

To: OnshoreCompetitionsPolicy@ofgem.gov.uk

Date: 31 October 2024

Dear OFGEM,

Consultation Response: Draft Electricity (Early-Model Competitive Tenders for Onshore Transmission Licences) Regulations 2024

Eclipse Power Networks is pleased to respond to OFGEM's consultation. We support OFGEM's desire to bring competition into Electricity Transmission for specific situations and agree that the proposed format for tendering for early-model competition is appropriate.

We would like to take the opportunity to note, as we have in various recent engagements with OFGEM, that Eclipse Power feels that competition in Electricity Transmission could go further. By licensing localised connection Transmission solutions (in the form of Independent Transmission Operators) more benefits could be brought to customers and consumers, potentially at a pace far faster than the CATO model, and in an entirely complementary manner.

Also, we understand that Ofgem is considering exempting projects from competition following a CP30 and tCSNP2 refresh in 2026. This would further limit the pipeline of competitive opportunities for Electricity Transmission, removing the benefits from more investment.

Responses to OFGEM's Questions

Our responses to the questions are brief, and supportive:

1. Do you agree with our drafting of the draft Tender Regulations?

Yes, the need to do so, and the content and structure, is well thought out and generally clear.

2. Are there specific changes or modifications you would recommend to the draft Tender Regulations?

No, they appear to be acceptable for the purpose.

3. Is the proposed drafting of the Tender Regulations clear and understandable? If not, which parts require clarification?

The proposed regulations are generally clear and understandable.

4. Would you like to provide any further comments on the draft Tender Regulations and the proposed tender exercises that cannot be covered by the questions above?

No issues.

Kind regards,

W D Scott

Bill Scott

Senior Regulatory Analyst

Eclipse Power

Draft Electricity (Early-Model Competitive Tenders for Onshore Transmission Licences) Regulations 2024 for consultation

National Grid response

November 2024

This response to Ofgem's "Draft Electricity (Early-Model Competitive Tenders for Onshore Transmission Licences) Regulations 2024 for consultation" dated 20 September 2024 (the consultation) is from National Grid plc (NG), on behalf of our transmission business, National Grid Electricity Transmission plc (NGET) and our electricity interconnector business, National Grid Ventures Ltd (NGV).

Executive Summary

We are pleased to see continued progress in the development of the early competition regulatory framework through this consultation on the draft Electricity (Early-Model Competitive Tenders for Onshore Transmission Licences) Regulations 2024 (the "Tender Regulations") which will provide the legislative framework for future onshore transmission competitive tenders.

We continue to support onshore competition where it delivers benefits for consumers. For competition to be successful, this will require a framework that maximises the potential for organisations to participate in the process.

We broadly support the drafting of the Tender Regulations; however, we would welcome clarity in several areas which we have outlined in our responses to the specific questions posed in the accompanying consultation document.

The scale of investment and development activity needed to support the energy transition represents a significant increase in comparison to historic trends and requires a material uplift in capacity, resources, tooling, including the use of digital tools, platforms and new technologies and a shift towards a more holistic approach to network planning and delivery.

Introducing onshore competition in a way that supports the delivery of wider strategic ambitions such as the 'Clean Power Plan 2030' ("CP2030") and aligning with the transition to a more centralised approach to planning the network is essential. This will ensure that the expected benefits of a more holistic approach to delivering the network, such as securing supply chain capacity and taking a portfolio approach to delivery, are realised. We encourage Ofgem to consider this context carefully on the journey to implement early competition to ensure that it succeeds in delivering benefits to consumers.

We look forward to continued engagement with NESO and Ofgem on the details of early competition implementation and stand ready to support the first tender, as required.

Our responses to the questions raised in the consultation are set out in the Appendix to this document.

Appendix Consultation questions

Q1: Do you agree with our drafting of the draft Tender Regulations?

We broadly agree with the drafting of the draft Tender Regulations, but we welcome clarity in several areas as set out below.

Q2: Are there specific changes or modifications you would recommend to the draft Tender Regulations?

We have included both general and specific areas where clarification would be welcomed as part of our response to Question 3. These areas may require changes or modification to the drafting.

Q3: Is the proposed drafting of the Tender Regulations clear and understandable? If not, which parts require clarification?

We welcome clarity in the following areas:

(i) General observations

Confidentiality: We think that participants should be able to suggest amendments to confidentiality agreement but welcome clarity on whether a blanket provision will be taken across all participants. In addition, we think that any external persons that Ofgem appoints to conduct reviews on its behalf are visible to all bidders and must be subject to the same confidentiality provisions as NESO and Ofgem, with visibility of the identity of such persons being given at an early stage in the tender process, as participants may wish to use the same persons as external support on a bid team.

Process Efficiencies: Where determined to be appropriate, we would welcome consideration of a streamlined approach to aspects such as pre-qualification and conflict mitigation methodologies, especially in cases where multiple tenders are being run close to one another. For example, use of a single pre-qualification or an evergreen conflict mitigation methodology.

We think that a dual track of tender and licence application is logical; however, this should be considered from a resource perspective for both potential bidders and Ofgem. For example, Ofgem might wish to consider the impact on resources of an influx of applications.

Tender timelines: We would welcome further detail on the expected process where a bidder may seek to challenge the outcome of the tender.

Application of the Utilities Contracts Regulations 2016 / Procurement Act 2023: We understand that any tenderer (including any winner) of any of the competitions under these Regulations will not be subject to the Utilities Contracts Regulations 2016 or the Procurement Act 2023 in respect of any of the competed projects, even if they are currently subject to them in their capacity as an Electricity Transmission/Distribution Network Operator. However, it is important that the Tender Regulations make this clear.

Pre-market engagement: We think that it is important that any pre-market engagement is conducted fairly and that interested parties have an opportunity to engage once a “preliminary market engagement notice” is published. We welcome further clarity on the proposal that a participant can be disqualified for “deriving an unfair advantage from having participated in preliminary market engagement.” This risk should not be placed on participants as any unfair advantage would be created by either NESO or Ofgem.

Communication: We note that throughout the Tender Regulations there is reference to “giving notice.” We would welcome clarity on how this correspondence (and other communications) will be made between NESO and prospective participants.

Cost re-imbursement: We think that a successful competition framework should attract a wide pool of potential bidders. Therefore, the costs on bidders relating to their own participation in a tender, as well as the costs incurred by the tender parties, should be considered carefully to ensure that these are fair and proportionate (especially in the early stages of implementation).

