

COMMENTARY ON SPA

1. PURPOSE OF THIS DOCUMENT

- 1.1 This document accompanies Ofgem's first template SPA and sets out a commentary to explain Ofgem's approach for those developers whose projects are likely to fall into the transitional regime. This document provides commentary in relation to each clause of the SPA in turn, and in relation to each schedule as it is referred to. The commentary is by way of explanation only and does not constitute legal, financial or tax advice from the Authority, Ofgem or its retained advisers and must not be relied upon by any stakeholder participating in this Consultation. All developers and potential bidders are advised to seek their own advice before commenting upon or contributing to this consultation

2. CLAUSE 2 – CONDITIONS

- 2.1 The key event under the SPA is the transfer of the offshore transmission system to the preferred bidder (referred to in the SPA as the "Purchaser"). In some cases, where the system is still under construction, there may be a substantial period between the award of the offshore licence and the transfer of assets. The SPA will set out rules to govern the parties' behaviour during this period. It is therefore structured to become effective at the same time as the offshore transmission licence is granted.
- 2.2 Part A of Schedule 1 to the SPA contains the conditions precedent which must be met in order for the SPA to become effective. The key condition to such effectiveness is the grant of an OFTO licence to the successful bidder by Ofgem.
- 2.3 Parts B, C and D of Schedule 1 to the SPA contain Ofgem's current view of the conditions precedent which would have to be met in order for the transfer of the offshore transmission system to occur, described in the SPA as "Completion". These conditions precedent are intended to ensure that the Purchaser is able to operate the offshore transmission system immediately following Completion. The conditions will need to be tied in with any conditions precedent in other relevant documents, in particular the OFTO licence and the STC and may well need to be tailored to each individual project.
- 2.4 If the conditions precedent have not been met by a stated longstop date, the SPA terminates; it being assumed that in these circumstances Ofgem will need to make a transfer scheme under Schedule 2A of the 1989 Act introduced by the Energy Act 2008. The SPA will also terminate where the offshore transmission licence is not granted or is revoked.
- 2.5 Merger control laws may also necessitate the insertion of a condition precedent requiring notifications to be made to and/or merger clearances to be obtained from the relevant competition authorities.
- 2.6 In the event that notifications need to be made to and/or merger control clearances are required from any jurisdictions which prohibit the completion and/or implementation of a transaction prior to clearance being obtained, consideration should be given as to whether any of the provisions (for example, conduct of Vendors' activities before completion) would breach such a prohibition.

3. CLAUSES 3 AND 17 - SALE AND PURCHASE AND DEFERRED CONSIDERATION

- 3.1 The SPA has been structured as the sale and purchase of assets to recognise that only part of the Vendor's assets (the transmission assets) are to be transferred and the other assets (the generation assets) retained. The SPA includes additional provisions which provide for the sale and purchase of the assets to be categorised as the transfer of a business as a going concern, although an assessment of whether the transfer does constitute the transfer of a business as a going concern will need to be conducted by the developer on a project specific basis.
- 3.2 The details of the assets and contracts to be transferred to the Purchaser will be project specific, and shall be set out in Schedules 2, 3, 5 and 6 of the SPA.
- 3.3 As set out in the consultation documents, the purchase price payable by the Purchaser will be equal to the higher of (a) 75 per cent. of the ex ante valuation and (b) the ex post valuation.
- 3.4 As the ex post valuation will not be available prior to Completion, the SPA provides for the purchase price to be paid in two instalments:-
- 75% of the provisional ex ante valuation, as notified by Ofgem prior to Completion and which is payable by the Purchaser at Completion; and
 - a further payment by the Purchaser, or repayment by the Vendor, of the difference between the ex ante valuation and the final ex post valuation, as notified by Ofgem, and which shall be payable by the Purchaser or the Vendor (as the case may be), as soon as reasonably practicable following completion of the offshore transmission system and Completion of the SPA.
- 3.5 Ofgem understands that some developer projects may have phased completion under their construction contracts. In relation to any such projects the SPA may therefore have to be amended in order to allow for the phased transfer of completed assets with multiple sequential completions.
- 3.6 The OFTO licence will require the OFTO to notify Ofgem of any amendments to the SPA following signing and to provide Ofgem with a copy of any such amendments. If any such amendment changes the basis upon which the OFTO was awarded its income stream then Ofgem will have the discretion to make appropriate adjustments to the OFTO's income stream.

4. CLAUSE 4 - EXCLUDED ASSETS AND CONTRACTS

The SPA provides for the generation assets (and contracts relating to them) which are to be retained by the Vendor to be excluded from the sale and purchase of assets to the Purchaser. The details of any such excluded assets and contracts will be necessarily project specific, and shall be set out in Schedule 4 of the SPA.

