



Making a positive difference  
for energy consumers

All interested parties

Direct Dial: 020 7901 1849  
Email: [transmissioncompetition@ofgem.gov.uk](mailto:transmissioncompetition@ofgem.gov.uk)

Date: 27 July 2015

Dear Colleague

## **The Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2015**

This letter introduces the revised Tender Regulations which will provide the framework for future offshore transmission competitive tender exercises expected to deliver billions of pounds of investment over the next decade. It also summarises our response to the responses we received to our consultation on the draft 2015 Tender Regulations published in March and the changes made to the 2015 Tender Regulations since the consultation closed.

The Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2015 (the "Regulations") have now been published and will come into force on 3 August 2015. They can be found on the [Legislation.gov.uk](http://legislation.gov.uk) website<sup>1</sup>. The 2015 Regulations set out the tender process framework for determining the person to whom an offshore transmission licence will be granted.

### **Context**

Offshore transmission plays an integral part in attaining the Government's target to provide 15% of the United Kingdom's energy needs from renewable sources by 2020. Efficient delivery of transmission assets for offshore wind energy projects forms a core part of the strategy for reaching this objective in the most cost effective manner.

The Department of Energy and Climate Change (DECC) together with Ofgem<sup>2</sup> developed a regulatory regime for the construction and operation of offshore transmission assets to facilitate this objective. Under the regime, Ofgem runs a competitive tender process to select and license Offshore Transmission Owners (OFTOs).<sup>3</sup> Since establishing the legal framework in June 2009, we have licensed twelve OFTOs for assets worth over £2.3 billion in total. A further three projects worth approximately £600m are currently in the tender process towards licence grant.<sup>4</sup>

<sup>1</sup> <http://www.legislation.gov.uk/ukxi/2015/1555/contents/made>

<sup>2</sup> The Office of the Gas and Electricity Markets Authority (the "Authority") is the regulator of gas and electricity markets in Great Britain. Ofgem is the Office of Gas and Electricity Markets, which supports the Authority in performing its statutory duties and functions. For ease of reference, Ofgem is used to refer to Ofgem and the Gas and Electricity Markets Authority (The Authority) in this document.

<sup>3</sup> This process is run by Ofgem under the Electricity Act 1989 (the "Act") and Regulations made under the Act which underpin the regime.

<sup>4</sup> The current Regulations in force are the Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2013, ("the 2013 Regulations").

The offshore transmission regime is delivered in two parts: a transitional and an enduring regime. The transitional regime applied to offshore transmission projects constructed by offshore generator developers (“developers”) which met the qualifying requirements under the Regulations before 31 March 2012<sup>5</sup>. The final transitional tender exercise, for the offshore transmission assets for West of Duddon Sands, is currently at the Preferred Bidder stage and is expected to reach licence grant later in the summer.

Any projects meeting the qualifying requirements under the Regulations after 31 March 2012 are considered to be part of the enduring regime. Under the enduring regime, developers may choose either the generator build option or the OFTO build option.

Under the generator build option, the developer will design and construct the offshore transmission assets before they are transferred to an OFTO, which will operate, maintain and decommission the transmission assets.

Under the OFTO build option, the developer will obtain the connection agreement and undertake high level design and preliminary works associated with the offshore transmission assets before transferring these to an OFTO, which will be responsible for the construction and ongoing operation of the offshore transmission assets.

### **Legal framework for the Regulations**

Section 6C of the Electricity Act 1989 (‘the Act’) enables the Authority to make regulations which are appropriate for facilitating the making of a determination on a competitive basis of the person to whom an offshore electricity transmission licence is to be granted. The making of these Regulations is not subject to a specific parliamentary procedure but the approval of the Secretary of State is required to make them.

The first set of Tender Regulations came into force in June 2009, after extensive consultation with stakeholders on the design of the offshore transmission regime. The Regulations were revised in 2010, and subsequently in 2013, in order to reflect evolution of the offshore transmission regime. The 2015 Regulations were made on 11 July 2015 and will come into force on 3 August 2015.