Licensing: We think that the Tender Regulations focus heavily on the electricity transmission licence. It is our understanding that the appropriate licence could be an electricity transmission or CATO licence (expected to be consulted on in Q1 2025). We welcome clarity from Ofgem on the licensing arrangements as the details emerge. For example, will

the appropriate licence be the electricity transmission licence (with specific parts switched on or off) or a new CATO licence.

(ii) Specific references

Reference	Clarification/modification sought
Reg 2(1)	"transmission licence" is not defined. "co-ordination licence" is not defined. We welcome clarity on what/who is the holder of a coordination licence. We think that this is referring to NESO, which holds an "electricity system operator licence", which is defined in s.6(1)(da) of the Electricity Act 1989.
Reg 3(4)	We would welcome clarity on why there is a perception that a party without a transmission licence might face barriers and what these barriers are.
Reg 5	We welcome clarity on this provision which seems to allow market engagement to occur without requiring that it is made public.
Reg 18(5)(b) and (ii)	The term 'developer' is not defined in these regulations. 18(5)(b) should start with "requiring the preferred bidder to" 18(5)(b)(ii) The term developer should be modified to preferred bidder .
Reg 19(5)	We think that the intent of this provision is to state that if a bidder participates in a tender, they do so at their own risk but would welcome clarity here.
Reg 24(3)	We think this needs further consideration to clarify how (the process by which) successful bidders will pay the Authority's costs in reimbursing bid costs.
Reg 29(6)	We think that the reference to paragraph (1) in the penultimate line is incorrect. We think that it should refer to paragraph (3a).
Reg 30(2) and (4)	We welcome clarity on this calculation, e.g. through a worked example, as it is unclear.
Reg 31(2)	We welcome clarity on this calculation, e.g. through a worked example, as it is unclear.
Reg 40	We welcome clarity on whether if Ofgem chooses to modify an existing licence, would this be done using the S.11A Electricity Act 1989 process? We would also welcome clarity on how the application and granting of licence process would apply to existing licence holders.

Q4: Would you like to provide any further comments on the draft Tender Regulations and the proposed tender exercises that cannot be covered by the questions above?

N/A

Plenary Europe Limited

Draft Electricity (Early-Model Competitive Tenders for Onshore Transmission Licences) Regulations 2024 for consultation

Organisation and Contact Details

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Introduction

Plenary Group is a world leading independent developer, investor and long-term manager of public infrastructure. We have been partnering with the public sector to deliver exceptional projects since 2004. In that time we have developed more than 80 public sector projects globally with an aggregate project value of over £40 billion. As long-term partners to our clients, we continue to hold a stake in every one of these projects and maintain accountability for their outcomes.

We have been following the development of the early model for competitive tenders for onshore transmission licences (CATOs) closely, and intend to bid for these projects once they come to market. Our role on a project would be to provide equity, lead the commercial and financial development of the bidder solution, and act as the lead consortium party member representing the project to the client.

We note that the CATO projects bear a close resemblance to the Renewable Energy Zone projects in Australia, which we are also involved in tendering for. Our observations on the CATO model are informed by our participation in those processes, as well as our international experience responding to infrastructure tenders across a wide range of jurisdictions and asset types.

In this response, we make a number of general observations and comments on the development of the commercial models for the projects, and then go on to provide specific responses to the consultation questions.

General observations on the development of the CATO procurement model

Creating a level playing field for competitors to incumbent transmission operators

We note Ofgem's indication that existing Transmission Operators (TOs) will be required to submit conflict methodology statements, and that they are encouraged to create ring-fenced management structures and cost accounting to bid for the CATO projects outside of their regulated activities. However, there are a number of ways which we believe the existing TOs will still have a significant competitive advantage relative to other bidders:

- Where the design solution is not tightly specified at the outset of the tender stage, TOs will have an inherent advantage due to their existing knowledge of existing network infrastructure such as sub-stations, cabling routes and capacity, and land availability.

- Although TOs will be restricted from moving staff between the bidding unit and the regulated business during the ITT stage, it will presumably be possible for the TO to second staff from the regulated business to the bidding unit for the duration of the ITT. This will be a significantly more cost-effective way to staff the bidding team with the right experience than will be available to other bidders, who will have to rely either on permanent hires (with no certainty of revenue to support that risk), or on external consultants who are likely to be substantially more expensive.
- Although the TOs' bidding units may be separated from a cost accounting point of view up to a certain level, the bidding units will still report to the same board and shareholders as the regulated businesses. The TOs will therefore have a greater ability to 'absorb' the bidding costs at a corporate level alongside their other activities, while third party bidders will need to approach the projects on a standalone basis.
- When preparing proposals for operating costs of the CATO assets, incumbent TOs will be able to assume a degree of cost-sharing between their existing operations and the operations of the CATOs. This cost-sharing is an issue even if there is no explicit cross-subsidy from the regulated operations. For example, a member of staff can have their time split between regulated and non-regulated work, and have their cost allocated accordingly without cross-subsidy. However, new entrants would not have this luxury, and would have to create a standalone organisation and operating structure.
- Incumbent TOs will have a substantial advantage in relationships with, and likely leverage over, the existing supply chain. For example, we have heard feedback from a number of contractors with the required experience that they are nervous about being involved in a bid process against one of their major clients (the incumbent TOs).

The above issues will all be particularly acute for the first few CATO projects to come to market. At this point in time, the established operations of the incumbents will give them a significant advantage. However, if measures are taken to address this, and allow new entrants into the market, over time a competitive market will emerge in which new entrants are able to establish themselves operationally, organisationally, and with the supply chain. We would advise Ofgem to have this 'end goal' of competition in mind, and accept that this may require higher tender process costs for the first projects.

We would recommend that Ofgem strengthen the ringfencing of the bid teams within existing transmission operators. For example, we would recommend that staff transfers between the TO bid teams and the other TO operations are not permitted at any time.

We would also recommend that the key terms of the established TO's supply chain arrangements are made clear to incoming bidders, to support incoming bidders in achieving competitive outcomes with the supply chain.

A procurement process with a sensible timeline and set of risks to get to revenue generation

We understand that Ofgem intends for the appointed bidder to undertake the 'preliminary works' including detailed design, consenting, planning permission, land acquisition, and ground surveys following the award of the contract but before Financial Close. There may be payments to the CATO during this preliminary works period, but these would be capped at 50% of the preliminary works costs of reference design according to NESO's estimates.

