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Consultation on Draft Model Sale and Purchase Agreement and Draft Data Room Guidelines for Transitional Tenders May 2009

Dear Richard,

We welcome the opportunity to comment on this Consultation. This response is provided on behalf of the RWE group of companies, including RWE npower, RWE Supply and Trading GmbH and npower renewables Ltd, a fully owned subsidiary of RWE Innogy.

General Comments

In principle we agree that a model Sale and Purchase Agreement (SPA) should be used by the developer and successful bidder to define the terms for the transfer of the transmission assets and associated rights and liabilities to the newly licensed offshore transmission owner (OFTO). From the OFTO perspective, it will be important that the information contained in the SPA is sufficiently detailed to allow bids to be developed. We also believe that a degree of dialogue and negotiation between the bidders and developer will be important to deliver the best technical and commercial outcome and that the SPA will facilitate this.

Ofgem's template SPA contains a comprehensive set of terms and conditions both for the generic provisions as well as the project specific schedules. It will be important that the final SPA is not overly prescriptive as in practice developers will take a variety of approaches and the SPA needs to be flexible enough to accommodate this. Specialists (e.g. tax, HR, property, insurance etc) will need to review the SPA in the context of the relevant project and therefore there will inevitably be further issues to discuss at the time.

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Comments on Sale and Purchase Agreement

We have not suggested detailed drafting changes to the SPA, but have made some general comments as set out below:

Clause 2.11 – please clarify why the warranties survive termination of the agreement.

Clause 5.4 - typo delete "default" on line 6 and replace with "details".

Clauses 6.3 and 6.8 - we suggest changing from three months to six months, to better reflect the practical timescales associated with obtaining third party consents.

Clause 7.6 - if the vendor receives a claim in respect of an assumed liability then the purchaser should be obliged to (1) indemnify the vendor and (2) assume conduct of such claim if the vendor so requires.

Clause 10 - some of the restrictions on how the vendor conducts the business between signing and completion are too restrictive particularly if the asset is mid construction during this period. At clause 10.3 the words "(in its absolute discretion)" should go. Also we would suggest deletion of clause 10.3.1. In relation to Key Contracts (10.4-10.6) it is reasonable to consult the purchaser but 10.6 is unacceptable as it goes too far in terms of putting the purchaser in control over an asset which it has not yet purchased. At clause 10.12 the consent of the purchaser should not be unreasonably withheld or delayed.

Clause 15 - should be reciprocal i.e. it should apply to the purchaser's completion obligations as well.

Clause 16.4 – we have a major concern about repeating the warranties at completion. Our view is that the warranties are given at signing only as they are a snap shot of the state of the business at the time the agreement is signed.

Clause 16.9 - the purchaser should not be able to make a warranty claim if it has actual knowledge of the claim at the time of signing the agreement.

Clause 21.14 should be mutual/reciprocal and apply to both parties.

Regarding employees, we endorse the approach set out in the footnote that provides for simplifying the agreement should no employees be TUPEd across to the purchaser.

Schedule 8 Warranties

Clause 1.3 – delete as the purchaser will have novated to it the construction contract then the purchaser will have a direct right against the contractor. It is thus not appropriate for us to be exposed as well as it gives the purchaser two bites of the cherry.

Clause 4.4 – the vendor should not give a warranty as to the completeness or sufficiency of the data room/disclosure pack

Schedule 10 paragraph 4 - we should avoid generalities here and there should be a complete list of deliverables not open-ended.

General Comments

We recognise that the SPA is not the usual place for dealing with ongoing commercial arrangements but it is the only contractual relationship between the developer and the OFTO, given the central role of the GBSO in the process. Perhaps the transition plan (or a similar schedule to the SPA) would be the best place to deal with these issues forward.

Spares

The SPA should include provisions that deal with spares procured by the generator. These could include for the generator to hold and free issue, or for spares to transfer to the OFTO. In the latter case, the generator would want comfort that the spares could only be used on their project's offshore transmission system. The generator would also want an obligation placed on the OFTO to replace assets on a like for like basis, particularly with regard to plant ratings.

Ownership Schedule

The SPA should include an ownership schedule that clarifies interfaces/ownership/O&M responsibility for assets on the onshore and offshore substations, e.g. communication systems, IT systems, CCTV, LV & Back-Up Supplies, Electrical Plant, Facilities, Fibre Optics, Emergency Equipment etc.

Construction Issues

There needs to be clarity about when exactly transfer occurs, what is handover/acceptance process/criteria, transfer of warranties (will include transfer of warranties for sub-set of assets in some contracts) and particularly arrangements for phased adoption. The issue of phased adoption needs further development as part of the overarching regulatory regime and requirements reflected back into the SPA.

Access Arrangements

Provisions that clarify access rights to generator assets located at onshore and offshore substations.

Health and Safety

Generator working at OFTO onshore and offshore substations - provisions that govern working/safety/communication arrangements.

Outage Planning & Co-ordination

Provisions that ensure effective outage planning and co-ordination and effective working/communication in unplanned outage situation.

Provision of reactive capability by Generator

Provisions that clarify arrangements where generator offers to provide reactive capability in excess of the minimum required in the Grid Code.

Back-up / Emergency Supplies

Provisions that oblige OFTO to maintain supplies to generator equipment on onshore and offshore substations in emergency situations.

Comments and Draft Data Room Guidelines

When undertaking project due diligence and valuation, bidders will need access to a full range of technical and commercial information. The Draft Guidelines specify a comprehensive list of information categories that will be populated. Ofgem recognises that each project will be different and we believe that the Guidelines should establish a minimum level of information provision.

We hope these views are helpful and if you wish to discuss any aspect of them in further detail, please do not hesitate to contact me.

Yours sincerely,

By email so unsigned

Charles Ruffell
Economic Regulation