

DONG Energy Power A/S

A. C. Meyers Vænge 9
2450 Copenhagen SV
Denmark

Tel +45 44 80 60 00
Fax +45 44 80 60 00

www.dongenergy.com

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Mr Richard Clay
Manager, Offshore Transmission
Ofgem
9 Millbank
London SW1P 3GE

Dear Mr Clay

Offshore Electricity Transmission – Tender Process Consultation

Thank you for the opportunity to comment on your documents issued on 5 March 2008. This response is made by DONG Energy A/S. Our responses to the consultation questions are set out below, and we have added more general comments under each chapter heading where appropriate.

Section 2 of the document contains new information which is not consulted on (in that no responses are requested on this chapter). Any response on these points will be made in our comments on the final consultation document issued on 25 March.

Whilst it is helpful to see greater clarity on a number of issues for the tender process, we retain our fundamental concern that the enduring regime will delay and increase costs for projects not able to meet the transitional criteria. In particular, the decision now seems to have been made that first enduring tender will be held in 2010 (see para 6.4 of the consultation which makes it clear that the design of the enduring process will be informed by the first round of tenders). This means that any projects that intended to make the second transitional tender, but were not in fact able to meet the qualification criteria or preconditions would need to restart its whole offshore process in the enduring tender, inevitably delaying matters by at least one year. We also remain unclear how the process would work if these is to be a Best and Final offer stage (as there appears insufficient time allowed for this) and if there is to be a re-run of the tender due to no or inadequate bids or bidders. We notice that the revised tender timetable now has one month less for the period of bidding and choosing a preferred bidder (6 months) compared with the timetable in your consultation of October 2008 (7 months). No information is provided as to how this reduction in time has come about and in overall terms the programme appears rather optimistic. A clear statement needs to be made by Ofgem and DECC that no project will be disadvantaged by any problems or delays in the tendering process.

A further general comment can be made about the process for appealing decisions made by Ofgem in connection with the tender. Ofgem or the Authority should arrange for there to be a separate department to hear complaints or appeals, otherwise bidders or developers will be “appealing” matters to those who made the decision in the first place.

As you will be aware, we commented earlier that the criteria for meeting transitional status was rather unclear and pressed for clarity on what was meant by entering into “*all necessary construction contracts for construction of the regulated assets*”, or what are the “*necessary property rights, environmental and planning consents*” for the offshore project and regulated assets. We note that the absolute requirement has now been mitigated by the new section “*The Authority may allow a project to be a qualifying project ... notwithstanding the fact that a developer may not have been able to demonstrate that it has met the requirements ... provided that the Authority is satisfied that a developer shall use its best endeavours to meet the requirements or resolve any other matters identified by the Authority in this regard within any time period notified by the Authority to a developer.*” However as it remains a matter solely at the discretion of Ofgem we are no further forward in understanding in detail what the requirements are.

We are also concerned that a number of matters raised in our individual discussions with Ofgem have not come out in the consultation. These include:

- the treatment of phased projects (the suggestion being that all phases could be treated together, this appears to have been agreed for some projects but not others, but is not consulted upon);
- where the developer is not bidding to be the OFTO, the benefit of having the developer submit a view on a target revenue stream that accords with its own assessment of the asset value, operating costs and expected “return”;
- the possibility of further transitional tenders which might be required where projects meet the criteria for the tenders but don’t wish to proceed immediately; and
- treatment of power exported during commissioning - the process envisages appointment of an OFTO at the end of commissioning, it is not clear how the wind farm will be able to export power and/or be paid for exports ahead of the OFTO’s formal appointment.

Yours sincerely

Ivan Christiansen
Head of UK North West & Onshore
DONG Energy Power
Tegholmen
A.C. Meyers Vaenge 9
2450 Copenhagen SV

Annex: List of Questions and Answers

Questions - Chapter 4

We welcome feedback from stakeholders on all of the issues raised in this chapter. In particular, responses are requested on:

Our proposal to separate the pre-conditions in the transitional regime.

We agree with this proposal. We also note that the first pre-condition has now been changed so that for an embedded connection, the developer must hold an offer of a connection rather than having signed a connection agreement. This distinction is helpful, although we note the actual wording in the tender regulations is different again.

We were also under the impression from our discussions with Ofgem that specific measures were to be taken with respect of phased projects and are rather surprised that no mention of this is made in the consultation

The scope and level of detail an engineering audit report should contain.

We consider that bidders in the transitional tender process should be required to make their own due diligence enquiries and the developer should not be forced to pay for a report that is for their benefit (even if the cost of the report can be included in the assets value transferred, the developer will end up paying for it through the TNUoS charge). That said, we can see the merit of a short summary document by a third party including the following items:

Section	Engineering auditor's work
1. Design basis	
1.1. Applicable standards and regulations	Independently identify the requirements to the transmission element enforced by Grid connection agreement and Grid Code or Distribution Code as applicable, at the relevant time (ie including any derogations obtained against subsequent grid code and distribution code changes.
1.2. Developer's objectives	Review developer's single line diagram, possible pre-tender and dimensioning, availability calculations and further. State whether developer's thereby identified objectives for the transmission element would conform to 1.1.
2. Contract review	Review contract for having comprehensively encompassed above requirements, applicable technical standards as applicable, set out adequate requirements to climate and environmental protection and electrical safety at work.