From a bidder perspective, there is therefore a long time period and substantial outlay before the project generates a return, consisting of:

- An ITT and preferred bidder phase of around 18 months combined, where the bidder will incur significant bid costs
- A preliminary works phase of length unknown at this stage, but conceivably at least two years (given the planning, consenting, and land acquisition stages), where the bidder will carry the cost of preliminary works in excess of the allowance determined by NESO
- The construction period, which is likely to be several years, before the project revenues commence

This means there is a timeframe of potentially up to around four years between the commencement of the ITT, and potentially five to ten years before project revenues commence.

For new entrant tenderers, this is likely to be too significant a risk to take, without protection from the cost exposure of tendering, and payments during the preliminary works phase based on the actual costs of the preliminary works undertaken.

We would strongly recommend Ofgem provide reimbursement of bid costs for both losing bidders and the winning bidder at the outset of the preliminary works phase, once the preferred bidder is appointed.

Bidders should not be expected to be in a loss-making position through the preliminary works phase. The cost of preliminary works could be a ‘biddable’ item in the tender process, and could be fixed at a level which bidders expect to cover their costs during this phase.

Involvement of the regulator through the tender stage

We note in the draft tender regulations the interactions between the roles of NESO and Ofgem: NESO will run the tender process, while Ofgem will assess the linked licence applications and effectively act as an approval authority. Ultimately, Ofgem, as the regulator, is likely to take overall responsibility for achieving a commercial outcome from the tender process which provides sensible value for money to users of the transmission system. Where there are commercial mechanisms which result in risks being passed to customers, Ofgem will need to review the implications of these for customers.

Given the importance of Ofgem in this process, we would encourage Ofgem to be directly involved in the tender process. For example, if there are dialogue meetings discussing the trade-offs between risk allocation and cost, then Ofgem should be present and actively involved in those dialogues.

Responses to consultation questions

Question 1: Do you agree with our drafting of the draft Tender Regulations?

We would welcome further clarity on Ofgem’s intentions regarding the costs of the tender process for bidders, NESO, and Ofgem. We note that the tender regulations contemplate that:

- Ofgem may determine on a case-by-case basis where bidders should have their tender costs reimbursed (Regulation 10(1)(b))
- Ofgem will receive payments from qualifying bidders, at ITT stage, to recover Ofgem and NESO’s costs of running the tender (Regulation (12(1)(a)-(b))
- Ofgem will direct the successful bidder to make a payment to Ofgem to recover Ofgem and NESO’s tender costs (Regulation 24(3))

We would welcome clarity on Ofgem’s intention to reimburse bid costs for losing bidders (currently contemplated to be on a case-by-case basis). Where market participants perceive a risk that the process is likely to be won by an incumbent transmission operator, it will be very challenging for incoming parties to take the risk of the substantial bid costs to participate in the process.

It is also not clear to us:

- whether Ofgem intends to recover Ofgem and NESO’s costs from all tenderers, or only from the winning tenderer
- whether this cost borne by tenderers would be considered in the calculation of bidders’ tender costs which may be reimbursed.

Question 2: Are there specific changes or modifications you would recommend to the draft Tender Regulations?

We would recommend the following changes regarding tender costs.

Provision of security for Ofgem and NESO costs

Ofgem should not require bidders to provide security for Ofgem and NESO’s tender costs. The tender costs for bidders will already be substantial without this, and tenderers would not take the decision to pull out of a

tender lightly – to do so would risk losing the tender costs already incurred by the bidder, and substantial reputational damage.

The provision of security for Ofgem and NESO's costs is unlikely to have a material effect of a tenderer's decision to withdraw or not at this stage. However, it will have a substantial effect on new market entrants' decision to participate in the process at all.

Payment from successful tenderer for Ofgem and NESO costs

If Ofgem and NESO are to seek payments from successful tenderers for their own costs in running the tender process, then these payments should be made at Financial Close (i.e. after the preliminary works period). If successful tenderers are required to 'cashflow' these costs through the preliminary works period, new market entrants are likely to see this as a risk they are not willing to take.

Furthermore, leaving Ofgem and NESO 'at risk' for those costs through the preliminary works period will demonstrate to the preferred tenderer that they are aligned and have an incentive to cooperate with the preferred tenderer, who itself will have a substantial cost risk exposure at that point in time.

Question 3: Is the proposed drafting of the Tender Regulations clear and understandable? If not, which parts require clarification?

See response to Question 1 above.

Question 4: Would you like to provide any further comments on the draft Tender Regulations and the proposed tender exercises that cannot be covered by the questions above?

See the earlier section of this note covering our general observations on the development of the commercial model for the CATO procurements.

Email to:

OnshoreCompetitionsPolicy@ofgem.gov.uk

31 October 2024

Dear Aakriti Bhardwaj,

Response to Draft Electricity (Early-Model Competitive Tenders for Onshore Transmission Licences) Regulations 2024 consultation

Scottish Renewables is the voice of Scotland's renewable energy industry. The sectors we represent deliver investment, jobs and social benefits and reduce the carbon emissions which cause climate change. Our 360-plus members work across all renewable energy technologies, in Scotland, the UK, Europe and around the world. In representing them, we aim to lead and inform the debate on how the growth of renewable energy can help sustainably heat and power Scotland's homes and businesses.

Scottish Renewables has followed Ofgem's progression of a regulatory framework for introducing competition and welcomes the opportunity to respond to its Draft Electricity (Early-Model Competitive Tenders for Onshore Transmission Licences) Regulations 2024 consultation. As evidenced by our [response](#) to Ofgem's proposed regulatory funding and approval framework for onshore transitional Centralised Strategic Network Plan 2 (TCSNP2) projects, Scottish Renewables is keen to work with the regulator to ensure the framework and conditions set out are appropriate to obtain additional benefit from competition. Within our response, we have specific concerns and queries around the details of the consultation as well as more overarching considerations for the regulator.

We believe there is a valuable and timely opportunity to explore the difference in the devolved categorisation of transmission across GB and the potential to leverage the lack of sub-categorisation within Scotland to benefit competition and, thus, consumers. While 132kV is legally deemed a distribution asset in England and Wales, it remains defined as transmission in Scotland due to historic decisions made from Scotland's integration into the New Electricity Trading Arrangements (NETA) in 2005. As a result, TNUoS charges associated with 132kV are especially high due to the levels of maintenance required under this classification. If Ofgem intends to eventually include 132kV transmission asset lines in Scotland as projects for tender, we believe redefining the function of such lines could offer consumer savings and attract a wider range of competition.