### **Arrangements for projects qualified under the 2013 Regulations**

The 2015 Regulations set out the arrangements for projects which qualified under the 2013 Regulations, but whose tender exercises have not yet concluded.

At the point at which the 2015 Regulations come into force:

- a) where a project has qualified under the 2013 Regulations and we have issued the notice to all qualifying bidders of the payment they need to make to the Authority in relation to the invitation to tender (ITT) stage, the tender exercise for that project will continue to be held under the 2013 Regulations; or
- b) where a project has qualified under the 2013 Regulations but we have yet to issue the notice to all qualifying bidders of the payment they need to make in relation to the ITT stage, the remainder of the tender exercise for that project will be held under the 2015 Regulations.

This is because we consider that where the ITT stage has commenced for a particular qualifying project, it has progressed sufficiently far through the tender process and the tender exercise should continue under the same Regulations.

---

<sup>5</sup> This timeframe was stipulated in the 2010 Regulations.

All three ongoing tender exercises (for the offshore transmission assets for West of Duddon Sands, Westernmost Rough and Humber Gateway) will therefore continue to be held under the 2013 Regulations as they have all passed the point described in (a) above.

## **Overview of changes in the draft 2015 Regulations and consultation responses**

The key changes from the 2013 Regulations are to:

- **Enable an extended OFTO build framework:** this is the most significant change to the 2013 Regulations. This change reflects the policy positions published in December 2014 in the document 'OFTO build: Providing additional flexibility through an extended framework'<sup>6</sup> (the "December 2014 publication") which introduced an extended OFTO build framework to provide flexibility to respond to both the current and future requirements of offshore developers.
- **Implement changes to improve the overall efficacy of the tender process:** this includes minor amendments to the tender process in relation to generator build tender exercises to help achieve greater clarity for participants, enable greater efficiencies and ensure the 2015 Regulations continue to meet the objectives of the offshore transmission regime.<sup>7</sup>
- **Implement minor drafting amendments:** these smaller changes do not signify changes to our policies, but are to ensure the Regulations align with changes made to other pieces of legislation, remain fit for purpose and improve the drafting to make the Regulations easier to read.

The 2015 Regulations have been finalised following a 6 week consultation in March 2015. Stakeholders were invited to provide feedback on all aspects of the draft Regulations, including whether they considered them to give proper effect to the final policy positions set out in the December 2014 publication. We received three responses to the consultation, all of which were non-confidential, and can be found on our website<sup>8</sup>. The key issues raised by respondents during the consultation and our response to these, are summarised in Annex 1 to this letter. These responses predominantly related to detailed aspects of OFTO build policy outside the scope of the Regulations, such as tender costs. We would provide more detailed information on these aspects before an OFTO build tender commenced and once the details of the project to be tendered are known.

### ***Changes made since the March consultation***

Following consideration of the consultation responses, we have undertaken a detailed review of the 2015 Regulations. This has resulted in a number of drafting amendments that are intended to provide greater clarity about the tender process and ensure the policy intent is reflected in the drafting.

We also made a number of changes where we considered that the drafting could be improved to make the 2015 Regulations easier to read and reflect good drafting practice. These changes do not represent a change to tender process or policy, but aim to simplify

---

<sup>6</sup> OFTO Build: Providing additional flexibility through an extended framework (December 2014)  
<https://www.ofgem.gov.uk/publications-and-updates/ofto-build-providing-additional-flexibility-through-extended-framework>

Non-confidential stakeholder responses to this document are also available on this webpage.

<sup>7</sup> The objectives of competitive tenders for offshore transmission licences are: the delivery of transmission infrastructure to connect offshore generation, provision of certainty and best value to consumers through the competitive process, and attracting new entrants to the sector.

<sup>8</sup> <https://www.ofgem.gov.uk/publications-and-updates/draft-electricity-competitive-tenders-offshore-transmission-licences-regulations-2015-consultation-0>

the drafting of the 2015 Regulations. Where these changes appear more significant, we have explained our rationale.

