmission licence.

The seal of the Gas and Electricity Markets Authority here affixed is authenticated by the signature of



26th May 2009

Steve Smith
A member of the Gas and Electricity Markets Authority

I approve

1st June 2009

Mike O'Brien
Minister of State
Department for Energy and Climate Change

SCHEDULE 1

Regulation 5

QUALIFYING PROJECTS

1. The requirements in this paragraph are that the developer has—
 - (a) entered into a bilateral agreement with the holder of a co-ordination licence in accordance with the arrangements for connection and use of the transmission system; and
 - (b) entered into an agreement for lease of the seabed with the Crown Estate Commissioners^(a).
2. The requirements in this paragraph are that the developer has—
 - (a) entered into a bilateral agreement with the holder of a co-ordination licence in accordance with the arrangements for connection and use of the transmission system, or entered into an agreement or accepted an offer of an agreement, with the electricity distributor responsible for the distribution system to which the transmission assets are or are intended to be connected;
 - (b) obtained all necessary consents and property rights for the transmission assets to be constructed and maintained;
 - (c) completed construction of, or entered into all necessary contracts for the construction of the transmission assets; and
 - (d) secured financing to construct the transmission assets.
3. Where the Authority considers that the developer has not met the requirements in paragraph 2(b) or (c), it may deem a project to be a qualifying project for those purposes, where the Authority is satisfied that the developer will use its reasonable endeavours to meet those requirements within a reasonable time period, such period to be notified by the Authority to the developer.

SCHEDULE 2

Regulation 8

ENTRY CONDITIONS

1. The conditions in this paragraph are that the developer has—
 - (a) provided information to the Authority to enable the Authority to both issue an information memorandum and establish a data room;
 - (b) provided a written warranty to the Authority, in a form reasonably acceptable to the Authority, that the information provided in sub-paragraph (a) is to the best of the knowledge and belief of the developer, having made reasonable enquiries, true, accurate and complete in all material respects; and
 - (c) complied with such other conditions as the Authority may determine are necessary in relation to that particular tender exercise.
2. The conditions in this paragraph are that the developer has—
 - (a) provided information to the Authority to enable the Authority to both issue an information memorandum and establish a data room;
 - (b) provided a written warranty to the Authority, in a form reasonably acceptable to the Authority, that the information provided in sub-paragraph (a) is to the best of the

(a) The Crown Estate Commissioners are a body corporate under section 1(1) of the Crown Estate Act 1961 (c.55).

knowledge and belief of the developer, having made reasonable enquiries, true, accurate and complete in all material respects;

- (c) completed the transfer agreement with all information available to the developer, and provided an undertaking in writing to the Authority in respect of those transmission assets which have not reached completion under the terms of the transfer agreement, to complete the remaining parts of the transfer agreement as soon as reasonably practicable thereafter;
- (d) provided an undertaking in writing to the Authority to transfer any property, rights or liabilities in or relating to the transmission assets to the successful bidder in respect of that transitional tender exercise, in accordance with the transfer agreement on payment of the sum determined in accordance with regulation 3; and
- (e) complied with such other conditions as the Authority may determine are necessary in relation to that particular transitional tender exercise.

SCHEDULE 3

Regulation 9

QUALIFICATION

1. The information specified in this Schedule in relation to a particular tender exercise is as follows–

- (a) the rules particular to the pre-qualification and qualification to the tender stages of the tender exercise;
- (b) the pre-qualification questionnaire, qualification to tender questionnaire and confidentiality agreement;
- (c) the instructions that apply to the pre-qualification questionnaire, qualification to tender questionnaire and confidentiality agreement;
- (d) the date, time and manner in which the following are to be submitted to the Authority–
 - (i) a completed pre-qualification questionnaire;
 - (ii) the amount of payment as calculated in accordance with the Authority's cost recovery methodology in relation to the pre-qualification questionnaire stage of that tender exercise;
 - (iii) a completed qualification to tender questionnaire; and
 - (iv) a signed confidentiality agreement;
- (e) the selection criteria to be applied by the Authority in evaluating a completed pre-qualification questionnaire and qualification to tender questionnaire submitted to the Authority;
- (f) in respect of a transitional tender exercise, the estimate or assessment of the costs which ought to be, or ought to have been, incurred in connection with the development and construction of the transmission assets in respect of each qualifying project as calculated by the Authority in accordance with regulation 3; and
- (g) any other such information in relation to the pre-qualification and qualification to tender stages of the particular tender exercise as the Authority may determine is necessary.

