

Offshore Electricity Transmission: Updated Proposals for the Competitive Tender Process (Appendices)

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Target audience: All with an interest in renewable energy and offshore electricity transmission.

Overview:

We are working together with the Government to introduce a new regulatory regime for offshore electricity transmission. A key part of the proposals for this regime is that offshore electricity transmission licences would be granted on the basis of a competitive tender process. The Government has decided that Ofgem should manage this process.

This document updates our proposals for managing this competitive tender process. We are also consulting for the final time on the draft regulations that would provide the legal framework to enable this process.

This document contains a number of detailed appendices and annexes (published separately) that support the main consultation document.

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Context

Electricity generated from offshore renewable sources is expected to make an important contribution to the achievement of the UK's share of the EU's target of generating 20 per cent of energy from renewable sources by 2020. It is therefore necessary that fit for purpose offshore electricity transmission infrastructure is developed to transfer the electricity generated to the onshore network and ultimately to consumers. It is important that this infrastructure is developed in a timely and cost effective manner, whilst maintaining achieving best value for electricity consumers.

Ofgem has been working with the Government (the Department for Energy and Climate Change or DECC) to introduce and implement a new regulatory regime for offshore electricity transmission. A key part of the proposals is that offshore electricity transmission licences would be granted following a competitive tender process managed by Ofgem. This document updates our proposals for managing this competitive tender process. We are also consulting for the final time on the draft regulations (which would be made in accordance with section 6C of the Electricity Act 1989 when inserted) that would provide the legal framework to enable this process.

Specifically, this document consults on those issues where we are proposing to update our proposals for the design of the competitive tender process from those set out in our Competitive Tender Process consultation document published in October 2008. It sets out our updated approach to managing the tender process for those offshore transmission assets that have been or will be constructed by offshore developers, known as the transitional regime. We also confirm that the broad principles of this approach would be applied to tenders in the enduring regime, where the new transmission assets would be designed, financed and constructed by the offshore transmission owner. This document also sets out refined proposals on those issues we would expect to be resolved before a tender would commence.

We expect to commence the first round of tenders for the transitional regime this summer, shortly after the Go-Active date for the regime.

Associated Documents

- Offshore Electricity Transmission – A Joint Ofgem/DECC Regulatory Policy Update, November 2008, Ofgem ref: 153/08.
- Offshore Electricity Transmission - Competitive Tender Process, October 2008, Ofgem ref: 142/08
- Consultation letter for draft tender regulations, July 2008, Ofgem ref: 108/08
- Offshore Electricity Transmission - A Joint Ofgem/BERR Regulatory Policy Update, June 2008, Ofgem ref: 84/08

Offshore Electricity Transmission: Updated Proposals for
the Competitive Tender Process

March 2009

- Offshore Electricity Transmission - Regulatory Policy Update, January 2008, Ofgem ref: 4/08
- Regulation of Offshore Electricity Transmission: Government Response to Offshore electricity Transmission - A Joint Ofgem/BERR Policy Statement, January 2008, BERR ref: URN 08/546
- Offshore Electricity Transmission - A Joint Ofgem/BERR Policy Statement, July 2007, Ofgem ref: 189/07
- Offshore Electricity Transmission - Second Scoping Document, March 2007, Ofgem ref: 58/07
- Regulation of Offshore Electricity Transmission: Government Response to the Joint DTI/Ofgem Consultation on Licensing Offshore Electricity Transmission, March 2007, BERR ref: URN 07/634
- Licensing Offshore Electricity Transmission - A Joint Ofgem/DTI Consultation, November 2006, Ofgem ref: 199/06
- Offshore Electricity Transmission - Scoping Document, April 2006, Ofgem ref: 60/06
- Regulation of Offshore Electricity Transmission - A Joint Consultation by DTI/Ofgem, July 2005, Ofgem ref: 178/05

These documents are available to download at:

www.ofgem.gov.uk/Networks/offtrans/pdc/cdr/Pages/cdr.aspx

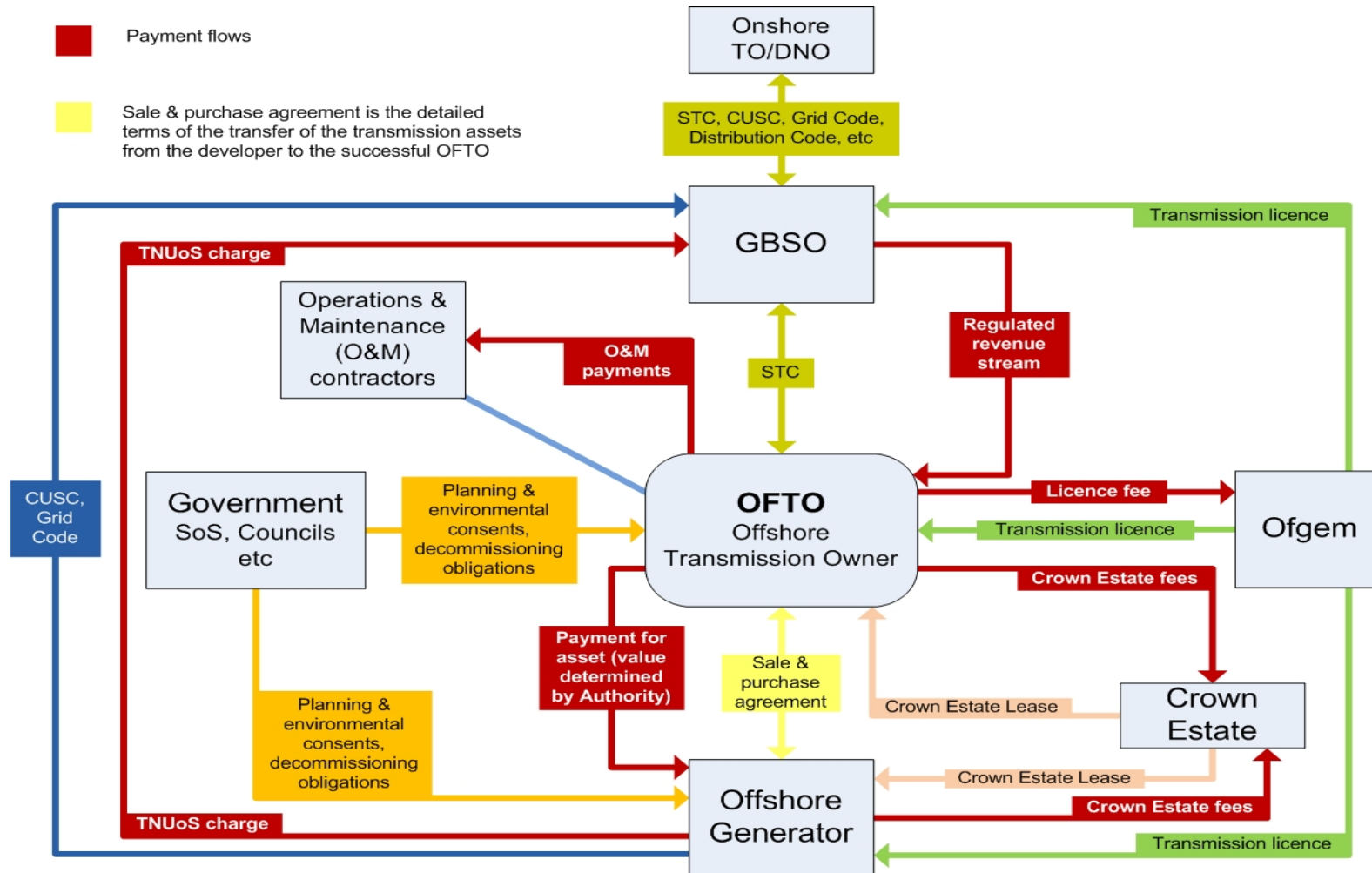
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Appendix 5 – Overview Contractual Framework for Transitional Projects

1.1. This appendix provides an overview of the key contractual relationships for transitional projects. It also identifies payment flows where appropriate.



Appendix 6 - Key Provisions in the Sale and Purchase Agreement

1.1. This appendix provides our initial view on those key provisions we believe would need to be addressed in the model sale and purchase agreement (SPA)¹. As set out in Chapter 4, we are proposing to convene a workshop over the coming months to assist the development this model SPA, and we will be publishing further details on this shortly.

KEY PROVISIONS IN SALE AND PURCHASE AGREEMENT

A) Conditions precedent

The SPA is likely to enumerate a number of matters that must be satisfied prior to, and define certain financial and/or operational positions that must subsist at, the time for completion. The obligation to fulfil such conditions may attach to either or both of the purchaser and the vendor, and a party may be entitled to waive specific conditions precedent.