5. CLAUSE 5 - PAYABLES AND RECEIVABLES

- 5.1 The SPA has been structured to effect a clean division of title and liability on and from the Completion Date. Accordingly, the SPA provides that the Vendor shall be responsible for all payables incurred or attributable to any period prior to the Completion Date and that the Vendor shall be entitled to receive and enforce any receivables accrued up to and including the Completion Date.
- 5.2 The SPA contemplates an adjustment to the consideration payable by the Purchaser to the extent any prepayments for goods and services have been made, or received by, the Vendor.

6. CLAUSE 6 - THIRD PARTY CONSENTS FOR TRANSFER OF ASSETS AND CONTRACTS

- 6.1 The Parties have a mutual obligation to obtain any required third party consent or agreement in relation to the transfer of title of any of the Assets. If any required third party consent or agreement is not obtained prior to Completion, the Vendor is deemed to hold the benefit of the applicable Assets in trust for the Purchaser pending the receipt of such consent or agreement. If the requisite third party consent or agreement is not obtained by a longstop date after Completion, the Assets are excluded from the sale and purchase, and the Vendor must indemnify the Purchaser in respect of all associated costs.
- 6.2 The Vendor is also required to assign and/or transfer any permits, licences or approvals relating to the Business to the extent possible. If the permit, licence or approval is not assignable or transferable, the Purchaser will need to obtain its own permit, licence or approval as soon as reasonably practicable.

7. CLAUSE 7 - ASSUMED AND EXCLUDED LIABILITIES

- 7.1 Clause 7 makes it clear that the Purchaser does not assume any liability of the Vendor, save as expressly set out in the SPA. In particular, the Purchaser does not assume any liability for taxation relating to the Business prior to the date of transfer by the Vendor.
- 7.2 The SPA deals separately with liability for environmental matters, such that all past, present and future liabilities and obligations of the Vendor to any third party or regulatory or government authority in relation to environmental issues are assumed by the Purchaser in their entirety.

8. CLAUSE 8 - SITES AND PROPERTY DOCUMENTS

- 8.1 The terms on which any right, title or interest in any real property are to be transferred to the Purchaser will be project specific, and the relevant provisions shall be set out in Schedule 5 of the SPA, as referred to in Clause 8.
- 8.2 The SPA anticipates that the Vendor will at Completion have entered into leases or licences of seabed and also into substation licences which relate to property that is offshore. It is also anticipated that the Vendor will have interests in land and under contracts relating to land that is located onshore, such as under wayleave agreements.
- 8.3 In relation to the interests in land of the Vendor these will be Leases, as defined by the SPA, and specific drafting in relation to the transfer of those interests to the Purchaser is as set out in paragraph 2 of Part D of Schedule 5 of the SPA. Leases are to be transferred on Completion following the obtaining of any necessary third party consents.

- 8.4 Any licences or wayleave agreements are personal or contractual rights and their transfer to the Purchaser or novation is governed by paragraph 1 of Part D of the SPA. It is a condition to Completion that any third party consent necessary for the transfer of those contracts to the Purchaser has been obtained.

9. CLAUSE 9 – EMPLOYEES AND BENEFITS

The terms on which any employees are to be transferred to the Purchaser (and whether there will be any such employees) will be project specific, and the relevant provisions can be out in Schedule 7 of the SPA.

10. CLAUSE 10 - CONDUCT OF VENDOR ACTIVITIES BEFORE COMPLETION

- 10.1 Clause 10 governs the behaviour of the Vendor in the period leading up to Completion.
- 10.2 To protect the Purchaser's interests in the transferring system, the Vendor is not entitled, without the Purchaser's consent (inter alia) to:
- 10.2.1 enter into, amend or modify any material contract;
 - 10.2.2 exercise any rights, grant any waivers or elect a particular method of performance pursuant to a material contract; or
 - 10.2.3 modify, alter, vary or surrender any material permits, licences, approvals or consents,
- relating to the Business or the Assets.
- 10.3 Clause 10 also sets out the Vendor's obligations to the Purchaser to provide reasonable access, information and co-operation to inspect the Assets, witness tests of the Assets and familiarise itself with the Assets in order to facilitate an effective transfer.
- 10.4 Clause 10.12 includes a standard list of restricted matters that the Vendor must also not undertake or permit without the consent of the Purchaser.
- 10.5 Clause 10 also provides procedures for the Parties to agree updates to the various schedules of the SPA which set out what is and what is not to transfer on Completion. It is under consideration whether the Parties should be entitled to refer to an expert any material disagreement in relation to any update or further revisions to be agreed pursuant to Clauses 10.19 to 10.35.

11. CLAUSE 11 - TRANSITION PLAN

- 11.1 In order to ensure an orderly, successful transfer of the transmission business to the Purchaser where there is an extended period of time between the Effective Date and Completion the parties are required to agree a Transition Plan.
- 11.2 This plan will set out the actions, timetables and milestones that need to be met by the Vendor and Purchaser (as applicable) in order to ensure that the transfer of the system is carried out in an efficient and effective manner. It will be necessary for both Parties to actively engage and cooperate with each other during the transition period. Schedule 11 (Transition Plan) sets out more details in relation to the content of the Transition Plan.