By redefining the function of 132kV lines for new circuits that align more closely with distribution charging methodologies, the qualifying criteria for project bidders could be rescaled to meet distribution standards. As such, a wider range of competitors would be able to meet criteria requirements, prompting more innovative and flexible circuit build designs combined with reduced costs resulting from a distribution asset rate of return. Defining the function at the outset would secure reduced costs for consumers throughout the asset's life and avoid reinforcing an arguably outdated classification with incoming network changes. In addition, a reclassification of function for such assets would create greater harmony with England and Wales as cross-border networks are increasingly reinforced. We believe a reclassification holds the potential to promote Ofgem's ambition for competition in line with its remit to protect consumers.

Regarding the tender regulations proposed, we welcome the obligation on tender parties to address barriers. While there is evidence from other countries that competition attracts new supply chain parties into the market, we suggest there needs to be a greater focus on supply chain engagement strategy for competition and Ofgem needs to address this as part of the process. Integrating a mechanism like that of the Sustainable Industry Rewards (SIRs) within the Contracts for Difference (CfD) to the tendering process could help alleviate this issue and attract the necessary suppliers. We would like to see Ofgem acknowledge this issue and take tangible steps to address this.

Navigating the appropriate interaction between incumbent TOs and CATOs in an interconnected network is challenging; however, we believe the framework as set out currently does not provide sufficient clarity or provision of conflict mitigation for successful tendering. There is insufficient information about the role and responsibility of the incumbent TOs within the process. The incumbent TO is required to support the process, but greater detail around the specific expectations of this support, and cost recovery of resources involved, is needed to ensure TOs are fully incentivised to support competition. Regarding the assessment of the conflict suggested by NESO and Ofgem in the pre-tender stage, we would also like to see substantive detail on what this process constitutes and transparency on the protocols that the parties are obligated to follow to manage the conflicts.

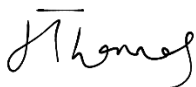
Remaining areas where we would like to see greater detail are:

- Estimate the level of bid costs and securities, with details on who these costs are going to.
- Interaction with Connections Reform and the management of connections during the tender process.
- Interaction with the sequencing of planning and/or flexibility of design for optimal consenting.

To maximise the benefits that Ofgem foresees in introducing competition, we would urge you to consider our suggestion of an asset reclassification that offers immediate but also wider benefits to the future system. In addition, we look forward to seeing further details about the proposals and the practicalities supporting them.

Scottish Renewables would be keen to engage further with this agenda and would be happy to discuss our response in more detail.

Yours sincerely,



Holly Thomas

**Grid & Systems Policy Manager
Scottish Renewables**

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By email:

OnshoreCompetitionsPolicy@ofgem.gov.uk

Date

1st November 2024

Contact

David Boyland

07584573029

Dear Aakriti,

SP Transmission (SPT): Response to Ofgem's consultation on the Draft Electricity (Early-Model Competitive Tenders for Onshore Transmission Licences) Regulations 2024.

SPT welcome the opportunity to respond to Ofgem's consultation on the Draft Electricity (Early-Model Competitive Tenders for Onshore Transmission Licences) Regulations 2024. SPT are the Transmission Owner (TO) for Central and South Scotland. Currently SPT support competition on our network, with c.96% of our regulated transmission activities being delivered by the market.¹

We have reviewed the tender regulation draft document alongside the consultation and have compared the key proposals against the Utilities Contracts Regulations (UCRs) to which SPT is subject. The UCRs set out the process for bidders in a tender process run by TOs and have considerable read across in terms of core concepts, which we believe will help to shape the tender regulations, ensuring that the process remains fair and transparent for all parties involved in the competitive process.

We have been engaging with Ofgem extensively on the competitive process and the read across into the transitional Centralised Strategic Network Plan (tCSNP2) projects, from which we believe one project will be identified for early competition in December 2024. Our concerns remain over the ambitious timelines set out by Ofgem for the competitive process, particularly around the intention to conduct a tCSNP2 refresh in January 2026. Ofgem has stated this is to reaffirm the need for the tCSNP2 projects. We have serious reservations that if the project need is not certain, it would be inappropriate for Ofgem to select a project for early competition 12 months before the need for that project has been reassessed and confirmed. This is particularly relevant given that Ofgem have noted in this consultation that even although a project will be selected by the end of 2024 Ofgem will not determine the projects qualification until after the tCSNP2 refresh in January 2026. We strongly believe that Ofgem risk locking in a suboptimal solution for competition and should consider the wider impacts to consumers. This process and policy is too important to fail at the first hurdle. If an incorrect project is selected this will have unintended consequences which will significantly impact the market, industry stakeholders and the timely and efficient delivery of imperative decarbonisation targets. **As such, we believe that a project should only be selected for competition following the refresh in January 2026.**

¹ https://www.spenergynetworks.co.uk/userfiles/file/Annex_18_Competition_Plan.pdf

A summary of our response can be viewed below alongside our detailed comments in response to the consultation questions, which are set out in Annex 1 of this response.

Summary:

Stakeholders and Incumbent TOs should be able to scrutinise the competitive tender process.

One of our main concerns arising from the review of the tender regulations is the lack of information within the tender regulations which refer to the role of the incumbent TO in the competitive tender process. There is a requirement for the incumbent TO bidding unit to be treated in its own regard given the licence obligations that will be set on TOs which has a cross over with the tender regulations. We would welcome further clarity and information from Ofgem on how it envisages the TOs roles and responsibilities in the tender regulations, as well as more information on the treatment of TO backed bidding units and single purpose vehicles (SPVs).

We are also concerned with the tender regulations in that there appears to be a lack of provisions which would allow stakeholders, other than bidders, to raise challenges to Ofgem and the NESO decisions. Ultimately, there is an inability for stakeholders and TOs being able to raise objections to a provisional determination/ the appointment of a successful tenderer. Ofgem's proposals to only have qualifying bidders being able to raise objections fundamentally subtracts from the ability of stakeholders to hold Ofgem and the National Energy System Operator (NESO) to account. We would strongly suggest that at the provisional determination and the successful bidder stages, Ofgem allows stakeholders to raise objections or concerns with the selected bid. Particularly as it would be in the consumers best interest to have the tender process efficiently scrutinised.