The SPA is likely to include common conditions precedent, such as:

- grant of the relevant transmission licence,
- approval of the transition plan, and
- receipt of other third party consents and approvals.

It is likely that the SPA would effect the transfer of individual assets from the vendor to the purchaser. An alternative to an asset transfer, however, is that the assets comprising the offshore transmission system are transferred by the vendor into a corporate entity the ownership of which is then transferred to the purchaser under the SPA. The terms of the transfer of assets into such a corporate entity would be similar to those applying on a direct transfer of such assets to the purchaser.

Conditions precedent should also be tailored to each individual offshore transmission system, and a due diligence exercise would need to be undertaken by the purchaser to ensure that the SPA reflects the circumstances of each project (for example, lender consent under any loan agreement).

One specific item to be considered is the terms upon which the technical specification and condition of the assets, and their readiness for transfer, are to be assessed. The SPA would need to set out the acceptance process for the assets, including the way in which it would be determined whether the handover criteria have been satisfied.

B) Consideration

This section of the SPA would need to describe the amount of consideration payable by the OFTO, which would be derived from the ex-post cost assessment by Ofgem. The ex-post cost assessment would be undertaken by Ofgem prior to completion of the SPA.

¹ For the purposes of this draft document, boilerplate provisions have been disregarded.

C) Sale and purchase of assets

The SPA would need to provide for the transfer of title in each of the relevant assets comprising the offshore transmission system, and the SPA would establish the terms upon which that title is transferred. This would include:

- standard covenants regarding title to the assets,
- apportionment of the purchase price among the assets to be acquired, and
- transfer of ownership of, and risk in, the assets to the purchaser at completion.

D) Sale Assets/Excluded assets

This section would define the assets to be transferred to the purchaser. The sale assets would typically include real property, fixed and moveable plant and equipment, intellectual property rights and contracts, and would capture all of the assets required by the purchaser to enable it to operate and maintain the offshore transmission system.

Details of the assets to be transferred would be set out in the schedules to the SPA (see below).

The SPA would typically also take account of excluded assets and contracts that must be retained by the vendor for the continued operation of the generation station.

Where an asset or a contract is relevant to both the offshore transmission system and the generation station, the manner in which assets (for example, crown estate leases) or contracts (for example, composite construction contracts) may be split or apportioned between the vendor and the purchaser would also need to be specified. This would be project specific.

E) Third party consents for transfer of assets and contract

The SPA would provide for the assignment of any contracts to the extent the benefit of such contracts may be assigned without third party consent. However, the SPA would also need to take account of the fact that the transfer of assets and the benefit of certain contracts may be conditional upon receipt of third party consent.

It is likely that all such consents would need to be obtained in relation to core assets as a condition precedent to completion. To the extent such consent is not obtained in relation to a non-core asset prior to completion, it is likely that the SPA would oblige the parties to take reasonable steps to procure that such consent is obtained prior to a longstop date following completion.

Such consents and approvals are likely to relate to, among other things, the Crown Estate lease, planning permissions, marine and environmental consents and licences, material construction contracts or subcontracts and any agreements with the GBSO or onshore TO which need to be transferred.

The SPA would also usually provide that the purchaser assumes responsibility for the due performance of all obligations under the transferring contracts from completion.

F) Assumed and excluded liabilities

The SPA would typically define the date from which the purchaser assumes and agrees to duly and properly perform, pay and discharge and indemnify the vendor against all assumed liabilities.

Any payables or receivables outstanding at completion are likely to be accounted for in the purchase price to ensure a "clean" transfer.

G) Employees, pensions and benefits

In the case of the majority of projects there would probably be no employees who would transfer to the purchaser under TUPE. However, TUPE would apply if there are any employees wholly or mainly employed by the vendor in the operation or maintenance of the offshore transmission system. In the event that any employees do fall within this category, the terms of transfer of employment (over and above TUPE), and the treatment of any related pension obligations, would need to be specified in the SPA (and would be set out in the relevant schedule).

H) Conduct before completion

Pending completion, ownership of, and risk in, the assets is expected to remain with the vendor, and the vendor would be responsible for insurance of the assets.

It is likely that the SPA would require the vendor to obtain the purchaser's approval in certain circumstances, for instance in relation to the amendment of the construction contract (or other related contracts) or the entry into a new contract relating to the offshore transmission system which would transfer to the purchaser at completion.

I) Completion

The SPA would define the formal obligations of each party at completion, and set out the steps that must be taken by each party in order to effect the transfer of the relevant offshore transmission system.

J) Warranties

Warranties are contractual statements of fact regarding the assets and status or behaviour of the purchaser and the vendor on which the other party is entitled to rely. In all cases, the SPA is likely to include generic high level warranties from both the purchaser and the vendor (for example, in relation to corporate approval and in relation to historic events and compliance). Additional project specific warranties would be considered on a project-specific basis, and any such warranties would be set out in a project-specific schedule.

K) Post completion activities and vendor's access to information

It is likely that the SPA would grant the vendor limited rights following completion (for example, reasonable access to relevant books and records which have transferred to the purchaser), and the vendor is likely to be obliged to take steps to ensure that the purchaser obtains the full benefit and enjoyment of the assets following the transfer.

L) Tax related matters

The SPA is likely to need to deal with a number of tax issues, including stamp duty, VAT and capital allowances.

M) Announcements and confidentiality

The SPA may deal with the confidentiality of certain information to the extent that such matters are not separately dealt with in stand-alone confidentiality agreements, subject in all cases to the requirements of the Freedom of Information Act 2000.

N) Schedules

As noted briefly above, the SPA would, to the extent relevant, include specific schedules detailing:

- the contracts to be transferred or novated to the purchaser,
- the specific assets to be transferred to the purchaser,
- the terms and conditions relating to the transfer of any employees, and
- the project-specific warranties.

The SPA would also annex an agreed form novation agreement, pursuant to which the identified contracts would be novated to the purchaser.

Appendix 7 – PQ, QTT and ITT Selection Process

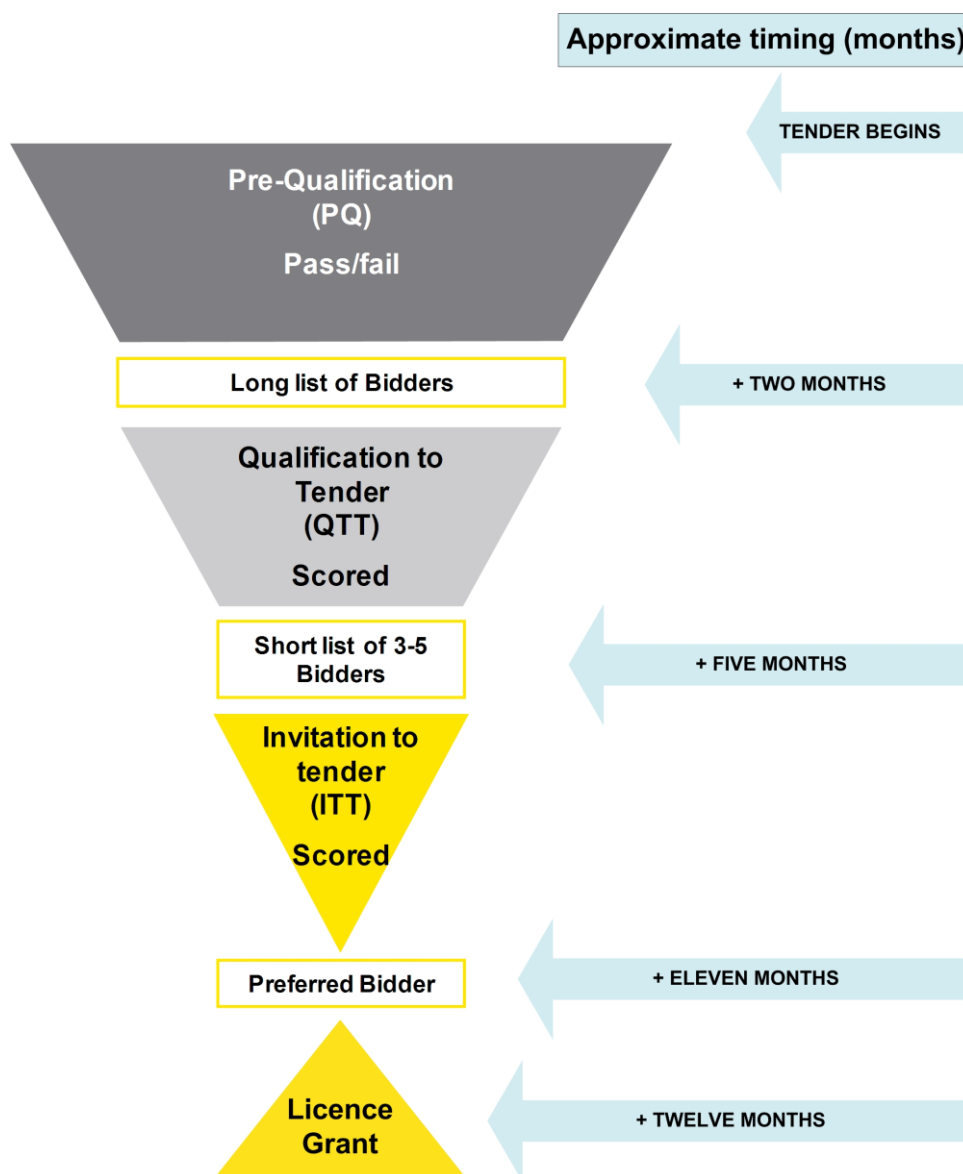
Introduction

1.1. This appendix provides further detail on the proposed approach to the selection process for the following proposed tender stages:

- Pre-Qualification (PQ)
- Qualification to Tender (QTT)
- Invitation to Tender (ITT)

1.2. One of the key aims of the competitive tender process is to attract effective, robust bidders into the ITT stage of the competition in order to ensure the most appropriate outcome is secured for all parties.

1.3. We set out, in a diagram below, a summary of the overall selection process from PQ through to ITT:



PQ Stage: Selection Approach

1.4. This section outlines the overall approach to selection and scoring for PQ by referring to the high level categories of criteria for evaluation, with specific detail associated with financial criteria outlined. Note that the PQ Template Document in Annex 1 provides a draft of the PQ tender process requirements in a template form.

Key attributes of stage:

- Applies a pass or fail test with minimum thresholds,
- Applicant’s would have access to regime and project specific teaser documents that provide a general regime and project overview of features,
- Based on assessment of Applicants bid information compliance, economic and financial standing, legal standing, and management and operational capability,
- Assessment is for general prequalification, rather than on per project basis,
- One submission required per Applicant, irrespective of number of projects they wish to be considered for, but they must identify the specific projects they wish to bid in the submission, and
- The outcome of PQ would be a long list of applicants who are eligible to proceed to QTT stage.

1.5. Each Applicant’s economic and financial standing would be assessed against their proposed total investment within the tender round. The proposed approach to assessing bidders against a total investment appetite requires that bidders must identify the project(s) for which they wish to be considered.

PQ Selection Criteria

1.6. We intend all areas of assessment to be based on pass or fail criteria with a requirement that all criteria must be passed in order to proceed to the next round of assessment.

1.7. The categories of criteria proposed apply at the PQ stage are set out in the table below. The rationale and the proposed approach for each is set out in the remainder of this section.

Table A7.1

PQ Sections	Methodology
1. Bidder Information	Pass/Fail Compliance
2. Financial Criteria Economic and Financial Standing	Pass/Fail
3. Non-Financial Criteria Organisation, Ownership and Governance Management and Operational Capability Has the Applicant submitted a complete and compliant PQ?	Pass/Fail Pass/Fail

1.8. As general criteria bidders must submit a complete and compliant PQQ, including the complete provision of information and provision of compliant declarations and director authorisations.

Financial Criteria – Economic and Financial Standing

1.9. We would assess whether the applicant has the necessary financial strength to be considered viable to support the proposed expenditure level with for the projects the Applicant has identified as per paragraph 1.5.

1.10. Recognising the potential variation in Applicants models and approaches to funding it is proposed to assess either a) the net assets of the applicant or b) their ability to raise finance against the total proposed investment.

1.11. For the net asset test we are minded to consider measuring the applicant's total net assets, based on the latest set of published financial statements against a requirement to be greater than or equal to 120% of the total indicative RAV of the applicant's preferred projects.

1.12. For the ability to raise finance test we are minded to consider evaluating applicants track record of achieving comparable total spend of debt and equity in the proposed financing structure. This could be demonstrated by the applicants as follows:

- Equity – each applicant has either (i) net assets of at least 100% of its Projected Equity Spend or (ii) a proven track record of raising equity totalling at least 100% of its Project Equity Spend in the last 5 years.
- Debt – each applicant has a proven track record in the last 5 years of either (i) raising debt totalling at least 100% of its Projected Debt Spend or (ii) investing in infrastructure assets or businesses with existing debt totalling at least 100% of its Projected Equity Spend Or (iii) a comfort letter from an A- rated financial institution stating their belief in the ability of the Applicant to raise the Projected Debt Spend.

1.13. In addition to these quantitative assessments we propose an assessment of the applicants' financial solvency and strength. We propose to base this on information provided in the PQ submission as well as publically available information. Where there is reliable evidence to raise question over the financial solvency of the applicant, applicants would fail by exception.

Non-Financial Criteria

1.14. Non financial criteria are proposed to ensure that bidders have the necessary track record in owning and operating similar, regulated or essential services infrastructure assets of a comparable size or complexity to partake in the next round of assessment. Applicants to be assessed on:

- organisation ownership and governance whereby bidders must sign a letter to certify that they are in good standing,
- management and operational capability where bidders must satisfy that they have, or can demonstrate the ability to access the necessary expertise to operate an essential services or regulated infrastructure asset of similar size and complexity.

Consortium Changes

1.15. It is proposed that where an applicant is a consortium, that consortium would be able to adjust its configuration/membership between PQ and QTT stages, subject to the newly configured consortia meeting the minimum requirements of the PQ stage. We intend to reassess the PQ criteria by exception (ie, where there has been a change in consortia,

projects bid for or other material change) at the QTT stage. For example where an infrastructure fund initially bids as a sole applicant and later intends to bid in a consortium with an additional partner the consortia would be reassessed as a whole.

QTT Stage: Selection Approach

1.16. This section outlines the overall approach to selection and scoring for QTT by referring to the high level categories of criteria for evaluation, with specific detail associated with financial criteria outlined. Note that the QTT Template Document in Annex 2 provides a proposed draft of the QTT tender process requirements in a template form.

Key attributes of stage:

- Applicants assessed against the criteria on a scored basis, with the exception of the bidder information compliance test and one financial and economic pass/fail test.
- Applicants provided with Information Memorandum providing detailed overview of each project within the tender round.
- Applicants required to reconfirm the specific projects for which they wish to be considered, by providing a separate QTT application for each project for which they wish to qualify.
- Applicants responses would be assessed based on a number of key areas, such as financial, managerial and operational capability.
- All bids for each project assessed separately for each project regardless of the number of projects that an applicant is bidding for.
- The outcome of QTT is the selection of a shortlist of 3-5 bidders for each project within a tender round

1.17. Note that the Applicants must pass the bidder information compliance test and the financial and economic pass/fail test.

1.18. We envisage Applicants responses to be in the form of concise descriptions of applicant's proposed approach for the operation, management and financing of the OFTO for each project submission.

1.19. Scores for each response would be allocated a weighting and combined to form an overall score per tender, with the applicants ranked with the highest scores progressing to the next round of the tender. It is proposed that a maximum of between 3 and 5 bidders would proceed to next stage based on the relative rankings per project arising from the scoring methodology.

QTT Selection Criteria

1.20. The categories of criteria that we propose to apply at the QTT stage are outlined in table 1.2 below. The rationale and the proposed approach for each is set out in the remainder of this section.

Table A7.2

QTT Sections	Methodology
1. Bidder Information	Pass/Fail Compliance
2. Financial Criteria Economic and Financial Standing	Pass/Fail
3. Financial Criteria Economic and Financial Robustness	60% of mark

4.	Non-Financial Criteria	
	Management and Legal Capability	20% of mark
	Operational Capability	20% of mark

1.21. The transitional regime does not require construction or design proposals from potential OFTOs. We therefore propose that for scored elements of the QTT under the transitional regime, the financial criteria form 60% of the overall score, with 40% allocated across the non-financial criteria. The scoring for this stage for enduring projects would be modified to reflect the requirement for consortia to include design and development proposals.

Financial Criteria – Economic and Financial Standing

1.22. Prior to assessing the scored element of the submission, we propose that a pass/fail economic and financial standing criteria be applied, which is proposed to be based on the turnover of the applicant. We propose that the existing annual turnover or income level of the applicant must be two times an estimated assumption for revenue stream for all projects the applicant is applying for. The purpose of this is to confirm with greater detail, the financial robustness of the applicant relative to their confirmed appetite for projects in the tender round.

