

# 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 Swindon Solar Farm Limited (“SSF”) against a non-qualification determination made by the delivery body (National Grid Electricity Transmission plc – “NGET”) in respect of a prospective Contracts for Difference (“CfD”) unit of that name.

## Appeal Background

2. SSF submitted an eligibility qualification application for a CfD unit in order to participate in the 2014 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 SSF’s CfD application had failed to meet the relevant qualification criteria.
4. NGET rejected the CfD application on the following grounds:
  - a. the Connection Agreement provided did not meet the evidence requirements of Regulation 25 of the Contracts for Difference (Allocation) Regulations 2014 (the “Regulations”) and Rule 4 of the Contract for Difference: Final Allocation Framework for the October 2014 Allocation Round (the “Allocation Framework”); and
  - b. the applicable planning consents had not been provided with SSF’s CfD application as required by Regulation 23. NGET said:

*“Alongside your Application you have provided minutes from a meeting which indicate a planning officer’s recommendation to the Planning Committee that permission be granted. However, these minutes do not constitute planning consent and accordingly your Application does not include applicable planning consents as required by Allocation Regulation 23.”*
5. SSF submitted a review notice dated 20 November 2014 to NGET disputing its non-qualification determination decision. In a non-qualification review notice dated 5 December 2014 NGET decided to uphold its decision in relation to the applicable planning

consents<sup>1</sup>. NGET reiterated the argument put forward in the non-qualification determination, namely:

*“We note your explanation that the planning application, though approved by the Local Planning Committee, was called in and a Public Inquiry was held in September 2014. The Secretary of State explicitly directed the Council not to grant planning permission without his authorisation. No evidence was provided in the Application that showed that the Secretary of State has made his decision on whether planning permission should be granted and therefore applicable planning consents as required by Allocation Regulation 23 are not in place. This part of the Delivery Body’s original decision is therefore upheld.”*

6. In a qualification appeal notice dated 12 December 2014 SSF submitted an application to the Authority to appeal the non-qualification review decision pursuant to Regulation 43.

#### **SSF’s reason for appeal**

7. In the qualification appeal notice SSF dispute the decision made by NGET on the grounds that, under Regulation 23(6)(b), it considers a general permission or consent or an exemption applies in respect of the relevant works. SSF said that:

*“The applicant [sic] has delivered on every element to generate a timely planning consent; the timescales for the decision as a consequence of the call-in procedure is not in the control of the applicant; and the planning consent is expected in parallel with the remaining elements of CFD allocation process”.*

8. SSF said that the context for the project being subject to this procedure is “exceptional” and that it was highlighted in the House of Commons Standard Note (SN/SC/0930) that “...very few applications are called-in every year”.

9. In summary, SSF present the following arguments to support their grounds for dispute:

- a. **Delivery of components to generate the required planning consent:** Minutes of the Swindon Borough Council Planning Committee on 10 December 2013 provided by the appellant indicate that unanimous approval was given for the planning permission. SSF said that they also provided appropriately resourced and timely information for the subsequent Public Inquiry that was held in September 2014 as a result of the

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<sup>1</sup> NGET decided not to uphold its decision in the relation to the provision of applicable Connection Agreements and this matter does not form part of SSF’s appeal.

planning application being called-in.

- b. **Timescales for the decision not now in the control of the applicant:** SSF outline that the decision to call-in the application was made on 2 April 2014, 3.5 months following the Local Planning Committee meeting. The call-in process was following a request by the Secretary of State to extend the 21 day period for considering if the application should be called-in. SSF also note that the call-in process with the Secretary of State does not have a statutory timescale.
- c. **Planning consent is expected in parallel with the remaining allocation process:** SSF said that since the Public Inquiry phase is now complete, a recommendation from the planning inspector and the Secretary of State decision is imminent.