Ofgem should consider the provisions within the UCRs in developing the tender regulations.

Many of the provisions in the tender regulations lack additional considerations when looking at what is already standard industry practice between TOs and tendering works with contractors, for example. We believe that the UCRs, and the new Procurement Act 2023 when it comes into force in February 2024, could play a fundamental role in shaping the tender regulations to ensure there is consistency within the industry on what a competitive tender process will look like and for there to be standardised approaches to key procedural elements of the competitive tendering process.

Our concerns with the tender regulations are that there is a lack of clarity around where and how the notice of intention to commence (NID) a tender will be published, as well as a lack of detail on what the NID will include in terms of details about the project and key milestones/timelines. Additionally, Ofgem and the NESO should have obligations to ensure standards of objectivity and transparency when developing and applying their evaluation criteria, which is already standard practice in the UCRs.

We are also concerned with the lack of transparency around how bidders will be treated throughout the tender process. It is not clear from Ofgem's current proposals what might constitute a "difference" between bidders such that "different" treatment is considered justified. We would recommend that Ofgem set out the evaluation criteria sitting behind the process as well as a governance document that will detail the parameters behind key terms within the tender regulation process.

Lack of key provisions in the tender regulations.

Ultimately, we believe that the tender regulations lack provisions which, as stated above, ensures that stakeholders can scrutinise and hold the competitive tendering process to account. Failures of the tender regulations include a failure to account for the forum in which bidders will be able to raise objections. We would also encourage Ofgem to clarify on the following questions which we believe are fundamental shortcomings arising from the tender regulations and consultation:

- What remedies will be available to those who are successful in raising an objection/challenge?

- Will the available remedies be consistent throughout the process, or will different remedies apply at different stages? and
- Will there be time limits applicable for when an objection/challenge can be brought, and if so, what does Ofgem see as a reasonable timescale?

We would encourage Ofgem to address these concerns as they are fundamental elements of the tender process which appear to have not been considered. Addressing these will instil more confidence in the tender regulations and the competitive process as a whole.

Finally, we note our reservations around the approach taken in the consultation and draft tender regulations which infer that the NESO will be able to assess a TOs compliance with licence obligations. It is not appropriate for the NESO to assess a TO backed bidding unit against any parameter which could form a part of the TOs licence obligations. This is a power that only Ofgem should have, and we are heavily opposed to any derogation to this approach. We would encourage Ofgem to reaffirm the importance of Ofgem being the sole assessor of TO compliance with licence obligations.

Please do not hesitate to reach out should you wish to discuss any of the issues raised in this response.

Yours sincerely,

A handwritten signature in black ink, appearing to read "David Boyland".

David Boyland
Head of Transmission Regulation and Policy

Annex 1 – Responses to Consultation Questions

Q1 - Do you agree with our drafting of the draft Tender Regulations?

We are concerned with the lack of information within the tender regulations which refer to the role of the incumbent TO in the competitive tender process. We would encourage Ofgem to clarify the TOs roles and responsibilities from pre-tender through to post tender. It is also our view that the provisions which Ofgem state ensure transparency are not sufficient, and that general principles of procurement, similar to those imposed by the UCRs, ought to be introduced to ensure tenderers are treated equally and without discrimination. The consultation suggests that transparency is achieved in the tender regulations in that, when carrying out Preliminary Market Engagement (PME), tender parties must take steps to ensure fair competition, and that the NESO must publish either a 'preliminary market engagement notice' detailing the timing and scope of that engagement or provide reasons for not publishing a notice in the 'intention to commence notice'. We do not consider these provisions are sufficient to ensure transparency in circumstances where the PME process is ultimately discretionary. We seek clarity from Ofgem as to how it intends for the PME notice to fit into the overarching competitive process, particularly around whether TOs will be notified ahead of PME if a project within their licence area is going to be selected for competition.

The consultation also states that before publishing an intention to commence notice, Ofgem and NESO must prepare their own conflicts assessment in relation to the tender exercise to ensure a fair and transparent process. It also raises significant concerns for SPT as the NESO does not have the authority to assess TO compliance with licence obligations, therefore, to assess a TO backed bidding unit, the NESO would in effect be inadvertently challenging the TOs adherence to its licence. We would strongly encourage Ofgem to consider how this would work and to ensure that only the regulator can and will assess a TOs compliance with licence obligations. The current proposals, that include the NESO assessing any aspect of the tender regulations that could have a read across to licence conditions of a TO, is wholly inappropriate, and should be omitted, or an alternative process considered for such cases.

Q2 - Are there specific changes or modifications you would recommend to the draft Tender Regulations?

Having reviewed the tender regulations and used the UCRs as a comparison to the duties placed on TOs when procuring contracts, we have set out some of the key considerations that we believe Ofgem should be implementing within the tender regulations. We would welcome further engagement on these and would encourage Ofgem to ensure a level-playing field in its approach to the regulation of bidders in the competitive process as set out below.

- Any incumbent TOs bidding into the tender through bidding units will be doing so under strict conflict mitigation measures so those bidding units will not be able to rely on any perceived advantage that the transmission licence offers. As such, it is unclear to us what Regulation 3(4) is aimed at achieving. We would welcome clarity from Ofgem on what barriers it envisages that bidders without a transmission licence will face given the extensive information sharing arrangements which are being put in place between the TOs, NESO and bidders? Our concern is that this provision could result in bidders not part of a group which holds a transmission licence being advantaged over bidding units formed by an incumbent TO, thereby creating an unfair process and distorting a level playing field between all bidders.
- We seek further clarity on Regulation 8(1) of the tender document. The purpose of the notice of intention to commence an onshore transmission tender (NID) seems to be purely to alert the market to the fact the tender is coming but there isn't any requirement to provide the market with any information beyond the date on which the tender would be launched. The regulation does not indicate where the NID will be published. This process seems to follow the Periodic Indicative

Notice (PIN) under the UCRs and as such, we would encourage Ofgem to consider the UCRs and underlying principles in developing the tender regulations and to align the NID with the PIN.

