

DETERMINATION PURSUANT TO REGULATION 46 OF THE CONTRACTS FOR DIFFERENCE (ALLOCATION) REGULATIONS 2014 FOLLOWING AN APPEAL MADE TO THE AUTHORITY PURSUANT TO REGULATION 43

Introduction

1. This determination relates to an appeal made by Drenl Limited (“Drenl”) against a non-qualification determination made by the delivery body (National Grid Electricity Transmission plc – “NGET”) in respect of the prospective LRRE Beddington Lane Contracts for Difference Unit (the “CfD Unit”).

Appeal Background

2. Drenl submitted an eligibility qualification application for the CfD Unit in order to participate in the 2014 Contracts for Difference (“CfD”) allocation round (the “CfD application”).
3. In a Notification of CfD Qualification Determination dated 13 November 2014 (the “non-qualification determination”), NGET determined that Drenl’s application in respect of the CfD Unit was not a qualifying application because Drenl had failed to provide a countersigned Connection Agreement, as required by Regulation 25 of the Contracts for Difference (Allocation) Regulations 2014 (the “Regulations”) and Rule 4 of the Contracts for Difference: Final Allocation Framework for the October 2014 Allocation Round (the “Allocation Framework”).
4. In a Review Notice from Drenl to NGET dated 20 November 2014 (the “review notice”) Drenl disputed the non-qualification determination decision on the grounds that they had made a simple mistake in submitting an unsigned copy of the Connection Offer and that at the time of the eligibility qualification application they did in fact hold a Connection Agreement for the CfD Unit. Drenl also provided a copy of the Connection Agreement (which had been countersigned in January 2014) and evidence of payment to the operator of the distribution system with the review notice.
5. In a Non-qualification Review Notice dated 5 December 2014 (the “non-qualification review notice”) NGET informed Drenl that, having considered the review notice, it had decided to uphold the non-qualification determination. In summary, this was on the basis that a countersigned offer had not been provided as part of Drenl’s CfD application and, by virtue of Regulation 20(2)(c), NGET was not able to take account of the countersigned copy of the Connection Agreement that had been provided with the review notice.

6. In a CfD Qualification Appeal Notice submitted on 12 December 2014 (the “qualification appeal notice”), Drenl submitted an application for the Authority to review NGET’s non-qualification review notice, pursuant to Regulation 43.
7. Pursuant to Regulation 46, where the Authority receives a qualification appeal notice that complies with Regulations 43 and 44, the Authority must determine that appeal.

Appellant’s reason for appeal

8. Drenl sets out in the qualification appeal notice the grounds and supporting arguments as to why the CfD application should be judged to be a qualifying application. The grounds and supporting arguments are summarised as follows:
 - Drenl made a simple and minor mistake in submitting a copy of the Connection Offer that had not been signed by Drenl;
 - Drenl had a legitimate expectation that Government guidance on the way in which simple processing errors will be followed;
 - at the time of submitting its application, Drenl held a Connection Agreement signed by Drenl and the operator of the distribution system, as evidenced by the signed Connection Offer submitted with its review notice;
 - NGET has applied too strict an interpretation of “Connection Agreement” as defined in the Regulations and Allocation Framework, and its decision was unreasonable and disproportionate and the Regulations unfairly prejudiced applicants who mistakenly submitted incorrect documentation; and
 - notwithstanding these points, the copy of the Connection Offer submitted with the original application should in any case have sufficed as evidence of a Connection Agreement, regardless of the fact that it had not been signed by Drenl.

Our Findings

Evidence of a Connection Agreement

9. Regulation 25(2) provides that *“Where a direct connection or a partial connection applies or is to apply to the relevant CfD unit, the applicant must provide a copy of each of the*

connection agreements applicable to the relevant CfD unit which allows such connection.” Connection Agreement is defined in Regulation 25(6) as “...an agreement to connect to: The national transmission system of Great Britain; or the distribution system, entered into by the operator of the relevant system”.

10. The requirement under the above Regulation is for the provision of a Connection Agreement and had DECC¹ intended for a Connection Offer, rather than agreement, to be sufficient it would have reflected this in the drafting.
11. That this was not what was intended is supported by the fact that DECC appear to have actively considered and dismissed the option of a Connection Offer as part of the consultation process. A number of respondents to DECC’s consultation on the relevant drafting suggested that the requirement should be limited to submission of a Connection Offer, in light of the costs associated with securing a signed agreement². However, the position ultimately reached by DECC, having taken these responses into account, was to retain an agreement between the relevant parties.
12. Rule 4 of the Allocation Framework specifies that, for the purpose of that Rule, a Connection Agreement includes a countersigned offer (or offers) made to an applicant. The intention behind this drafting is clarified at question 9 of DECC’s publicly available CfD FAQs³, which sets out the following question and answer:

Q: Is it a connection agreement or countersigned offer?

A: The final Allocation Framework has now clarified that for purposes of evidencing applicable grid connection agreements; this also includes countersigned offer(s) between an applicant and the relevant operator of the Transmission System or Distribution System.