## Our Findings

### Issue 1: Jurisdiction to Determine

- 10. SSF did not provide the required non-qualification determination or the non-qualification review notice in its qualification appeal notice within the required 5 working day time limit.
- 11. Regulation 43(1) states that where a non-qualification determination is upheld and the applicant disputes that determination it can apply to the Authority to determine that dispute.
- 12. Regulation 43(2) states that a qualification appeal must be made by notice to the Authority; in such manner as the Authority requires; and by no later than 5 working days after the date of the non-qualification review notice (the “appeals deadline date”). “Working days” is defined in Regulation 2 to mean 9 am to 5 pm on Mondays to Fridays (excluding bank holidays).
- 13. Regulation 44(2)(a) states that a qualification appeal must be accompanied by copies of the non-qualification determination and the non-qualification review notice.
- 14. The Authority received SSF’s qualification appeal notice at 4.19 pm on 12 December 2014; the fifth working day after the NGET non-qualification review notice was made (5 December 2014). The SSF qualification appeal notice did not include the NGET non-qualification determination or the non-qualification review notice. The Authority notified SSF of the missing documents at 5.03 pm and received both at 5.22 pm.

15. As the qualification appeal raised to the Authority was not complete by 5 pm on the fifth working day after the non-qualification review notice, SSF has not complied with Regulation 43(2)(c) and not made a valid qualification appeal pursuant to the Regulations. The Authority therefore considers that it does not have the jurisdiction to make a determination on SSF's appeal under Regulation 46 as the appeal was made out of time.

## Issue 2: Applicable Planning Consent

16. Regulation 23(6) states that where SSF considers that in respect of any relevant works any of the applicable planning consents do not apply; or a general permission or consent or an exemption applies, SSF must provide details of those matters to NGET.
17. In addition, page 49 of the Allocation Framework requires SSF to demonstrate that either the applicable planning consents do not apply, or that the planning consents are obtained for the relevant works.
18. SSF said that under Regulation 23(6)(b), in respect of the relevant works, a general permission or consent or an exemption applies and that details pertaining to the exemption are to be provided to NGET. However, details of a general permission or consent or an exemption were not provided. In addition, there is no evidence of an applicable planning consent.
19. Regulation 24 defines "applicable planning consents" to include "planning permission". "Planning permission" means in respect of relevant works in England and Wales, planning permission under Part 3 of the Town and Country Planning Act 1990 ("T&CPA 1990").
20. Section 58(1)(b) of the T&CPA 1990, planning permission may be granted "*...by the local planning authority (or, in the cases provided in this Part, by the Secretary of State) on application to the authority in accordance with a development order*". As highlighted in the non-qualification notice, planning permission was agreed by the Planning Committee, but the planning application was not granted because it was called-in by the Secretary of State.
21. In addition, paragraph 13 of a letter from the Secretary of State to Swindon Borough Council contains an explicit direction not to grant planning permission without his authorisation.

22. Further, and in relation to Regulation 23(6)(b), the Department of Energy & Climate Change (DECC) Contracts for Difference FAQs<sup>2</sup> outline at question 12 DECC's position that local council planning committee minutes are not sufficient to satisfy CfD eligibility criteria regarding planning consents.

## **Conclusion**

### **Issue 1: Jurisdiction to Determine**

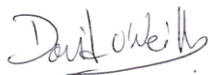
23. The appeal raised by SSF to the Authority was not a valid qualification appeal pursuant to Regulation 43 as it was made out of time. As such, the Authority does not have jurisdiction to make a determination under the Regulations.

### **Issue 2: Applicable Planning Consent**

24. In the alternative, and on the basis that a Court considers that we do have jurisdiction to consider the appeal, it is rejected because SSF does not have an applicable planning consent pursuant to Regulation 23. The approval by Swindon Borough Council Planning Committee does not constitute a general permission or consent or exemption pursuant to Regulation 23(6)(b).

## **Determination**

25. For the reasons set out above, the appeal raised to the Authority was not a valid qualification appeal pursuant to Regulation 43 and SSF does not have an applicable planning consent pursuant to Regulation 23. The Authority therefore determines that NGET's non-qualification determination in relation to SSF's CfD unit be upheld.



**David O'Neill**

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For and on behalf of the Gas and Electricity Markets Authority**

**19 January 2015**

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<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/353094/Contracts\\_for\\_Difference\\_-\\_FAQs\\_FINAL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/353094/Contracts_for_Difference_-_FAQs_FINAL.pdf)