- We would recommend that there should be an additional requirement for both Ofgem and the NESO to provide details of the qualifying project and the indicative dates and times for key milestones for the tender exercise set out as part of the NID. We believe this will dictate whether or not a tenderer decides to participate in the tender, a decision that would need to be taken sufficiently far in advance of the Pre-Qualification (PQ) stage being launched. It is SPTs position that Regulation 4(1) which states that it is at the tender party's discretion on when to conduct PME, must factor in the details of the qualifying projects and indicative timescales for key milestones through the NID.
- We are concerned with the lack information that has to be provided by the delivery body at the PQ stage as set out in Schedule 3 of the tender regulations, which include the evaluation criteria to be applied by the delivering body. While it is noted that both technical and commercial criteria will be used for assessment, we consider that the relative weighting to be attached to each of those criteria, or the order of importance of the criteria, should also be specified within the PQ information. We would also welcome further clarity from Ofgem on what will be set out in the evaluation criteria and would emphasise the importance of ensuring that industry expertise is retained. Incumbent TOs possess expertise in delivering economic and efficient projects to date and this should be factored into the establishment of any criteria. We would welcome further engagement on this area and would encourage Ofgem to consult on any evaluation criteria being proposed under the tender regulations.
- Under the UCRs, utilities must establish objective rules and criteria for the exclusion and selection of tenderers. The same rules should apply to Ofgem and the NESO. Currently, it would appear as though Ofgem, and the NESO are entitled to develop evaluation criteria, without any express rules around objectivity or transparency. By extension, the UCRs contain provisions imposing general principles of procurement which ensure that bidders are treated equally and without discrimination, and that the process is run in a transparent and proportionate manner. We suggest that the same or similar principles should be expressly imposed on Ofgem and the NESO in the context of these new tender regulations, so there are general rules to which all of Ofgem and the NESO's rights/obligations are ultimately subject to. We would encourage Ofgem to consider implementing such obligations into the tender regulations and where appropriate to clarify the obligations for Ofgem and the NESO in the relevant licence obligations.
- We are concerned with Regulation 3(2) which places a general obligation on Ofgem and the NESO to "treat bidders the same unless a difference between bidders justifies different treatment". This provision is not clear on what would constitute a "difference" and how material that difference needs to be before the principles of equal treatment are abandoned. Equally, if the tender party is satisfied there is a "difference" between bidders, it's not clear what Ofgem is referring to when referencing "different treatment". We would strongly suggest clarity is provided in this context to ensure that Ofgem is fully transparent on what the distinction is between "different" treatment and "unfair" treatment. We believe that greater transparency in this regard will ensure that those participating in the process have a clearer understanding. Ultimately, our concern is that this distinction will exacerbate potential conflicts in ensuring a level playing field between all bidders.
- Regulation 17(1) as currently drafted narrows the scope of potential objections/challenges to those which "directly concern the evaluation of a tender or, if applicable, best and final offer". We believe this is too prescriptive insofar as it excludes any opportunity to raise objections/challenges on the grounds of, for example, procedural errors or unlawful exclusions etc. We would recommend that Regulation 17(1) is amended to allow for any breach of the tender regulations to be raised as a challenge/objection. It is fundamental that relevant stakeholders are able to raise concerns and hold all parties in the tender process to account. We would welcome further engagement on this.

- In addition, we would strongly suggest that any notices issued under Regulation 17(1) should identify both the intended preferred bidder and the intended reserve bidder, rather than only the intended preferred bidder. We believe that this was the intention of the consultation, although the drafting of the tender regulations do not set this out and should be revisited to address any ambiguity.

Q3 - Is the proposed drafting of the Tender Regulations clear and understandable? If not, which parts require clarification?

We assume that the qualifying projects stage described in the consultation document and Regulation 6 is intended to reflect the process currently ongoing whereby the NESO are expected to make its recommendation to Ofgem on a suitable project to tender in November and Ofgem will then consult on its minded-to position on the first project to be put out to competition. We have three key concerns about this stage that require clarification from Ofgem:

- Firstly, we do not think it would be appropriate for the qualifying projects stage to complete and for a project to be selected (even provisionally) until the tender regulations have been finalised and are in force. The tender regulations are meant to regulate this key part of the process and it would be inappropriate for the first project to be selected without the regulations being put in place to provide a framework for this decision.
- Table 2 in the consultation document shows the qualifying projects process. Step 4 is for Ofgem to identify the first project for early competition and a potential pipeline of projects from the tCSNP2 recommendations. Step 5 is for Ofgem to confirm the exempted projects following the assessments of the Clean Power Plan 2030 and the tCSNP2 Refresh expected in January 2026. It is only after this step that the NESO is expected to make its recommendation on the projects (first and subsequent) identified for competition, before Ofgem decides whether a project is a qualifying project. If Ofgem is not expected to make its final decision on a qualifying project until after January 2026 we do not understand why Ofgem would complete step 4 and identify the potential first project in the coming months. This would result in over a year's delay between the first potential project being identified and the final decision being made by Ofgem. The selection of the potential first project will have an impact on the market and investor certainty that should not be underestimated by Ofgem. It is also still not clear to us what obligations the incumbent TO would have over the selected project until the final decision. We believe that over this period between the initial and final decision, the process should be kept as short as possible to avoid creating further delays to project delivery which would ultimately impact on consumers. Ofgem have not presented any justification as to why there needs to be this delay of over 12 months.
- In terms of Regulation 6(3), it states that a project will be a qualifying project if Ofgem is satisfied each requirement set out in paragraph 1 Schedule 1 is met. These requirements include an assessment by the NESO that *"there will be sufficient competition in an onshore transmission tender exercise for the project that the award of an onshore transmission licence in respect of that project will contribute to the protection of the interests of existing and future consumers in relation to electricity conveyed by distribution systems or transmission systems"*. We assume this would require the NESO to have conducted PME to be able to assess whether there will be sufficient competition in any tender exercise to ensure consumer benefits are realised. It is pertinent that Ofgem and the NESO are transparent with their PME activities and ensure that stakeholders are notified and consulted where appropriate prior to the NESO making a decision through its assessment.

We consider that the intended stages of procurement process, and associated timelines, ought to be confirmed at the outset of the tender. Regulation 13 currently provides that the decision as to whether a best and final offer (BAFO) round will be held will be taken by Ofgem and the NESO after the invitation to tender (ITT) stage. We consider that this prevents bidders from having fair notice of whether their ITT submission will be taken to be their best offer, or if a further opportunity will be given to bid again. We suggest that a BAFO stage could be included for by default, with the opportunity

for Ofgem and the NESO to dispense with that stage in circumstances where it is no longer required (where, for example, all bidders bar one have withdrawn or been disqualified from the process).