SCHEDULE 4

Regulation 13

INVITATION TO TENDER

1. The information specified in this Schedule in relation to a particular tender exercise is as follows–

- (a) the rules particular to the invitation to tender stage of the tender exercise;
- (b) a description of the information required by the Authority for the submission of a tender;
- (c) the time, date and manner in which tenders shall be submitted to the Authority;
- (d) the evaluation criteria to be applied by the Authority in evaluating tenders; and
- (e) any other such information in relation to the invitation to tender stage of the particular tender exercise as the Authority may determine is necessary.

SCHEDULE 5

Regulation 15

BEST AND FINAL OFFER

1. The information specified in this Schedule in relation to a particular tender exercise is as follows–

- (a) a description of the information required by the Authority for the submission of a best and final offer;
- (b) the time, date and manner in which any best and final offers shall be submitted to the Authority;
- (c) the evaluation criteria to be applied by the Authority in evaluating best and final offers; and
- (d) any other such information in relation to the best and final offer stage of the particular tender exercise as the Authority may determine is necessary.

SCHEDULE 6

Regulation 18

EVENTS OF CANCELLATION

1. The events in this Schedule are–

- (a) the Authority does not receive any completed and compliant pre-qualification questionnaires in accordance with regulation 10;
- (b) the Authority does not receive any completed and compliant qualification to tender questionnaires in accordance with regulation 12;
- (c) the Authority determines that there are no qualifying applicants or qualifying bidders in respect of a qualifying project;
- (d) the Authority does not receive any compliant tenders in accordance with regulation 13;
- (e) the Authority does not receive any compliant best and final offers in accordance with regulation 15;
- (f) a preferred bidder withdraws from a tender exercise in respect of a particular qualifying project and the Authority has not determined a reserve bidder in respect of that qualifying project;
- (g) the matters referred to in the notice published in accordance with regulation 16(1) are not satisfied by a preferred bidder and the Authority has not determined a reserve bidder;
- (h) a reserve bidder withdraws from a tender exercise in respect of a particular qualifying project after a preferred bidder has withdrawn from that tender exercise in respect of that qualifying project, or after a preferred bidder has failed to satisfy the matters referred to in the notice published in accordance with regulation 16(1);
- (i) the matters referred to in the notice published in accordance with regulation 16(1) are not satisfied by a reserve bidder and the preferred bidder has withdrawn from that tender

exercise in respect of that qualifying project, or the preferred bidder has failed to satisfy those matters;

- (j) a successful bidder fails to make a payment in accordance with regulation 21(4);
- (k) a developer has been disqualified from a tender exercise in accordance with regulation 20(1);
- (l) a developer fails to make a payment or provide security in accordance with regulation 24(2);
- (m) a developer fails to meet the conditions specified in paragraph 1 or 2 of Schedule 2 in accordance with regulation 8;
- (n) a developer does not agree the variation to the bilateral agreement with the holder of a co-ordination licence in order that the preferred bidder has in place a valid bilateral agreement;
- (o) a developer terminates its bilateral agreement with the holder of a co-ordination licence;
- (p) a developer withdraws its qualifying project from a tender exercise for any reason;
- (q) the Authority determines that it would not be appropriate to grant an offshore transmission licence to any qualifying bidder.

SCHEDULE 7

Regulation 20

EVENTS OF DISQUALIFICATION

1. The events in this Schedule in relation to a developer, applicant, qualifying applicant, qualifying bidder or bidder group are—

- (a) causing or inducing any person to enter into an agreement or to inform a developer, applicant, qualifying applicant, qualifying bidder or bidder group of the amount of any rival tender;
- (b) a material breach of the tender rules, any rules particular to the pre-qualification, qualification to tender and invitation to tender stages of a tender exercise or any requirements specified in these Regulations;
- (c) submitting any information to the Authority which is false or misleading unless the provision of further information is acceptable to the Authority;
- (d) engaging in, attempting to engage in, allowing or encouraging any anti-competitive behaviour by or between any developer, applicant, qualifying applicant, qualifying bidder or bidder group;
- (e) doing anything which would constitute a breach of the Prevention of Corruption Acts 1889 to 1916.

2. The events in this Schedule in relation to a developer are—

- (a) offering to pay or give any sum of money, inducement or valuable consideration directly or indirectly to any officer of the Authority, applicant, qualifying applicant, qualifying bidder or bidder group who is involved in a tender exercise (or any related party of these) in relation to any actions or omissions;
- (b) contacting an applicant, qualifying applicant, qualifying bidder or bidder group who is subject to a tender exercise (or any related party of these) outside any requirements specified in these Regulations. This includes, but is not limited to, contact for the purposes of discussing the possible transfer of an employee of an applicant, qualifying applicant, qualifying bidder or bidder group to the employment of the developer for the purpose of the tender exercise in question.