The key changes are as follows:

**Definition of bidder:** to prevent a circular definition we have removed the reference to a bidder group and refer instead to any person or persons acting together.

**Definition of generator build tender exercise:** this definition has been amended to provide further clarity.

**Cost recovery:** to simplify drafting the provisions detailing our approach to cost recovery, included in schedule 10 of the draft 2015 Regulations, have been moved so that they are now included within the body of the Regulations. This change improves the ease of use the 2015 Regulations. This has resulted in amendments to regulations 5(1) and (2), 7(1) and (3), 9(5) (a)-(e), 10(a) and (b), 16(2), 18(1), 21(6), 23(5), 26(2), (3), (4), (5) and (6), 27(2)(a) and (b) and (3), 28(4)(a) and (b), 29(6)(b), 30(1), (2), (3), (4) (5), (6), (7) and (8), 31, 32(2), 33(6), Schedule 3(1)(e).

**Calculation and payments of costs incurred in connection with both generator build and OFTO build tender exercises:** the drafting in these sections in the 2015 Regulations has been amended in the following ways:

- to remove unnecessary repetition from the drafting in these sections, and to improve the ease of reading we have made changes to paragraphs 3, 5 and 7 of regulation 4; paragraphs 1 and 2(b) of regulation 5; paragraphs 1(a), 5, 7, 8, 9 and 10 of regulation 6; and paragraphs 1 and 3 of regulation 7.
- Regulation 6 has also been updated to provide more clarity about costs incurred in connection with preliminary works and construction phase contracts for an OFTO build tender exercise.

**Re-imbusement of ITT bid costs:** following stakeholder feedback we have provided more clarity in the 2015 Regulations about how we would notify all tender participants of the total bid costs to be reimbursed and the process for reimbursing these costs if we determined it was appropriate to apply this provision. This has resulted in changes to paragraphs 11 of regulation 6(11), 1(b) of regulation 14, 6 of regulation 26, 4(b) of regulation 27 and 6(b) of regulation 29.

**Reserve Bidder:** following stakeholder feedback, the 2015 Regulations provide more clarity about the process of moving from a Preferred Bidder (PB) to a Reserve Bidder (RB) in the event that the Authority determines to withdraw the notice to the PB. This has resulted in changes to the drafting of paragraphs 8 and 9 of regulation 21.

Annex 2 to this letter provides a schematic of how the project qualification and tender entry stages of the tender process would differ for generator build and OFTO build tender exercises. This has been included for information purposes only, to provide stakeholders with more clarity of how the Regulations will operate for the early stages of a tender.

The 2015 Regulations are provided in Annex 3 to this letter. Annex 4 provides a copy of the 2015 Regulations with all the changes marked up against the 2013 Regulations and Annex 5 a copy of the 2015 Regulations with all changes marked up against the draft 2015 Regulations consulted on in March. These are provided to assist stakeholders in reviewing the changes. The explanatory notes at the end of the draft Regulations set out the overall content of the Regulations and how they fit together.

## Next Steps

There are certain areas set out in our December 2014 publication on OFTO build, and in relation to detailed arrangements for generator build, which do not require implementation through the 2015 Regulations. These are not within the scope of this letter. We intend to communicate further detail on these as follows:

- **Tender documentation:** the 2015 Regulations refer to various stage-specific tender documents to be published for a tender exercise (e.g. the pre-qualification questionnaire). In addition to these documents we will also publish guidance and necessary administrative details relating to the tender process and other relevant documents. These documents will be published in due course and ahead of future generator build and OFTO build tender exercises; and
- **The licence:** to be granted to an OFTO following a generator build or OFTO build tender exercise. We will publish further details on the licence in advance of the next tender exercise commencing.

We currently expect the next generator build tender round to commence in early 2016. For further information on offshore transmission, please visit our website<sup>9</sup> or contact [TransmissionCompetition@ofgem.gov.uk](mailto:TransmissionCompetition@ofgem.gov.uk).