We are also concerned that there are a number of provisions that are unclear or have not been consulted on previously. For example, there are various mentions of ITT documentation, evaluation criteria in the PQ documentation, and the delivery body functions assessment report as well as other criteria which have not been made available to stakeholders. It would be inappropriate for SPT to comment on these without having seen what the content is and being able to fully engage with the documents. As such, we would urge Ofgem to provide clarity on the evaluation criteria's being proposed in the consultation, alongside drafts of all process documentation to be prepared by the NESO so that stakeholders are able to assess them and provided the necessary comments. We encourage Ofgem to uphold the interests of transparency and to acknowledge that stakeholders must be able to analyse all aspects of the tender exercise to ensure the process maintains a level playing field between all bidders in the process.

In relation to the Licence Application process set out in Part 16 of the tender regulations it is not clear how this would apply to a separate TO bidding unit that is a qualifying bidder. Would the bidding unit be expected to apply for a separate transmission licence, or should modifications be made to the existing TO licence to apply specifically for the project? We note the powers in Regulation 40 for Ofgem to make necessary modifications to a successful bidder's existing transmission licence, but we would ask Ofgem to provide clarity on the expected process in these circumstances. We would expect that any licence modifications to be made in these circumstances would follow the usual process under s11A of the Electricity Act 1989. It is also not clear to us at what point Ofgem would invite representations on a transmission licence application as per the current process.

Q4 - Would you like to provide any further comments on the draft Tender Regulations and the proposed tender exercises that cannot be covered by the questions above?

It is important to recognise in the consultation that there will need to be a different approach taken or an amended approach, that could sit parallel with the tender regulations for the treatment of TO backed bidding units. As many of the obligations on bidders, particularly around conflict mitigation and separation requirements, will form some element of the TO's licence, it is not appropriate for the NESO to assess whether it believes a TO is compliant with its licence conditions. As such provisions where the NESO will provide Ofgem with evidence that entry conditions have been fulfilled, for example, should remain with Ofgem when assessing TO bidding units going through the tendering process. The NESO does not have the powers to be able to assess the TO or its bidding units against any provision which may have a link to a licence obligation. As such, the obligations from the tender regulations on the NESO to prepare its own conflict assessment and the development of a delivery body function assessment exacerbates our concerns. Ultimately, we are strongly against such a suggestion and would encourage Ofgem to consider an alternative process where the TO and its bidding unit are fully assessed by Ofgem.

In terms of the standstill period prior to appointing the preferred bidder we believe there are potential lessons to be learnt from the UCRs in the way it approaches similar positions. As it stands the tender regulations do not take account method of delivery for preferred bids and states that the 10-day period will run from the date the notice is "given" by Ofgem or the NESO. By contrast, the UCRs propose that the commencement and expiry of the standstill period is dictated by the method of delivery. If the bid is sent electronically, it ends 10 days after the sending date. For alternative methods of delivery, the standstill period will end on the earlier of (i) 15 days after the sending date and (ii) the 10th day after the date on which the last bidder receives it. We would encourage Ofgem to implement the standard practice in the UCRs into the tender regulations to ensure there are no opportunities for inconsistency or an unfair approach being applied across the pool of bidders.

We are also concerned with the lack of transparency on the decision-making criteria for unsuccessful bidders. It is unclear from the consultation and the draft tender regulations whether there will be an

obligation to provide unsuccessful bidders with a summary of the reasons why the bidder was unsuccessful. Similarly, there is no apparent obligation to advise why a bidder has been successful. This process is outlined clearly in UCRs. We would recommend that Ofgem consults this in developing the process.

Our principal concerns with the tender regulations are that there appears to be a lack of provisions which would allow stakeholders, other than bidders, to raise challenges to Ofgem and the NESO decisions. It is also unclear on how those permitted to raise challenges will be able to do so. Ofgem should clarify the forum in which challenges can be brought. The tender regulations have not set out what remedies are available in the event of a successful challenge. This is a fundamental process which needs to be clarified as well as whether the remedies vary at different stages of the tender process. As the tender regulations do not set out the remedies available for successful challenges, it calls into questions the confidence in the process and undermines the purpose of a standstill period. We are also unclear of whether there will be time limits applicable to raising objections/challenges, a point which is addressed in the UCRs, which states that challenges must be brought within 30 days of the date when the challenger became aware that the grounds for challenge existed. We would strongly suggest that Ofgem considers what remedies will be available to a successful challenge, and to develop and clarify the process stakeholders will need to follow in order to raise objections and challenges, as well as the governance process behind the decision making of the outcomes. Finally, we would also suggest that Ofgem considers setting out the time limits for raising objections and we would encourage Ofgem to consider the approach taken in the UCRs when coming to its decision.

FAO: Aakriti Bhardwaj, Senior Policy Manager

By email: OnshoreCompetitionsPolicy@ofgem.gov.uk

1 November 2024

Dear Aakriti,

Consultation on Draft Electricity (Early-Model Competitive Tenders for Onshore Transmission Licences) Regulations 2024 for consultation

Transmission Investment (TI) is a leading independent electricity transmission business in the UK, with over ten years of experience developing, acquiring and managing large complex infrastructure projects. TI manages one of the largest offshore electricity transmission portfolios in Great Britain (GB), in total we currently manage approximately 4GW of transmission and £3billion in capital employed. TI is also leading the development of two electricity interconnector projects in support of the UK's Net Zero ambition. This includes a proposed 700MW link between Northern Ireland and Scotland known as "LirIC", as well as the FAB interconnector between GB and France. We are a strong advocate of introducing competition to deliver electricity transmission faster and cheaper, and we continue to support the development of the required arrangements for these competitive processes.

We welcome Ofgem's consultation on the Draft Electricity (Early-Model Competitive Tenders for Onshore Transmission Licences) Regulations 2024 (the "Draft Tender Regulations"), which marks a key milestone in enabling early competition. It is widely accepted that successfully meeting Net Zero objectives requires substantial investment in electricity transmission infrastructure to be delivered at an unprecedented pace.