3. The events in this Schedule in relation to an applicant, qualifying applicant, qualifying bidder or bidder group are—

- (a) failure to make any payment as required in accordance with these Regulations, unless that failure has been remedied within a period not exceeding ten days in accordance with regulation 24(3);
- (b) fixing or adjusting the amount of its tender by or in accordance with any agreement or arrangement with any other applicant, qualifying applicant, qualifying bidder or bidder group or by improperly using insider information;
- (c) entering into any agreement or arrangement with any other applicant, qualifying applicant, qualifying bidder or bidder group that it shall refrain from submitting a tender or as to the amount of the tender submitted;
- (d) communicating to any person other than the Authority the details of its proposed tender in respect of a qualifying project, except where this disclosure is made in confidence in order to obtain quotations necessary for the preparation of that tender;
- (e) where the bidding entity is a bidder group, any change to the membership of that bidder group other than a change which has been approved by the Authority or any breach of the tender rules in respect of bidder groups;
- (f) offering to pay or give any sum of money, inducement or valuable consideration directly or indirectly to any officer of the Authority, the holder of a co-ordination licence or a developer, who is subject to a tender exercise in relation to any actions or omissions;
- (g) contacting any officer of the Authority, the holder of a co-ordination licence or a developer who is subject to a tender exercise outside the tender rules, any rules particular to the pre-qualification, qualification to tender and invitation to tender stages of a tender exercise or any requirements specified in these Regulations. This includes, but is not limited to, contact for the purposes of discussing the possible transfer of such officer to the employment of the applicant, qualifying applicant, qualifying bidder or bidder group for the purpose of the tender exercise in question.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations set out the process for competitive tenders that will apply to the grant of offshore transmission licences.

Regulations 3 and 4 provide for the Authority to undertake an estimate or assessment of the total costs required to develop and construct the transmission assets and for the Authority to recover its costs in doing so.

Regulation 5 sets out how projects qualify for a tender exercise. Schedule 1 contains the details of how a qualifying project will be determined.

Regulation 6 requires a developer to make a payment and provide security to the Authority in respect of the Authority's tender costs.

Regulation 7 requires the Authority to publish a notice specifying the date on which a tender exercise will begin for one or more qualifying projects, once it has determined qualifying projects and received payment and security from a developer.

Regulation 8 sets out the conditions which must be satisfied by a developer. Schedule 2 contains the details of those conditions.

Regulations 9 and 10 describe the pre-qualification stage of a tender exercise and how qualifying applicants will be determined. Schedule 3 sets out the information in the qualification documentation.

Regulations 11 and 12 describe the qualification to tender stage of a tender exercise and how qualifying bidders will be determined. Regulation 13 describes the invitation to tender stage of a tender exercise. Schedule 4 sets out the information in the invitation to tender documentation.

Regulation 14 describes how the Authority will evaluate tenders to identify a preferred bidder. The Authority may also identify a reserve bidder. Where the Authority is unable to determine a preferred bidder, the Authority may hold a best and final offer stage under regulation 15. The Authority may also identify a reserve bidder at the best and final offer stage. Schedule 5 sets out the information in the best and final offer documentation.

Regulation 16 requires the preferred bidder to satisfy certain matters before it becomes the successful bidder. The reserve bidder may be treated as the preferred bidder if the original preferred bidder fails to satisfy the matters, fails to make a payment or withdraws from a tender exercise.

Regulation 17 provides for participants to withdraw from a tender exercise and allows the Authority to retain any payments made to the Authority in the event of a withdrawal.

Regulation 18 provides for the Authority to cancel a tender exercise under the circumstances described in Schedule 6. A tender exercise may be re-run from a particular stage until a preferred bidder or reserve bidder is identified or a tender exercise can be determined as failed. Regulation 19 describes how payments and security will be forfeited, repaid or released in the event of cancellation of a tender exercise.

Regulation 20 allows the Authority to disqualify a participant from a tender exercise under the circumstances described in Schedule 7 and forfeit any payments or security provided.

Regulation 21 requires the Authority to publish details of the successful bidder. Regulation 22 allows ten working days before an offshore transmission licence is granted to allow unsuccessful bidders an opportunity to request information from the Authority in respect of the successful tender.

Regulation 23 allows the Authority to recover its costs in running a tender exercise and return any overpayment and security where tender costs have been exceeded.

Regulation 24 relates to failure to make payments or provide security. Regulation 25 allows an application to the Authority for a decision as to the effect of any restriction or requirement applied under these Regulations.

Regulation 26 describes the rules for changes to bidder groups. The Authority shall notify a participant of any changes to the delivery of documents or actions required under regulation 27.

Regulation 28 dispenses with sections 6A and 6B of the Electricity Act 1989 for an application in respect of an offshore transmission licence.

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