Yours sincerely

**Steve Beel**

**Associate Partner, Electricity Transmission**

## Annexes

1. **Consultation responses on the draft 2015 Regulations**
2. **Schematic of the project qualification and tender entry stages of the tender process for generator build and OFTO build tender exercises**
3. **The Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2015**
4. **The Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2015, showing tracked changes to the Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2013**
5. **The Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2015, showing tracked changes to the Draft Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2015 published for consultation**

---

<sup>9</sup> <http://www.ofgem.gov.uk/NETWORKS/OFFTRANS/Pages/Offshoretransmission.aspx>

## **Annex 1- Consultation responses on the draft 2015 Regulations**

The 2015 Regulations have been finalised following a 6 week consultation in March 2015. Stakeholders were invited to provide feedback on all aspects of the draft Regulations, including whether they considered them to give proper effect to the final policy positions set out in the December 2014 publication. The key issues raised in relation to the drafting of the Regulations are summarised below. Note that we have not summarised below aspects of responses relating to detailed aspects of OFTO build policy outside the scope of the Regulations, such as the specific amount of tender costs, or the structure/amount of the tender revenue stream in the OFTO licence. We would provide more detailed information on these aspects before an OFTO build tender commenced and once the details of the project to be tendered are known.

### *Project Qualification & Tender Entry Conditions*

The 2015 Regulations extend to OFTO build projects the existing provision, which previously only related to generator build tenders, to qualify an OFTO build project where the developer has met most of the relevant qualifying requirements and the Authority is satisfied that they have appropriate arrangements in place to meet certain outstanding requirements within a reasonable timeframe (Schedule 1, paragraph 3). This change is intended to provide additional flexibility in meeting certain requirements that may take longer to finalise before commencement of a tender exercise. The 2015 Regulations also remove a tender entry condition relating to providing planned submission dates for outstanding consents (Schedule 2 paragraph 1(j)), as we consider that this is covered by an existing OFTO build project qualifying requirement (Schedule 1, paragraph 1(c)).

One respondent recognised the benefit of extending the period of time in which certain outstanding project qualifying requirements can be met without delaying start of a tender exercise. However, they suggested that potential bidders may require assurances about when the developer intends to meet these requirements, such as planned submission dates for outstanding consents, before being comfortable entering or progressing through the tender process. The Regulations contain an existing project qualifying requirement (Schedule 1, paragraph 1(c)) which requires a developer to provide written notice of how they intend to obtain any outstanding preliminary works. There is also a tender entry condition requiring the developer to provide an undertaking to the Authority to obtain all notified preliminary works (Schedule 2, paragraph 1(e)). We consider that these requirements will provide assurance to potential bidders that the Authority will not issue a notice to commence the tender exercise unless this information has been provided to its satisfaction.

### *Developer payment for an OFTO build tender*

The 2015 Regulations introduce an additional developer payment, for OFTO build tenders where any construction phase contract will be provided. This is to recover the costs the Authority will incur in reviewing the terms of the construction phase contracts at project qualification, as well as undertaking an initial estimate of the economic and efficient costs in relation to any such construction phase contracts. Two respondents highlighted that it will be important for developers to have a clear understanding of how much this payment will be before confirming their decision to trigger an OFTO build tender. In undertaking the assessment of construction phase contracts, the Authority will incur costs which must be recovered. The extent of these costs will depend on the number, scope and format of the construction phase contracts a developer intends to offer for a tender. Developers may apply to the Authority for a determination of these costs under regulation 9. In our December 2014 publication we stated our intention to work closely with developers, where an appetite for OFTO build exists, and prior to a developer's formal submission of a request to qualify a project.