<p>3. As built documentation review</p>	<p>Verify:</p> <ul style="list-style-type: none"> • Records of design and dimensioning, regarding: <ul style="list-style-type: none"> ○ Operating and short circuit currents; ○ Insulation coordination; ○ Relay protection concepts and coordination; ○ Sufficiency of auxiliary power for protection purposes; • Transmission element having been subject to connection provider’s testing, commissioning and documentation requirements; • Where included in transmission element, high voltage components (main transformers, switchgear, cables) having passed routine tests and having been comprised by type tests; • Selection of materials and corrosion protection conforming to contract requirements; • Provisions for safety at work and contractors’ instructions in relation thereto conforming to contract requirements; • Design, mounting and commissioning of transmission element main components and related civil works having been subject to inspection and quality procedures.
<p>4. Post-commissioning activities review</p>	<p>Identify any major remediation activity after commissioning, such as cable burial or remediation of defect on primary equipment.</p>
<p>5. Operation and maintenance</p>	<p>Ensure owner to have employed a maintenance organisation with procedures for preventive and corrective maintenance.</p>
<p>6. Site inspection</p>	<p>Inspect the substation sites. State possible significant deterioration or inadequate installation of transmission element.</p>

The scope for an additional pre-condition requiring developers to confirm their expectation that their projects should be completed within a reasonably short period after licence grant.

We do not consider it to be practical to require developers to make a firm commitment in respect of their projects being completed within a specified period after licence grant and are unclear what this would mean in practice, does Ofgem propose to retrospectively terminate an OFTO appointment if the project is not completed by a certain date? We propose instead that developers be given the opportunity to participate in a latter transitional tender, indeed from discussion with Ofgem we had understood that this was already being considered ie that there may be more than two transitional tenders.

Our proposal to separate the pre-conditions in the enduring regime.

DONG remains of the view that the proposed enduring regimes is impractical and will delay the development of offshore projects. Nevertheless we agree with the revised proposal to separate the pre-conditions in the enduring regime.

The proposal to develop a model Sale and Purchase Agreement for developers to populate and agree with Ofgem prior to a tender commencing.

We agree that this would be helpful but are concerned about the suggestion in section E of the key provisions of the SPA as set out on Appendix 6. We did not understand how it is possible to separate out the consents in relation to “core” assets and other assets.

We note that in section 4.38 Ofgem envisage being able to use the property transfer scheme to overcome a problem with a stalled negotiation. Whilst helpful, this overlooks the fact that should Ofgem seek to do impose terms on a prospective OFTO that it finds unacceptable, that party can simply walk away losing only its investment in the tender process. This is not an option for the developer who, at that stage of it development, faces stranding of its generation assets until such time as a new tender can be run and/or face the uncertainty of the “OFTO of last resort” process. An effective mechanism must be developed to deal with this eventuality to ensure a level playing field for developer and OFTO.

Questions - Chapter 5

We welcome feedback from stakeholders on all of the issues raised in this chapter. In particular, responses are requested on:

Our updated proposals on the pre-qualification stage of the tender process.

We support a two stage qualification process. We are concerned that bundling an “unattractive” projects with an “attractive” project, where the former has insufficient bidder interest, may damage the position of the attractive project.

Our proposals for the financial and non-financial criteria we are proposing for the PQ, QTT and ITT stages of the competition (as set out in this chapter and Appendix 8).

We consider the financial metrics rather arbitrary. We are also unclear how these metrics are to be used, for instance where it says that the applicant’s net total assets must be 120% of the RAV, this presumably means the bidder’s “group” as a whole (eg where a bidder uses an SPV), we recall that where the bidder is an affiliate of the developer it has already been stated that a separate ring fenced entity would have to be used. Where a consortium of bidders forms a joint bid, is Ofgem intending to assess the joint assets of the consortiums? If so, it would appear that the requirement would be met by any applicant provided that that the consortium group is large enough to meet the turnover metric, irrespective of the role to be taken by each member if the bidder group. Similar considerations apply in the case of the annual revenue test.

We note in Appendix 9, under the BAFO stage (first paragraph on page 32), it is stated “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”. Is there a “not” missing before “submitted in accordance”?

The next paragraph of Appendix 9 is not consistent with section 1.4.4 of Annex 1 and Annex 2, and section 1.4.3 of Annex 3, which say that BAFO stages will only be followed where there are multiple tender submissions. Furthermore it is not clear in the timetable how a BAFO stage will be accommodated within the year allowed for the process.

Our proposals on dealing with changes to consortiums within a tender process.

We have no comment on the consortium change proposals.

Our updated proposals for dealing with bidder dialogue and clarifications within a tender process.