Financial Criteria – Economic and Financial Robustness

1.23. The primary objective of criteria in this section is to assess how the applicant intends to finance the investment and whether they would be sufficiently financially robust to be a secure contractual counterparty. We are minded to focus the principal areas of assessment for financial and economic robustness as follows:

- Deliverability of the funding package. This would require applicants to provide details of their proposed approach to funding structures, including any contingency if funds are unavailable. We would expect this to be backed by evidence of ability to raise funding. Where corporate finance is suggested, the nature of and extent to which a Parent Company Guarantee is available in relation to the funding would be sought.
- A quantitative assessment of the applicant's desired project IRR, defined as a post tax, real cash flow rate of return. Project IRR is suggested to incorporate a meaningful quantitative cost assumption and independent of financing assumptions. Applicants would be expected to include any benefit from tax shields.
- Ability of the applicants to identify and apportion project risk. This would incorporate an assessment of the proposed approach to, and understanding of, identifying and managing the risks of operating an OFTO.
- Would assess the robustness of proposed shareholder and contractual structures, including use of parent company guarantees, the proposed roles of consortium members, their shareholdings, the terms of sub-contracting arrangements as well as sharing of liability limits and risks identified above.

Non-Financial Criteria – Management and Legal Capability

1.24. We intend to assess the applicants proposed approach to providing managerial and legal capability to support project delivery.

1.25. The principal elements for assessment of managerial capabilities of applicants are proposed as follows:

- Approach to operating regulated or public infrastructure assets,
- Approach to delivery of the transmission services, including roles and responsibilities of consortia members and sub-contractors,
- Approach to managing the interfaces with other parties including eg, subcontractors, adjoining operators, connected parties, users, etc.
- Proposed outline transitional or take over plan, including an indicative three month operational transition programme. This plan could include reference, as supporting evidence, to experience of acquisitions or joint ventures.

1.26. In respect of legal capability it is proposed that Applicants would be required to outline their approach to ensuring compliance with the applicable regulatory regime, including, inter alia, relevant codes, licences and regulations.

1.27. Applicants would also be required to demonstrate their approach to addressing and achieving acceptance of the model Sale and Purchase Agreement, and the terms of transfer therein, as applied to the specific projects.

Non-Financial Criteria – Operational Capability

1.28. We propose to assess the applicants proposed approach to undertaking operational activities, providing operational capability and to operational planning.

1.29. The principal elements for assessment of operational capabilities are proposed as follows:

- Approach to operational delivery of the OFTO's obligations in relation to the project. This may include the management of technical and operational relationships within the regulated industry structure and managing subcontractors.
- Approach to providing the capacity to undertake operational obligations of the OFTO for the specific project. This may include the following aspects: operation and maintenance of structures both offshore and onshore; operations in the marine environment; working within a regulated industry and taking over and running assets developed by a third party.
- Approach to resourcing and supporting the technical deliverables in their transitional and ongoing operational plan, including performance and repairs of the transmission infrastructure.

ITT Stage: Selection Approach

1.30. This section outlines the overall approach to selection and scoring by referring to the high level categories of criteria for evaluation, with specific detail associated with financial criteria outlined. Note that the ITT Template Document in Annex 3 provides a proposed draft of ITT tender process requirements in a template form.

Key attributes of the stage:

- Applicants assessed against the criteria on a scored basis, with weightings applied.

- Bidders provided with access to fully populated Data Room for the specific project/s for which they have been shortlisted.
- Assessment of applicants detailed responses and firm proposals in the key areas of financial and commercial criteria and non financial criteria such as managerial, legal and operational capability.
- Bidders would be required to submit a detailed bid for each project for which they have qualified through QTT.
- Bids for each project would be assessed separately on a project specific basis, with no regard to any other projects for which a Bidder may be bidding.
- The outcome of the ITT would be the selection of the Preferred Bidder (noting an optional BAFO maybe be conducted to aide achievement of a PB) who would proceed forward into the process to achieve Licence Award and Financial Close.

Quantitative and qualitative aspects of the Bids are expected to be fully detailed, given the availability of a fully populated Data Room.

Bidders would be expected to provide firm positions on all elements of pricing, funding and commercial structure.

ITT Selection Approach

1.31. The categories of criteria proposed apply at the ITT stage are out in table 1.3 below. The rationale and the proposed approach for each is set out in the remainder of this section.

Table A7.3

ITT Sections	Methodology
1. Bidder Information	Pass/fail Compliance
2. Financial and Commercial Criteria	60% of mark
3. Non-Financial Criteria	40% of mark

1.32. We therefore propose that for scored elements of the ITT under the transitional regime, the financial criteria form 60 % (depending on project specifics) of the overall score, with the remaining 40% allocated across the non-financial criteria.

1.33. The criteria and allocation of scoring across criteria would vary for the enduring projects to reflect the significant responsibility of the OFTOs for enduring projects to deliver design and development certainty and capability.

1.34. The breakdown of the scores within each category for the ITT would be developed in further detail as a result of this consultation process. We expect that there may be some project specific variations in the questions that are applied as a subset of the ITT selection criteria outlined above. We would expect these variations to be finalised on a project by project basis once projects have satisfied the preconditions to enter into a tender round, either transitional or enduring, and Developer Requirements have been confirmed.

Financial and Commercial Criteria

1.35. The primary objective of criteria in this section is to assess the firm financial proposals which must show the applicant intends to finance the investment and whether they would be sufficiently financially robust to be a secure contractual counterparty. We are minded to focus the principal areas of assessment for financial and commercial as follows:

- The Bidders proposed regulated revenue stream against a specific set of project assumptions contained within the ITT Documentation issued to the Bidders at the beginning of the ITT stage.
- The Bidders firm financial proposals for the project. Based on evaluation of the Bidders financial model (based on Ofgem input sheets and Bidders full model) and application of accounting, indexation and other cost policies and assumptions.
- The Bidders firm proposals for financing structure for a robust and viable OFTO such that it is able to finance its activities, including funding profile, sources, commitment and liability sharing and mitigation and use of Parent Company Guarantees.
- The Bidders firm proposals for insurance, including how the Bidder is proposing to insure against risks, particularly those associated with delays and revenue protection. We would consider assessment of how risks may be proposed to be re-insured and syndicated.
- The Bidders firm proposals for OFTO structure/SPV structure, including details of shareholding, contractual relationships and the robustness of provisions to address liability and risk sharing and mitigation.
- The Bidders acceptance of the terms of transfer as contained with the Sale & Purchase Agreement.

Non-Financial Criteria

1.36. The primary objective of the non financial criteria in this section is to assess the Bidders firm proposals for providing managerial, operational and technical capability and legal and regulatory compliance. We are minded to focus the principal areas of assessment for the non-financial criteria as follows:

- The Bidders firm proposals for the managerial structure and provision of the necessary management and technical resources and capability for the OFTO, including reference to roles, responsibilities and governance by multiple members where SPVs are proposed.
- The Bidders firm and detailed proposals for achieving the transition of the asset from the Developer at completion of asset construction, including pre and post handover commissioning activities.
- The Bidders firm and detailed proposals for the management of residual warranties and liabilities post construction.
- The Bidders firm and detailed business plan, correlating with proposed commercial and financing structure for the OFTO.
- The Bidders firm proposals for the achievement of all on-going operational activities, obligations, targets and performance standards.
- The Bidders firm proposals for management of operational risks.
- The Bidders firm proposals for the mitigation of performance risks, and performance failure rectification strategies.
- The Bidders firm proposals for ensuring ongoing compliance and achievement of regulatory standards and obligations over the life of the regulated revenue stream.

Appendix 8 – Draft Cost Recovery Methodology

Introduction

1.1. This appendix sets out our draft cost recovery methodology.

Draft Cost Recovery Principles

Introduction

The Government is introducing a new regulatory regime for offshore electricity transmission to connect significant amounts of renewable offshore generation to the onshore electricity network. The regime would ensure connection to the GB onshore grid in a timely and cost effective manner whilst maintaining the integrity of the system as a whole and achieving best value for electricity consumers.

To allow an opportunity for new market players to enter the new regulatory regime, the Government has concluded that there should be a competitive tender to decide who should be licensed as Offshore Transmission Owners (OFTOs) for the connection of specific offshore generation projects.

It has been decided by Government that Ofgem would run the competitive tender process to determine who would be appointed as new licensed OFTOs.

The principles

The principles set out in this document cover the financial cost recovery arrangements for the Offshore Transmission project.