- 11.3 It is in both the Vendor's and the Purchaser's interests to have a robust and effective Transition Plan in place in good time. However, in case the Parties are not able to agree a Transition Plan within a reasonable time, then the SPA provides for the matter to be referred to an independent expert.

12. CLAUSE 12 - REVIEW PROCESS

The SPA provides for a review process pursuant to which the Parties must, as the target date for Completion approaches, assess progress towards the fulfilment of the conditions precedent to Completion. The Parties are required to share information relating to the status of the conditions precedent and to determine whether Completion should proceed in accordance with the then agreed timetable or be delayed until a later date.

13. CLAUSE 13 - CERTIFICATION OF COMPLETION OF OFFSHORE TRANSMISSION SYSTEM

- 13.1 Ofgem's current view is that these provisions will be highly project specific in that they will need to reflect the certification provisions under the Vendor's construction contract(s) as well as relevant processes under the STC. We have not therefore sought to draft template wording.
- 13.2 The SPA will enable the Purchaser to have the benefit of the construction contractor's latent defect warranties and other relevant obligations under the construction contract. If certification by an independent certifier triggers take-over under the SPA, the Purchaser may also require a collateral warranty from or an equivalent direct right of recourse against that independent certifier.

14. CLAUSE 14 - COMPLETION OF SALE AND PURCHASE

The SPA includes standard provisions relating to the Completion process. The items to be delivered by each Party at Completion will, however, necessarily be project specific. The list of Completion deliverables will be set out in Schedule 10.

15. CLAUSE 15 - VENDOR'S DEFAULT AT COMPLETION

If the Vendor does not comply with its Completion obligations, the Purchaser is not obliged to complete the sale and purchase, but may elect to defer Completion or to proceed to Completion as far as practicable. The SPA does not grant the Purchaser any right to terminate or rescind the SPA in such circumstances, as the sale and purchase contemplated by the SPA is a key feature of the offshore transmission regime.

16. CLAUSE 16 - WARRANTIES

- 16.1 Under the SPA each Party warrants that it is duly authorised to enter into and complete the sale and purchase contemplated by the SPA.
- 16.2 In addition, the Vendor warrants in the terms of the warranties which are set out in Schedule 8. Many of these warranties are expected to be relevant to all projects.

- 16.3 Paragraphs 1.3 to 1.5, 12, 13, 14 and 15 set out certain warranties which may only be relevant to certain projects and/or which will require tailoring to the project specific circumstances by the developer prior to being issued to bidders. This list of warranties is not exhaustive and developers should consider whether further warranties based on the project specific circumstances are required. Bidders will then comment on the proposed warranties as part of their response to the ITT. Both developers and potential bidders may therefore wish to comment on the nature of the warranties which will be appropriate.
- 16.4 The template SPA provides that the warranties are given at the date of the SPA and repeated at Completion, and are subject to standard limitations on claims, including disclosure, time limits and monetary thresholds, which will be set out in Schedule 8. This framework will need to be customised on a project specific basis. For example, depending on the project specific circumstances, certain of the warranties may only be appropriate at the Completion Date and not at the time of signing.

17. CLAUSE 18 - POST COMPLETION ACTIVITIES

The template SPA assumes that there will be minimal transitional issues post Completion and the post completion obligations relate only to the Vendor's ongoing access to books and records applicable to the Business and the Assets and the requirement for the Vendor to forward any correspondence, information or enquiries relating to the Assets to the Purchaser. Any additional post Completion requirements will be dealt with on a project specific basis.

18. CLAUSE 19 - VAT AND RELATED MATTERS

- 18.1 Clause 19 provides for the Purchaser writing to the tax authorities to confirm whether or not the sale will be treated as a transfer of on going concern. There are then provisions to deal with either eventuality. The Purchaser or the representative member of its group has to be registered for VAT on or before Completion.
- 18.2 There are also provisions setting out how capital allowances will be apportioned between the Vendor and the Purchaser.

19. CLAUSE 20 - ANNOUNCEMENTS AND CONFIDENTIALITY

The template SPA includes standard provisions prohibiting the release or despatch of any announcement relating to the SPA or the disclosure of any information relating to, or obtained as a result of, the negotiation, entering into or performance of the SPA, without the consent of the other Party or as otherwise exempted.

20. CLAUSES 21 TO 24 - MISCELLANEOUS, NOTICES, COSTS AND GOVERNING LAW AND JURISDICTION

Standard provisions regarding assignment, third party rights, variation, service of notices and governing law are also incorporated in the template SPA. The OFTO licence will contain a requirement on the OFTO to notify Ofgem of any assignment of the SPA.