### *Developer involvement throughout the tender process*

The 2013 Regulations introduced an obligation on the developer to undertake to assist the Authority during any evaluation at the ITT and best and final offer (BAFO) stages of an OFTO build tender exercise. This supplemented the existing tender entry condition requiring the developer to undertake to respond to all queries from the Authority, whether arising from the Authority or a third party. Although neither of these provisions were amended in the draft 2015 Regulations, one respondent suggested that more clarity should be given in the Regulations about the involvement required from developers, particularly for an OFTO build tender, to respond to feedback provided by bidders and qualifying bidders. We consider that the Regulations provide sufficient clarity about the overall involvement required from developers throughout the tender process. We would set out further detail in the stage-specific documents for each tender exercise on the specific requirements on developers as part of that stage (e.g. in terms of bidder/developer sessions at the ITT stage).

One respondent also suggested introducing negotiation meetings between bidders and developers, prior to the appointment of a PB. There are currently structured opportunities for developers and bidders to engage during the ITT stage, at events arranged by Ofgem. We do not consider that it is appropriate to set out the detail of these arrangements in the Regulations, but will consider future arrangements as part of a lessons learned exercise after TR3.

### *Re-imburement of ITT bid costs*

The 2015 Regulations extend to generator build tenders the scope of an optional provision, which previously only related to OFTO build tenders, for a reimbursement of the costs, or a proportion of the costs, incurred by a qualifying bidder in the preparation of a tender submitted at the ITT stage ('bid costs'). This is intended to provide us with an option to be used where we felt this was necessary to ensure a competitive market for a tender exercise.

Two respondents suggested that the level of the costs to be refunded should be capped to a fixed amount to ensure that the developer has visibility of all the costs which they are liable for at the start of the tender and that these costs do not escalate. They suggested that without such a cap this could become a barrier to developers selecting an OFTO build option. We have since reviewed the drafting and have clarified in the 2015 Regulations (regulations 6(11), 14(1)(b), 26(6), 28(4)(b), 29(6)(b)) that if we determined it was appropriate to apply this provision, we would notify developers and potential bidders of the amount to be reimbursed ahead of the commencement of a tender round. As this provision relates only to bid costs incurred at the ITT stage, only the costs (or a proportion of the costs) of qualifying bidders who complete an ITT submission could be considered.

### *Preferred bidder stage*

The 2015 Regulations introduced a provision (regulation 21(5)) which will enable the Authority to determine that it may, in certain circumstances, require the PB to run a funding competition as part of the PB matters. One respondent agreed that requiring the PB to run a funding competition under certain circumstances may be beneficial; however suggested that this should be limited to circumstances where the proposed funding solution is mostly or entirely debt based, and that this limitation should be reflected in the Regulations. In our cover letter to the consultation on the draft 2015 Regulations, we stated that we would only exercise this requirement in cases where we consider there may be merit in having certain terms of the funding solution competed closer to the point of financial close. We do not consider it appropriate to limit the provision in the Regulations (e.g. to debt funding) as we consider that the Regulations should provide flexibility to take account of market conditions at the time of a tender.

The respondent also requested confirmation that anticipated costs savings that may be achieved from a funding competition will not form part of the evaluation of the ITT submissions and subsequent determination of the PB. The matters referred to in regulation 21(4) & (5) are those which the PB is expected to resolve before becoming the Successful Bidder (SB) and therefore would not influence the determination of the PB.

One respondent questioned whether the requirement in regulation 21(4)(b)(i), that the PB has established arrangements to construct the transmission assets and to provide transmission services, is necessary for an OFTO build tender exercise following the "Generator EPC" option, as the construction phase contract will encompass this. We consider that the OFTO will be responsible for construction of the transmission assets under any OFTO build option, and therefore that this provision will be relevant to every OFTO build tender exercise.