The Energy Act 2008² (the Act) contains key provisions with regard to the offshore transmission regime, specifically in terms of powers for Ofgem to fully recover the direct and administrative support costs associated with running the tender process. The Act enable's the Authority to:

- secure a financial commitment from the offshore developer to secure Ofgem's potential liability for running a tender process. This commitment is referred to as the "deposit",
- secure payments from participants in the process (i.e. the offshore developer and bidders) to cover its costs of running each tender process. These payments are referred to as "payments", and
- in respect of offshore projects subject to the transitional regime, request amounts from the offshore developer to cover costs incurred in relation to Cost Assessments.

Further details of the tender process would be set out in regulations (i.e. secondary legislation). These regulations would be made by the Authority although they would

² The Energy Act 2008 details cost recovery arrangements in section 44, and confirms that Part 1 of the Electricity Act 1989 is amended (insertion of section 6D and 6E).

require approval by the Secretary of State. The Authority is expected to make these regulations at its May 2009 meeting.

The principles would apply for the financial year 2009-10 and subsequent years. Set up costs identified after the Act received Royal Assent³ are also included. The principles would be kept under review in the light of any material changes in circumstances.

Developer financial commitment

The commitment, referred to as a deposit in the Act, is required to protect Ofgem where a developer 'pulls out' mid way through the tender process. In this scenario, it would be wrong to collect fees from a bidder where the developer has caused the process to fail.

Where the tender process has not failed due to the actions of the developer, the financial commitment would be returned to the developer in full at the end of the tender process. The commitment could be satisfied by cash deposited into an escrow account or some other suitable security instrument (eg Letter of Credit or Bank Guarantee). The Energy Act 2008 allows for approved third parties, for example a parent company, to provide the deposit or security.

Once the developer has confirmed that it has met the necessary pre-conditions for the tender and Ofgem has satisfied itself that this is correct, the developer would be required to provide its deposit or security.

When the commitment is provided, it should be received at the start of the tender and cover the estimated full costs of the tender process.

Developer payment

A non-refundable payment would be requested from the developer prior to the commencement of the tender process as an administration application fee.

Cost recovery - Tender set up costs

The Act does not state explicitly when costs may start to be recovered. However, under normal government practice⁴ set up expenditure may be incurred and hence recoverable once the specific legislation, the Energy Act 2008 in this instance, has been enacted. This occurred on 26 November 2008 and, as such, we expect to recover £500k of our 2008-09 costs up to 31 March 2009, and all of our costs thereafter.

Set up costs relating to preparations for the tender process would include (but not necessarily being limited to):

- Tender project staff costs,
- External expert advice,
- Legal costs (internal and external),
- IT Systems,
- Ofgem overhead.

It is anticipated that full recovery of initial set up costs relating to the tender process would be completed within three tender rounds (anticipated to be 21 individual tenders). Set up costs arising for further tenders would be recovered from future tender rounds.

³ The Energy Act 2008 received Royal Assent on 26th November 2008.

⁴ *Managing Public Money*, Annex 2.5, section A.2.5.2 and HM Treasury's Fees and Charges guide.

Cost recovery – Tender ongoing costs

The Act amends the Electricity Act of 1989, giving Ofgem the ability to seek payments from the participants in a tender exercise, to cover its full costs for a particular tender exercise.

Under the legislation, tender costs include the costs which are incurred in relation to a specific tender exercise, and an appropriate proportion of costs incurred in relation to tender exercises generally.

Costs which are incurred in relation to a specific tender exercise

The direct costs (eg. external expert advice, advertising, etc) which are incurred in relation to specific tender exercises would be allocated to a specific tender bid stage. Staff costs would be apportioned to each tender bid stage based on a general time apportionment methodology. Any other relevant costs (eg. bank charges), would also be allocated to a specific bid stage. A contingency amount would also be included in the initial estimate of tender costs to provide for additional costs of uncertain and unpredictable events such as tender re-runs and challenge.

Payments made by bidders would be based on a forecast of anticipated costs. As described in section 8, a subsequent reconciliation process would ensure that costs for bidders reflect actual tender costs.

Costs incurred in relation to tender exercises generally

The overhead calculation is in two parts:

- General overhead (excluding accommodation), and
- Accommodation overhead.

General overhead's cover Ofgem's administrative support functions such as HR, IT, facilities management, Finance etc. It is a set percentage and is applied to staff costs. Therefore, the higher the level of staff time spent on a tender, the higher the level of overhead it would attract.

An accommodation charge would be based on the area of floor space that is taken up by the offshore transmission team and any associated legal/managerial (pro-rata) staff and applied as a proportion of the overall office floor space, to allocate accommodation cost overheads.

The fixed overhead rate for individual tenders would be reviewed at least annually to avoid the risk of significant over/under recovery over time.

Cost Assessments (ex-ante and ex-post)

The Act⁵ allows the Authority to undertake valuation assessments where transmission assets need to be transferred to the offshore transmission licence holder from, for example, the developer. The assessment would enable the Authority to determine the appropriate transfer value of the transmission assets. Costs incurred by the Authority in connection with the assessment can be recovered from the owner of the regulated asset.

⁵ The Energy Act 2008 details cost recovery arrangements in section 44, and confirms that Part 1 of the Electricity Act 1989 is amended (insertion of section 6D and 6E).

Recovery of Cost Assessment costs

As required by section 6D(1)(c) of the Electricity Act 1989 (inserted by section 44(2) of the Energy Act 2008), a Cost Assessment is paid for by the asset owner. Therefore:

- For ex-ante assessments, the developer would be liable,
- For ex-post, it would be the successful bidder (OFTO) who would pay for the Cost Assessment as part of the final tender process payment. An estimated cost would be provided to the successful bidder prior to financial close. If no OFTO can be found, under the transitional scheme, Ofgem would appoint an existing TO licensee as the OFTO of last resort, who would pay for the Cost Assessment cost.

The Energy Act allows for 'any' relevant costs to be recovered from the owner. Following Royal Assent (section 2 refers), costs arising from Cost Assessments may be documented and collected from the asset owner on completion of the assessment.

Likely attributable costs are as follows (but not necessarily being limited to):

- Tender project staff costs,
- Consultancy costs (especially the independent assessment),
- Legal costs (internal and external), and
- Ofgem overhead.

The above costs would be identified separately, enabling the recovery of expenditure from the asset owner at the time.

Collection and refund of monies*Tender fees: Developer payment*

As described above, an administration payment is payable by the developer. It is non-refundable and must be received before the tender process can commence. The payment would go directly into Ofgem's bank account.

Tender fees: Bidder payments

The request for tender payments into an escrow⁶ account would be included in the tender documentation issued to companies at the Pre Qualification (PQ) stage.

An initial application fee would be requested to be returned at this stage. This is a non-refundable payment.

The fees for the remaining tender costs would be estimated prior to the tender commencing. As the tender process proceeds, Ofgem would draw down from the appropriate escrow accounts monies to cover the relevant tender stage. Bidders would be requested to provide additional payments at each of the tender stages⁷. Where a bidder is unsuccessful in proceeding to the next stage, draw down would then stop for further stages.

For example, where a bidder is part of the tender process up to and including the ITT stage but does not become the preferred bidder, then draw down of monies from their escrow

⁶ Payment may be made into an escrow account or via an acceptable form of guaranteed money

⁷ Where an acceptable form of guaranteed money is obtained eg. Letter of Credit, a guarantee for the estimated full amount to be incurred by the bidder will be requested at the Invitation to Tender stage.

account would relate to Ofgem's costs up to and including the ITT stage. No monies relating to the preferred bidder stage will be drawn down.

Closure of escrow accounts for unsuccessful bidders would take place after the OFTO award. A cost reconciliation would be made as soon as reasonably practicable after a tender exercise has finished.

A final reconciliation of the income and expenditure relating to the tender exercise would take place prior to licence award, to enable the successful bidder to include the costs into their financial close, and any final payments/refunds would be made.

The reconciliation exercise would be audited by Ofgem's outsourced internal audit service provider.

The financial flow of monies is shown figure A8.1.

Cost Assessments

As described above, the collection of actual Cost Assessment costs are recoverable. Payment would be requested as follows:

- For ex-ante assessments: the developer would be requested to make a payment promptly after the assessment is completed,
- For ex-post: the successful bidder (OFTO) would have the assessment cost included into the final tender process payment prior to licence award. If no OFTO can be found, under the transitional scheme, an existing TO would become the OFTO of last resort and hence would pay for the Cost Assessment exercise.