Dialogue between bidder(s) and developer will be essential. Different processes could be followed depending on whether the developer is bidding.

Our updated tender documentation contained in Annexes 1-3.

We note in Annex 3 there are very prescriptive obligations in respect of the bidders own financial model. As commented in respect of your October 2008 consultation, DONG Energy is concerned that if it were to bid to be an OFTO, it would likely finance the development on balance sheet. Therefore there would be no “Bankable Model” for the purposes of project financing. We are not clear therefore how we could comply with this requirement. Further we questioned why such a model is in any event needed, surely Ofgem will be making its decision based upon the specific input data and (binding) revenue stream bid, it thus seems unnecessary for any prospective OFTO to submit its internal (or external in the case of project financing) cost model.

Our initial thoughts on further developments for the tender process going forward.

We propose that a review be conducted of the effectiveness of the regime and financial impact on developers including the cost of separating out their transmission assets, participating and funding the tender process and the costs of TNUoS. This should be used inform future development of the regime.

Questions - Chapter 6

We would welcome feedback on our overall proposed approach to competitive tenders as set out in this chapter.

DONG Energy has made known its views on the proposed approach to tendering under the enduring regime and does not wish to comment further on the proposed detail.

However, we remain sceptical that the structure can deliver the coordinated design for the round three developments unless someone other than the developers underwrites the costs of developing transmission assets in excess of those needed by a specific project.

Questions - Chapter 7

We welcome feedback from stakeholders on all of the issues raised in this chapter

We have no comments on this chapter.

Questions - Chapter 8

We welcome feedback from stakeholders on the draft tender regulations contained in Annex 4, specifically on the translation of our proposed approach to running competitive tenders into the relevant legal instrument.

Add new definitions in 2(1):

“tender exercise” has the meaning given in section 6D of the 1989 Act;

“transitional tender exercise” has the meaning given in section 6D of the 1989 Act

Change the following definition in 2(1):

"qualifying project" means in the Authority's opinion a project in which a developer has demonstrated the requirements in paragraph 1(1) or (2) or (4) of Schedule 1;

In Part 2 (Value of Assets) the distinction between the “ex-ante” and “ex-post” assessments is not clear. In particular, regulation 3(8) appears to apply to the ex-post assessment but this needs to be made explicit. Furthermore, according to Appendix 8 (“cost assessments” section on page 22) the cost of the ex-post assessment should be paid by the successful bidder, therefore “developer” should be changed to “the successful bidder”. Also in this regulation, the term “regulated assets” is used, this should be changed to “transmission assets”.

More fundamentally, regulation 3(1) only applies “where the construction of the transmission assets have not reached practical completion”. Where the transmission assets have already been constructed there needs to be a separate process, presumably only entailing an ex-post assessment.

Regulation 3(5) requires a developer to apply for a completion notice from NGET. Can you advise where in the arrangements NGET has an obligation to issue a completion notice, what are the terms under which it will or will not issue such a notice and what happens if it does not when it should? Furthermore, where the transmission assets are already complete at the time the Regulations become effective, how and when will the completion notices be issued?

It is not clear how the initial transitional tender exercises fit with the requirements of regulation 4(2) as it was stated that the Authority will make decisions on the Qualifying Projects in May which may be before the Regulations become effective.

In regulation 5(2) it is not clear how this works in the situation where a developer accepts a BCA offered by NGET but then refers terms in the Construction Agreement.

Regulation 16(5) is not consistent with section 1.4.4 of Annex 1 and Annex 2, and section 1.4.3 of Annex 3, which say that BAFO stages will only be followed where there are multiple tender submissions. Furthermore it is not clear in the timetable how a BAFO stage will be accommodated within the year allowed for the process.

Regulation 19(2) says that the Authority “may” re-run a transitional tender exercise. It is not clear what happens if it does not. Presumably if it chooses not to re-run, then regulation 19(5) would apply, and this should be modified accordingly.

We do not see how regulation 27(4) can work in practice, “suppliers” could encompass suppliers of services who would typically be constrained by “conflict of interest” provisions not to provide the same services to other bidders, the “suppliers” could also be service functions within the same ownership as the bidder and who will only supply services to that bidder.

Schedule 1 paragraph 1(b), add “has or will” after “developer” in the first line (as the assets may have already been completed).

Schedule 6 paragraph 1(1)(a) add “and compliant” after “receive any” (so as to make this consistent with the wording in regulation 10). Same goes for (b) and (d).

Schedule 6 paragraph 1(1)(f) add at end “or the preferred bidder does not satisfy the matters referred to in regulation 17(1)”.

Schedule 6 paragraph 1(1)(g) add at end “or a reserve bidder where the preferred bidder has withdrawn or failed to satisfy the matters referred to in regulation 17(1)”.

Schedule 6 paragraph 1(1)(i) add at end “where such variation is required to accommodate the result of the tender exercise”.

In Schedule 7 paragraph 1(1)(c) the term “canvassing” needs to be defined