Competition encourages innovation and the delivery of benefits to consumers more quickly and cheaply, with strong incentives for parties to deliver on time and on budget. Utilising both competitive and incumbent approaches is the most sensible way forward to ensure greater delivery resilience for such a large capital programme of transmission infrastructure, opening up the market to support accelerated delivery beyond only the incumbent approaches.

The ability of competitive tender exercises, now and into the future, to successfully deliver the best outcomes for energy consumers will only be realised through actively building and supporting a vibrant, transparent pipeline for the competitive market.

Qualifying Projects

Competition benefits are proven to be maximised when there is a large, visible, and stable pipeline of projects to be competed, where learnings and efficiencies can be rapidly built on by all involved. This is evidenced by the success of the OFTO regime and the offshore wind CfD auction rounds, supporting investor confidence, interest, and over the years reducing the transaction costs associated with the process. Therefore, we would stress the importance of ensuring the certainty of a project pipeline to allow learnings to be built upon, as well as providing the confidence to bidders to invest in the opportunity to deliver benefits to GB consumers. In our view, when the first project(s) is confirmed for competitive tender Ofgem should also be seeking to confirm a list of further potential projects for early competition, and the indicative timings for the tendering these relative to the first project(s). This will

increase the appetite for contractors, operators and investors to participate in the first process, and ultimately supports the best interests of the consumer.

Given the need to push forward the acceleration of transmission infrastructure, it is essential to ensure that as many projects as possible are placed in the tendering pipeline. The *Criteria Regulations*¹, were revised to support this aim such that competition processes should be used for all projects unless there is no realistic scenario where consumers can benefit². This default to competition approach must be applied consistently across all policy thinking to give confidence that a pipeline of projects is strong. This will build confidence for investors and the supply chain that CATOs are an additional and reliable alternative route for the delivery of transmission network infrastructure.

We note that for a project to qualify under paragraph 6 (3), the requirements of paragraph 1 of Schedule 1 must be met, most importantly with respect to Schedule 1 paragraph 1 (b), where the assessment is that there is insufficient competition. Where this condition is not met, it would suggest a wider and serious failure with regard to Part 2 and Part 3 of the regulations. We would like to see an obligation in the regulations on the tender parties to provide a report to the Secretary of State on specific actions to be taken and a timeline to complete them to avoid repeating a situation of insufficient competition.

Qualifying Bidders

To help support the best outcomes for consumers, by encouraging high-quality and competitive tender applications, we would propose Ofgem considers limiting the amount of Qualifying Bidders which enter into the ITT stage. In other markets, which have similar competitive models, it is market norm to shortlist a maximum of up to three participants. This approach is usually adopted alongside a bid cost recovery mechanism for unsuccessful bidders, that is only paid out if those bidders submit a compliant response to the ITT process. This encourages bidders to invest in producing high quality bids, which helps to de-risk project delivery. We would propose implementing a similar approach, limiting to no more than three Qualified Bidders, which in our view would provide the right balance between ensuring a competitive tender whilst incentivising quality applications.

Securities and Bid Cost

The Draft Tender Regulations provide Ofgem and NESO with the necessary “tools” to require bid cost and security payments at different milestones throughout the tender process. However, as drafted, the Draft Tender Regulations do not provide clarity on the end-to-end process with respect to these payments. Whilst we recognise that at this time Ofgem is seeking to ensure it has the tools it needs within the regulations, we would impress the importance of providing clarity to bidders on the security and bid cost requirements during the pre-tender process, as well as ensuring the tools chosen are compatible.

It is our view that providing certainty to potential bidders on the recovery of bid costs will incentivise a high quality and competitive process, which will support the best outcome for consumers. Failure to reimburse these costs may discourage parties to participate, or may not provide the appropriate incentive for participants to put sufficient effort into the process to yield the best solution. We would propose that 100% of bid costs could be recovered, capped at an appropriate level taking into consideration the specific project and its expected capital cost.

Bid cost reimbursement provides an incentive to bidders to remain in the process until a Successful Bidder is chosen, as they will not be eligible to receive reimbursement if they withdraw from the process earlier. Therefore, this should negate the need to post security at the Invitation to Tender (ITT) stage,

¹ The Electricity (Criteria for Relevant Electricity Projects) (Transmission) Regulations 2024, 7.—(1) *A cost-benefit analysis in respect of a project must demonstrate that the non-tendered consumer impact does not outweigh the tendered consumer impact.*

² This is a change in comparison to the draft Criteria Regulations, which required the CBA for the tendered solution to be “better” before running a competition. The emphasis of the final Criteria Regulation is for tendering to take place unless it is shown that incumbent delivery CBA is “better”.

which the Draft Tender Regulations as drafted appear to require. In our view this is too early a stage to require a security to be posted as, for example, if the ITT documents reveal further developed risk allocation which bidders cannot accept they may choose to withdraw early, accepting that they will lose the opportunity for reimbursement of bid costs. If parties are obligated to post security at the ITT stage, and stand to lose this, they may be perversely incentivised to stay in and put a “dummy” bid into the process, which risks inefficient outcomes for both other bidders and consumers.

If Ofgem chooses to require bidders to post security at the ITT stage, then the current drafting is lacking clarity on the mechanism to pay back unsuccessful bidders for this amount (sized to cover client-side tender costs). We would have expected to see this in Regulation 29(6) which provides for the repayment of bid cost reimbursement (subject to there being a notice made in accordance with Reg 10(1)(b)).

Conflict of Interest Mitigation

We welcome the inclusion of specific regulations to mitigate and manage conflicts of interests in the early competition tender process as laid out in paragraphs 37, 38 and 39 of the regulations. To give bidders confidence in the conflicts assessment and transparency of adherence to the resulting protocols, we would suggest the regulations are amended to also require the conflicts of interest assessment and protocols to be published early in the tender process (i.e. no later than the release of the Prequalification documents). This would enable all parties to be observant and mindful of the boundaries and limitations on parties and support the adherence to avoid actual or perceived conflicts of interest.

For the accepted benefits of competition to be delivered the process must be fully enabled and switched on. The publication of the Draft Tender Regulations marks an importance milestone on that path, with other key aspects yet to be consulted on, including changes to the NESO licence. We are in an important period of transition in the global race to Net Zero, there is no better time than now to ensure all options are available to tap into additional capacity, increase resilience and diversity to the delivery of the programme for our future transmission infrastructure.

We hope the contents of the letter are helpful, and we would be pleased discuss any points raised.

Yours sincerely,



Chris Veal
Managing Director