It is not anticipated that there would be any refund of these costs because the fee would be based on actual costs incurred.

Developer financial commitment

Once the developer has confirmed that it has met the necessary pre-conditions for the tender and Ofgem has satisfied itself that this is correct, the developer would be required to provide its deposit or security.

The commitment could be satisfied by cash deposited into an escrow account or some other suitable security instrument, such as a Letter of Credit. The Act allows for approved third parties, for example a parent company, to provide the deposit or security.

When the commitment is provided, it should be received at the start of the tender and cover the estimated full costs of the tender process.

Where the tender process has not failed due to the actions of the developer, the financial commitment would be returned to the developer in full at the end of the tender process.

Consequences of a tender exercise failing

Where a licence fails to be awarded for a tender exercise, the financial implications would depend upon the reason for tender failure:

- Failure due to developer action

Where the developer causes the tender to fail, for example, by withdrawing its asset from the tender process, the developer's financial commitment would be used to offset the tender process costs.

- Failure due to bidder(s) action

Where the tender process fails due to one or more bidder(s) actions, the relevant bidder(s) payments held in the escrow accounts would be used to offset the tender process costs.

- Failure to award a licence

Following a tender exercise, where the Authority fails to award a licence, say because there are no viable bidders, Ofgem would invoke the OFTO of last resort process and would appoint an existing TO. Any outstanding payments from the tender process would be payable by the TO at licence award.

Interest

The Act confirms⁸ that 'a repayment is to include an amount representing interest accrued on the whole or part of the payment'.

Where interest is accrued in an escrow account this amount would be repaid along with any principal sums to the developer/bidder.

In terms of Ofgem's own bank account, an Office of the Paymaster General (PGO) interest bearing bank account would be opened. Payments would be drawn down from escrow accounts and paid into the PGO account as they fall due. The interest would be taken into account at the end of the tender process i.e. licence award stage, when the final fee is calculated (Authority's total costs less amounts already paid). For simplicity, interest is only calculated once and the total interest is offset from the successful applicant.

The amount of interest accruing from the PGO account would be calculated with reference to the following:

- PGO interest rate(s),
- Amount(s) held, and
- Length of time in account.

A typical PGO interest rate calculation could be as follows:

Rate 1.75% (example base rate 2% less 0.25%) @ refundable amount £70,000 @ held for 3 months = £306.

Reconciliation

We would undergo a reconciliation exercise after each tender round, to ensure that income received matched out-turn costs, in accordance with the requirements of the Energy Act 2008.

Financial governance

The procedures for administering the tender process would be subject to review by Ofgem's internal audit function. The National Audit Office (NAO) may also wish to review the

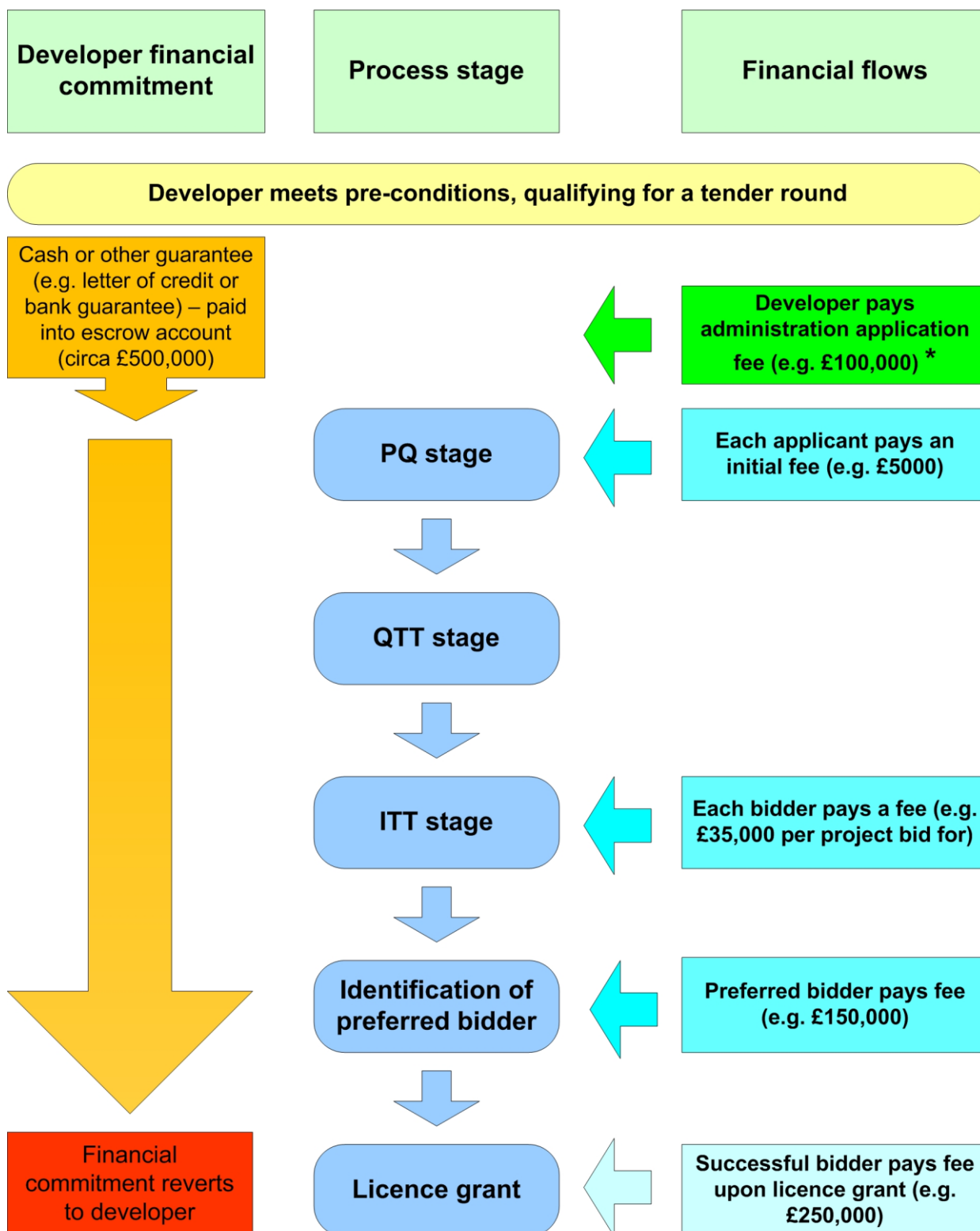
⁸ The Energy Act 2008 details interest payments in section 44, and confirms that Part 1 of the Electricity Act 1989 is amended (insertion of section 6D (1)(e)(ii) and (iii) and 6E).

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procedures for administering the tender process. The NAO are the statutory external auditors of Ofgem. As well as providing an opinion on financial statements, the NAO can also examine and report to Parliament on the economy, efficiency and effectiveness of any public spending.

Figure A8.1: Tender deposit and payment flow



* Developer also pays for the ex-ante Cost Assessment (circa £50,000)