This clarification reflects the variance in wording of connection documents across the transmission and distribution levels.

13. There is nothing in the drafting of Rule 4 to suggest that a Connection Offer which had not

¹ The Department of Energy and Climate Change.

² see para 3.8 *Electricity Market Reform – Contract for Difference: Contract and Allocation Overview* (August 2013) (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/233004/EMR__Contract_for_Difference__Contract_and_Allocation_Overview_Final_28_August.pdf), pages 34 and 126 *Electricity Market Reform: Consultation on proposals for implementation* (October 2013) (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255254/emr_consultation_implementation_proposals.pdf), pages 13 and 14 Government response to consultation on proposals for implementation of Electricity Market Reform (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324170/Government_Response_to_EMR_implementation_consultation.pdf)

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/353094/Contracts_for_Difference_-_FAQs_FINAL.pdf

been countersigned could similarly be construed as an agreement. If the intention was that a Connection Offer made by the operator of the distribution system, whether or not it had been accepted by the applicant, alone was acceptable then this would have been reflected in the drafting. There would have been no need for Rule 4 to qualify that a Connection Offer is only admissible where it has been countersigned.

14. For these reasons, our view is that NGET were correct not to qualify Drenl's CfD Unit. Drenl did not provide a valid Connection Agreement with its application and therefore did not meet the general qualification requirements necessary for the application to be a qualifying application under the Regulations.

Submission of counter-signed connection offer

15. Drenl's review notice was accompanied by a signed Acceptance of Notice Form in relation to the Connection Offer dated 22 January 2014. Drenl argues that this evidence proves that the Connection Offer submitted with the original application had been accepted, and therefore a valid Connection Agreement was in place at the time that application was made.
16. Regulation 20 (2)(c) states that a review notice must "*not contain any documentary evidence which was not provided to the delivery body in support of the application which is the subject of the non-qualification determination*". It was not therefore open to NGET to accept the signed copy of the agreement provided by Drenl with its review notice as evidence that a valid Connection Agreement was in place. NGET could only rely on the unsigned copy of the Connection Offer which, for reasons set out above, is not sufficient evidence to determine that the application was a qualifying one.

Exercising discretion and legitimate expectation of a mechanism to correct processing errors

17. Drenl considers that NGET should have exercised discretion in its non-qualification review, particularly as it provided a countersigned copy of the Connection Offer as part of the review notice. Drenl further considers that there should be a mechanism to correct simple processing errors made in the CfD application.
18. There is no mechanism under the Regulations and the Allocation Framework which affords NGET any discretion to correct errors, or allow applicants to correct errors, after the application window closes.
19. NGET was under no obligation to check the details of the application prior to the deadline

for receipt of applications. A publicly available guidance document notes that NGET would be reviewing applications and verifying associated documents.⁴ However, that document makes clear that the responsibility ultimately lay with the applicant. This means that, whilst NGET may have been able to check that Drenl had physically submitted a document purporting to be a countersigned Connection Offer, it had no obligation to do this or to check the detail of that document or make any assessment about whether it met the evidential requirements for a Connection Agreement.

20. As such, Drenl was specifically put on notice in advance that the onus was on it to ensure that its application was correct, including that the document it had submitted constituted a Connection Agreement.
21. Regulation 20(2)(c) specifically prevents NGET from considering information that was not provided as part of the CfD application.

Conclusion

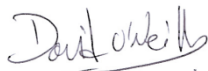
22. NGET was correct to determine that Drenl's application was not a qualifying application because a countersigned Connection Agreement was not provided as part of its CfD application. The copy provided had not been countersigned by Drenl and therefore did not meet the evidential requirements. Regulation 20 does not permit Drenl to provide a different, signed, copy of the Connection Agreement with the review notice and NGET could not take this into account when making its review decision.
23. There is no mechanism within the Regulations or Rules that allows an applicant to correct an application where the wrong document had been supplied. Neither is there any power for NGET to exercise any discretion around the submission of documents.

⁴ Question number 6 of DECC's CfD FAQs says: *"The Delivery Body will be reviewing applications and verifying associated documentation. However, no error rectification mechanic has been built in to the application window to allow applicants or the Delivery Body to correct errors in submitted applications. This is to ensure the Delivery Body is fair and consistent in its assessment across all applications, and to maintain the tight eligibility window timelines...Ultimately, the onus is on applicants to ensure the data is correct on submission and we encourage applicants to review the Allocation Framework and eligibility requirements and start to compile their evidence now.*

⁴https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/353094/Contracts_for_Difference_-_FAQs_FINAL.pdf

Determination

24. For the reasons set out in this decision letter the Authority hereby determines pursuant to Regulation 46 that NGET's non-qualification determination decision in relation to the CfD Unit be upheld.

A handwritten signature in black ink, appearing to read "David O'Neill", with a horizontal line underneath the name.

David O'Neill

**Head of Wholesale Markets Policy: Electricity Market Reform
For and on behalf of the Gas and Electricity Markets Authority**

19 January 2015