Another respondent expressed concern that a funding competition or BAFO stage, if run, could risk causing a delay to the tender process which may put developers off selecting an OFTO build option. They suggested that a 'back stop date' be introduced by which time the PB must have in place all the arrangements necessary to become the SB. The Regulations already require the PB to resolve the PB matters by a date specified by Ofgem. In the event that the PB fails to meet this obligation, Ofgem has the right to discontinue the tender exercise with the PB and go to the RB, if one has been appointed. Although this respondent raised this particular concern in relation to an OFTO build tender exercise, when running any tender exercise, Ofgem will always have due regard to the impact of running a BAFO stage or a funding competition at the PB stage, on the overall delivery timetable for the project.

Two respondents expressed concern that a PB may withdraw at a late stage in the tender process, which would pose a risk to developers. One suggested that the PB be required to pay a security to cover the developer's costs incurred in this eventuality. We consider that there are sufficient incentives (financial and reputational) in place to ensure that the PB will complete the arrangements necessary to become the SB and therefore do not consider a further measure necessary. We note that there have been no instances of PB withdrawal in the tenders completed to date.

#### *Reserve Bidder*

Two respondents requested clarity about the process of moving from a PB to a RB. The Authority will appoint a RB where it considers this appropriate based on the ITT submissions received from the qualifying bidders. For the TR3 tender exercise for Westermost Rough for example, the RB was announced at the same time as the PB<sup>10</sup>. In the event that the Authority determines to withdraw the notice of the PB<sup>11</sup>, it will appoint the RB as the new PB and publish a notice to that effect.

---

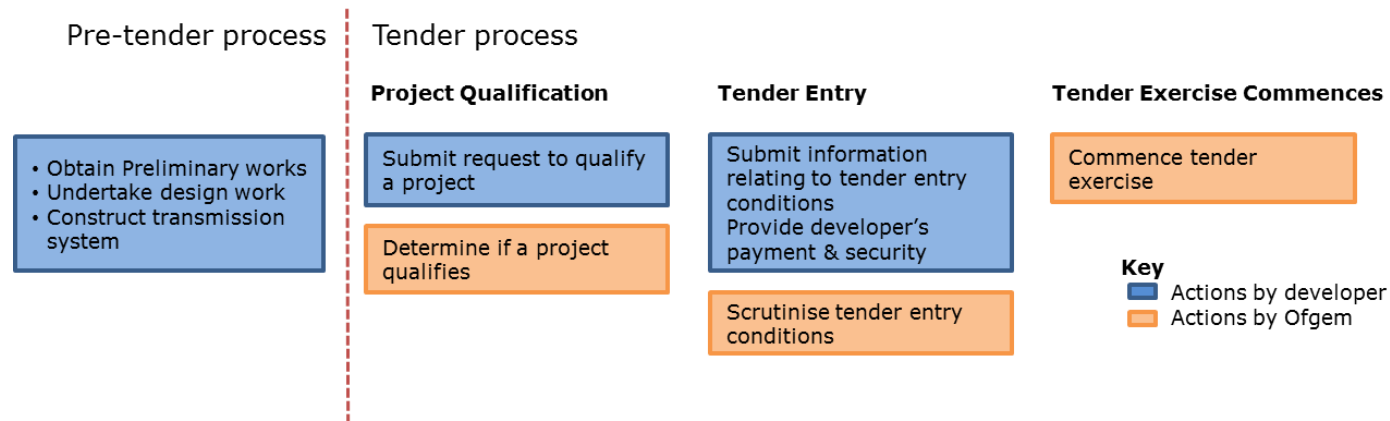
<sup>10</sup> Ofgem press release 15 May 2015 <https://www.ofgem.gov.uk/publications-and-updates/ofgem-appoints-preferred-bidder-westermost-rough-offshore-transmission-assets>

<sup>11</sup> The circumstances where the Authority would make this determination are: if the PB fails to resolve the PB matters; fails to make the payment of the PB fee; withdraws from the tender exercise or is disqualified.



## Annex 2 - Schematic of the project qualification and tender entry stages of the tender process for generator build and OFTO build tender exercises

**Figure 1 Project Qualification & Tender Entry for a generator build tender exercise**



**Figure 2 Project Qualification & Tender Entry for an OFTO Build tender exercise**