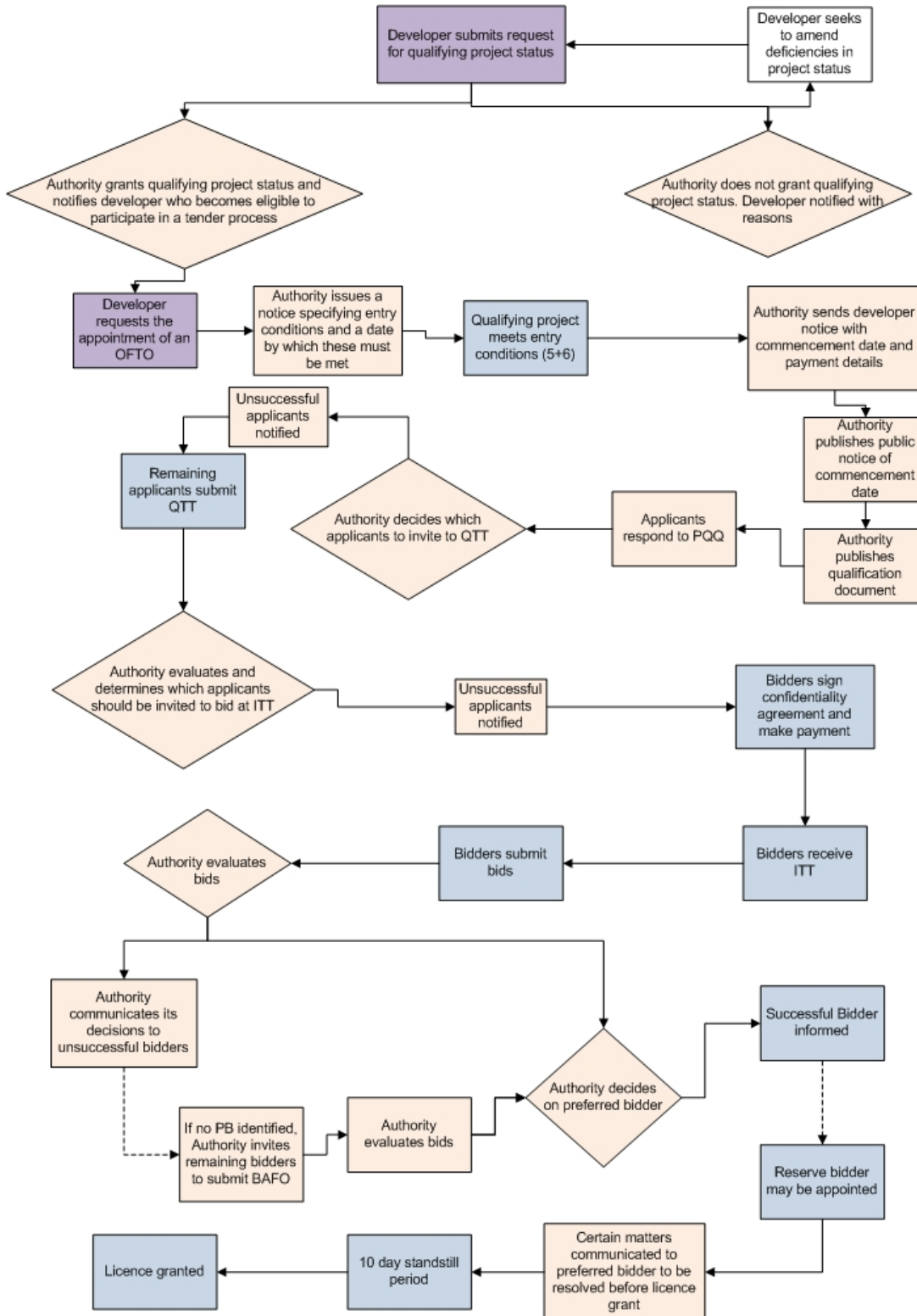
Appendix 9 - Key Features of the Draft Tender Regulations

Introduction

1.1. This appendix provides further rationale and explanation for the draft tender regulations we have published in Annex 4 to this document.

1.2. In order to assist the understanding of the draft regulations, the flowchart below illustrates the proposed competitive tender process, as provided for in the draft regulations. This flowchart is not intended to provide a definitive guide to the draft regulations, but maps out the key process stages they cover. It should be used in conjunction with the draft regulations, and the updated policy positions set out in Chapter 5.

Tender process diagram



Key Features of the Draft Regulations

1.3. This section provides an overview of each regulation.

Citation, commencement and extent (regulation 1)

Regulation 1 names the regulation and sets out the date on which they would come into force.

Interpretation of the regulations (regulation 2)

Regulation 2 sets out the interpretation of the regulations. Where a term has already been defined in primary legislation (the Electricity Act 1989 as amended), it is not defined separately in the regulations.

Notices required to be given in accordance with these regulations should be given in the manner in which the Authority sees fit in order to bring the notices to the attention of those likely to be affected.

Value of assets (regulation 3)

Regulation 3 provides for the Authority's assessment of the total efficient costs required to construct the transmission assets. Where a transitional qualifying project has not completed construction prior to the start of the tender exercise, the Authority should estimate the value of the transmission assets. The Authority should give notice to a developer to make a payment of a prescribed amount in respect of the Authority's costs incurred in estimating the value of the transmission assets.

Developers are required to give notice to the Authority twelve weeks prior to the practical completion of transmission assets construction. Where a developer has reached practical completion of construction of the transmission asset, it should request a completion notice from the coordination licence holder. The coordination licence holder should notify a developer and the Authority on issue of the completion notice. On receipt of the completion notice, the Authority should assess the value of the transmission assets. In cases where a transitional qualifying project has completed construction prior to the start of a tender exercise, the Authority should assess the value of the transmission assets prior to the start of the tender exercise. Where a transitional qualifying project completes construction following the construction of the transmission assets, the Authority should assess the value of the transmission assets when the Authority has received the completion notice.

If requested by the Authority, a developer should provide further information to enable the Authority to assess the value of the transmission assets. Once a transitional tender exercise has been held, the Authority should give notice to a developer to make a payment of a prescribed amount in respect of the Authority's costs incurred in assessing the value of the regulated assets.

Qualifying projects and entry conditions (regulations 4-7)

In section 6 of this consultation document, we propose to separate the conditions to become a qualifying project from the conditions for entry into a tender process. This would enable a project to qualify as transitional or enduring project. It would have to meet further entry conditions to enter into a tender process. This decision has been reflected in the redrafting of Parts 3 and 4 of the regulations.

The provisions in relation to qualifying projects are set out in regulation 4 and Schedule 1. Once the Authority is satisfied that a project is a qualifying project, it would publish a notice in which it would specify a date by which the entry criteria must be met in order for a developer to participate in a particular tender exercise.

Regulation 5 sets out the provisions for the entry conditions for enduring projects, which are specified in paragraph 1 of Schedule 2. Where a developer's initial connection offer has been referred to the Authority and the Authority considers that this issue would not have a material impact on the design of the changes required to the transmission system, it may proceed with a tender exercise provided that the rest of the entry conditions have been met.

Regulation 6 sets out the entry conditions in relation to transitional qualifying projects, which are specified in paragraph 2 of Schedule 2.

In accordance with regulation 7, a developer must make a request in writing to the Authority for the appointment of a licence holder to maintain and operate the transmission assets. This request must contain all of the relevant information required in order to meet the Authority's entry conditions. The Authority may publish a notice setting out the type of information that it would require in order to ensure that all of the entry conditions would be met. The Authority may issue a subsequent notice detailing any further requirements.

Notification and publication of qualifying projects (regulation 8)

Once the Authority has decided that a project has met the entry conditions to participate in a tender exercise, it should send the developer a notice specifying the date on which a tender exercise would begin and notify the developer of the amount of payment and security it is required to provide.

Commencement date (regulation 9)

The Authority should publish a notice specifying the date on which a tender exercise should begin for one or more qualifying projects. It may also consult a developer before publishing a notice for a specific project.

The Authority may in certain circumstances revise a commencement date for enduring projects by providing a notice to the developer and interested parties.

Pre-Qualification Stage (regulations 10 and 11)

The pre-qualification (PQ) stage is described in detail at Part 6 of the draft regulations. The Authority should publish the qualification documentation (which would relate to both the PQ and qualification to tender (QTT) stages) to commence this stage. Any person wishing to participate in a tender exercise must submit a pre-qualification questionnaire to the Authority.

The information provided in the qualification documentation may include:

- Rules of the PQ and QTT stages;
- a PQ and QTT questionnaire;
- instructions as to how each should be completed, including the date, time and manner, as well as the accompanying fee which must be delivered to the Authority;
- details about the location and generation capacity of each qualifying project subject to a tender exercise and, for transitional tender exercises, an estimate or assessment of the value based on an evaluation of the transmission assets of each qualifying project;
- other information that the Authority determines is necessary may also be included; and
- the selection criteria to be applied by the Authority in evaluating the completed PQ and QTT questionnaires.

The draft regulations require the Authority to publish its selection criteria and to determine qualifying applicants accordingly. The Authority may decline to consider a PQ questionnaire that is not submitted in accordance with its rules regarding the time, date and manner for submission. The Authority should notify each applicant as to whether or not they have been selected as qualifying applicants to proceed to the QT stage.

Qualification to Tender stage (regulations 12 and 13)

The Authority would invite qualifying applicants to submit a qualification to tender questionnaire.

The Authority would decide who would become qualifying bidders in respect of each qualifying project in accordance with the selection criteria set out in the pre-qualification documentation after considering every completed QT questionnaire. The Authority may decline to consider a QT questionnaire that is not submitted in accordance with its rules regarding the time, date and manner for submission. It would inform all applicants as to whether or not they have been selected to tender at the invitation to tender stage.

Invitation to Tender stage (regulation 14)

Part 8 of the regulations sets out the invitation to tender process. The Authority should notify all qualifying bidders of;

- a date by which they should return a signed a confidentiality agreement to the Authority governing access arrangements to the data room; and

- a date by which they should make a payment to the Authority determined in accordance with the Authority's cost recovery methodology.

Once these requirements have been met, the Authority would invite qualifying bidders to submit a tender for providing offshore transmission services for each qualifying project to which their application has been successful.

The Authority should publish the invitation to tender documentation, containing the information set out in Schedule 4. This may include;

- instructions as to the information required by the Authority in order to submit a tender;
- the rules of the invitation to tender stage;
- the date, time and manner by which tenders should be submitted;
- the evaluation criteria to be applied by the Authority in evaluating completed tenders; and
- any other information the Authority considers necessary.

The Authority may decline to consider a tender that is not submitted in accordance with its rules regarding the time, date and manner for submission.

Evaluation stage (regulation 15)

This regulation states that the Authority should evaluate tenders for each qualifying project received in accordance with the criteria set out in the invitation to tender documentation. Where possible, the Authority would identify a preferred bidder. It may also identify a reserve bidder in the same way.

Best and final offer stage (regulation 16)

If the Authority is unable to determine a preferred bidder at the end of the evaluation stage, it would commence a best and final offer stage in accordance with regulation 16 and Schedule 5.

In order to carry out a best and final offer stage, the Authority would;

- decide on which qualifying bidders to invite to participate in a best and final offer stage;
- notify those qualifying bidders that have not been invited to submit best and final offers;
- send invitations to selected qualifying bidders to submit a best and final offer issuing instructions including the time, date and manner in which best and final offers should be delivered to the Authority;
- notify selected qualifying bidders of the required payment determined in accordance with the Authority's published cost recovery methodology,
- set out the matters to be included in the best and final offer tender; and
- issue the criteria to be applied by the Authority in evaluating best and final offers.

The Authority may decline to consider a best and final offer that is submitted in accordance with the Authority's rules regarding the time, date and manner for submission.

Where the Authority has only received one tender, it may request that qualifying bidder to submit a best and final offer if it considers that it would be appropriate to do so.

Notification of preferred bidder and reserve bidder (regulation 17)

As soon as the Authority has decided that it is prepared, in principle, to grant a licence to the preferred bidder, it should publish a notice to that effect. The notice must specify the name and address of a preferred bidder and describe the matters that need to be resolved by the preferred bidder and the date by which this must be done.

Where the matters specified in its notice are not resolved to the Authority's satisfaction, or a preferred bidder withdraws from a tender exercise, the Authority may withdraw a notice by publishing a further notice to that effect. Where the Authority withdraws this notice and the Authority has appointed a reserve bidder, it should treat a reserve bidder as a replacement preferred bidder.

The Authority should notify each qualifying bidder that is not a preferred bidder or a reserve bidder.

Withdrawal of a tender (regulation 18)

If a qualifying bidder withdraws its tender, it would not be re-admitted to a tender exercise for that qualifying project.

Cancellation of a qualifying project from a tender exercise (regulation 19)

Regulation 19 sets out the process for cancellations of a qualifying project from a tender exercise. We are specifically consulting on the reasons why the Authority would seek to cancel a tender exercise in chapter 7 of this document. The events of cancellation are set out in Schedule 6 of the draft regulations.

Where the Authority determines that it would be appropriate to cancel a tender exercise, it may give seven days notice of its intention. It would provide the opportunity to allow representations to be made. Where the Authority does cancel a tender exercise, it would be required to publish a notice to that effect including the reasons for it. Where the Authority cancels a transitional tender exercise it may re-run a tender exercise in respect of that qualifying project. In the event that no preferred bidder is identified in a transitional tender exercise which has been re-run, the Authority may re-run a further transitional tender exercise in respect of that qualifying project or determine that a transitional tender exercise has failed.

Where the Authority re-runs a transitional tender exercise in respect of a qualifying project, it would do so in accordance with the tender regulations. Where the Authority determines that a transitional tender exercise has failed, it should not commence a further tender exercise in respect of that qualifying project. It may issue a direction to an existing transmission licensee in this case, in accordance with a standard condition of its licence.

Where the Authority cancels a tender exercise it may partially or fully repay a payment by an applicant or qualifying bidder.

Disqualification from tender exercises (regulation 20)

We are specifically consulting on the reasons why the Authority would seek to disqualify an applicant, qualifying applicant, qualifying bidder or preferred bidder from a tender exercise in chapter 7 of this document. The Authority may disqualify any of these persons if it is satisfied that any of the events in Schedule 7 occur or have occurred. If any of these events occur and the Authority believes that they may materially affect the outcome of a tender exercise, any payment provided to the Authority in accordance with its published cost recovery methodology would be forfeited by, and not returned to, the applicant or qualifying bidder concerned; and an applicant, qualifying applicant or qualifying bidder may also be disqualified by the Authority from a tender exercise by the Authority giving notice to that applicant, qualifying applicant or qualifying bidder.

Where an applicant, qualifying applicant or qualifying bidder is disqualified from a tender exercise, every document, information or tender submitted by that applicant, qualifying applicant or qualifying bidder to the Authority should be deemed to be invalid and should not be taken into consideration for the purpose of determining a successful bidder.

Notification of successful bidder (regulation 21)

Part 13 sets out the process for licence grant. Once the Authority decides to grant a licence to a successful bidder it would publish a notice to that effect, specifying the name and address of the successful bidder. Subject to the possibility of judicial intervention and the requirements of the standstill period, the Authority would grant the licence using powers under section 6 of the Electricity Act 1989.

Enforcement of public procurement obligations and publication of grant (regulation 22)

The Authority should inform all qualifying bidders of its determination in relation to a successful bidder, where practicable, setting out their score and the score of the successful bidder. The Authority should allow ten days between the time that it sends this notice and the grant of the offshore transmission licence (the standstill period) to the successful bidder.

A qualifying bidder who receives such a letter may ask the Authority for reasons why it was unsuccessful. It must make this representation by midnight on the second day

of the standstill period. The Authority must provide the characteristics and relative advantages of the successful bidder by three days before the end of the standstill period.

Subject to any proceedings brought within the standstill period, the Authority should determine whether to grant the offshore transmission licence to the successful bidder.

Property schemes (regulation 23)

Where commercial negotiations fail, in the case of a transitional tender exercise, the Authority may make a property scheme in accordance with Schedule 2A of the Electricity Act 1989.

Cost recovery (regulation 24)

Section 6D of the Act enables the Authority to recover its costs of carrying out a tender exercise. Part 14 of the regulations provides for the recovery of the Authority's tender costs using the powers set out in section 6D. This part of the regulations also makes reference to a detailed cost methodology which would be published for each tender exercise and would set out details of how the Authority would recover its tender costs in accordance with section 6D. The Authority would notify all participants in a tender exercise of any amount of payment or security required under the regulations and the date, time and manner by which such payment or security is required.

Failure to make payments or provide security (regulation 25)

Where a developer fails to make any payment or provide security before a tender exercise is commenced as required under the regulations, the Authority may require that payment or security within a further period specified by the Authority by notice to the developer. Where the developer does not provide payment or security within the further time period, the Authority may cancel that developer's qualifying project from a tender exercise.

Where a developer fails to make any payment or provide security after a tender exercise has commenced, it should have ten days to remedy that failure before the Authority cancels the tender exercise.

Where an applicant or qualifying bidder fails to make a payment, it should have ten days to remedy that failure before the Authority excludes that applicant or qualifying bidder from a tender exercise.

Enquiries to the Authority (regulation 26)

An applicant, qualifying applicant or qualifying bidder wishing to participate in a tender exercise may apply to the Authority for a decision as to the effect of any restriction or requirement under the regulations. Where a person makes an

application, the Authority may charge that person a prescribed fee for any decision given in response to it.

Bidder groups (regulation 27)

Stakeholders should note that this regulation is still under review. However, the intent behind it is set out below.

Any rules for the purposes of selection from a pool of applicants, qualifying applicants or qualifying bidders, published by the Authority under these regulations should include provisions regarding changes to bidder groups at any stage of the tender exercise.

These rules should prohibit exclusivity agreements with suppliers.

Changes to delivery of documents or actions (regulation 28)

The Authority may change the time, date or manner by which any document or notice must be delivered by or to the Authority or published under the regulations. The same provision applies in relation to any action required to be undertaken by the regulations. In each case, the Authority would seek to take reasonable steps to notify the changes to the stakeholders concerned.

Disapplication of certain provisions (regulation 29)

Regulation 29 specifies that applications for offshore transmission licences should only be made in accordance with the regulations. It also allows the Authority to modify the terms of a transmission licence under section 6 of the Act. This is relevant for provisions in relation to an appointment of OFTO of last resort in cases where abandonment of an asset occurs after licence has been granted.