

DETERMINATION PURSUANT TO REGULATION 71(3)(b) OF THE ELECTRICITY CAPACITY REGULATIONS 2014 (AS AMENDED) FOLLOWING APPEALS MADE TO THE AUTHORITY¹ PURSUANT TO REGULATION 70(1)(a)

Introduction

1. This determination relates to appeals made by Rydberg Development Company Limited (“RDCL”) against reconsidered decisions made by the EMR delivery body (National Grid Electricity Transmission plc (“NGET”)) in respect of the following Capacity Market Unit (CMU):
 - (1) TOWN03
2. The appellant states that two applications have been made for this CMU under different identifiers: *“The two CMU applications are for the same CMU on the same site. There are two separate [sic] applications both of which are currently pre-qualified into the T-1 Auction”*². The other application was made under the identifier TOWN04.
3. Pursuant to regulation 71(3) of the Electricity Capacity Regulations 2014 (as Amended) (the “Regulations”), where the Authority receives an appeal notice that complies with regulation 70, the Authority must review a reconsidered decision made by NGET.

Appeal Background

4. RDCL submitted applications for TOWN03 and TOWN04 in respect of the 2016 Supplementary Auction³.
5. In the Notification of Prequalification Decision, dated 23 September 2016 (the “NGET Prequalification Decision”), NGET Conditionally Prequalified TOWN03 for the Supplementary Auction:

¹ References to the “Authority”, “Ofgem”, “we” and “our” are used interchangeably in this document. The Authority refers to GEMA, the Gas and Electricity Markets Authority. The Office of Gas and Electricity Markets (Ofgem) supports GEMA in its day to day work.

² RDCL refer to the “T-1 Auction” which is also named the “Supplementary Auction” which we use throughout this document (see Footnote 3)

³ The definition of supplementary auction has been inserted into the Regulations by SI 2016/742 amending regulation 2(1)(b) thus: *‘after the definition of “storage facility” insert— “supplementary auction” has the meaning given in regulation 10(1)(ba);’* and adding to regulation 10(1) as follows: *‘(ba) by 1st August 2016, whether a T-1 auction is to be held in the auction window starting on 1st September 2016 (a “supplementary auction”)*’

“As per Rule 6.6, the Financial Commitment Milestone has not been achieved; therefore this application is Conditionally Prequalified and will need to provide credit cover as above.

As per Rule 3.7.3(c), Distribution Connection Agreement has been deferred; therefore this application is Conditionally Prequalified and will need to provide credit cover as above.

As per Rule 3.7.1(a)(ii), Planning Consents have been deferred; therefore this application is Conditionally Prequalified.”

6. RDCL submitted a request for reconsideration of the initial prequalification decision (the “Dispute Notice”) on 30 September 2016 which stated:

“The wrong auction was entered however the declarations and site meet the extended years criteria and minimum capital spend requirements for a 15 year t-4 contract. [sic]”

7. NGET issued a Notice of Reconsidered Decision on 14 October 2016. In that Notice, NGET explained that the dispute was not accepted but TOWN03 remained conditionally prequalified for the Supplementary Auction:

“We have not accepted your dispute.

Rules 3.3.4 and 3.3.6 require that the Applicant submit a separate application for each auction in which the Applicant wishes to prequalify the CMU.

There was no Application received for the T-4 auction during the Prequalification Window (Rule 3.3.7).

The CMU is still Conditionally Prequalified for the T-1 auction”

8. RDCL submitted an appeal notice to the Authority on 21 October 2016 under regulation 70 of the Regulations.
9. RDCL claims that issues during prequalification had led to an error but that their intent was correct, as the Applicant had submitted two separate applications to NGET but in each instance had selected the Supplementary Auction.

RDCL's Grounds for Appeal

10. RDCL disputes the decision on two grounds.

First Ground of Appeal

11. The first ground is that the Applicant intended to comply with rule 3.3.4

“An Applicant must make separate Applications for a Capacity Auction with respect to separate CMUs.”

and rule 3.3.6

“For each CMU which an Applicant wishes to Prequalify, and for each Capacity Auction, the Applicant must:

submit a separate application form and the required Additional Information (together, an “Application”) to the Delivery Body;”

12. RDCL submitted two separate applications (one for TOWN03 and one for TOWN04) in order to comply with rule 3.3.4 and 3.3.6 but one of the submissions was incorrect, having been entered into the Supplementary Auction rather than the T-4 auction.

Second Ground of Appeal

13. The second ground of dispute is that NGET’s prequalification IT system was unsuitable and that no guidance was provided, which led to the errors occurring.

14. RDCL originally submitted one application, which was intended to cover both the T-4 Auction and Supplementary Auction. As part of the application process the CMU was required to submit a construction plan with the earliest and latest dates for the completion of each construction milestone. RDCL submitted the earliest date based on the possibility of getting an agreement in the Supplementary Auction and the latest date based on the possibility of getting an agreement in the T-4 auction. RDCL states there was no guidance or rules saying this approach could not be taken.

15. NGET told the Applicant that this approach was not suitable, which RDCL claims is because the milestone dates in the construction plan could not apply to both auctions. RDCL state that duplicate CMUs then had to be created as a work around, which was driven by constraints in the IT system, noting *“This has then allowed an error to occur.”*

The Legislative Framework

16. The Electricity Capacity Regulations 2014 were made by the Secretary of State under the provisions of s27 of the Energy Act 2013.

17. The Regulations set out the duties upon on the Delivery Body (NGET) when it determines eligibility. Regulation 22(a) specifies that each application for prequalification must be determined in accordance with the Capacity Market Rules.
18. Regulations 68 to 72 set out the process and the powers in relation to Dispute Resolution and Appeals.

The Capacity Market Rules

19. The Capacity Market Rules were made by the Secretary of State pursuant to powers set out in s34 of the Energy Act 2013.
20. Rule 3.3.6 provides that:

*“For each CMU for which an Applicant wishes to Prequalify, **and for each Capacity Auction, the Applicant must:***

- a) Submit a separate application form and the required Additional Information to the DB;*
- b) Comply with the requirements of the Application Process; and*
- c) Cooperate with the DB and other Admin Parties in the execution of their duties.” (bold added)*

21. Rule 3.3.7 provides that:

“An Application will not be considered or accepted unless it is submitted;

- a) During the prequalification window; and*
- b) In accordance with:*
 - (i) the Regulations and the Rules.*
 - (ii) the timetable and requirements for submission set out in the Auction Guidelines applicable to the relevant Capacity Auction;*

....”

22. The prequalification window is defined as *“for any Capacity Auction, the period specified in the Auction Guidelines within which applications for prequalification are to be made.”* (rule 1.2, page 29).

23. Rule 4.4.1 provides that:

*“The Delivery Body must, for each CMU for which an Application has been received, determine whether the CMU has prequalified for **the** Capacity Auction.”
(bold added)*

24. Rule 4.2.3 provides that:

“If an Application and Opt-out Notification, or more than one Application or Opt-out Notification is received with respect to a CMU during a Prequalification Window, the most recent in time to be submitted will prevail and any earlier Application or Opt-out Notification will be deemed not to have been submitted.”

Our Findings

First Ground

25. RDCL has requested that TOWN04 be left to apply for the Supplementary Auction and TOWN03 be moved to apply for the T-4 Auction. However, a separate Application is required for a CMU in respect of each auction. This is set out in rule 3.3.6(a) which states that “for each Capacity Auction, the Applicant must... submit a separate application form and the required Additional Information (together, an “Application”)”. This provision means that prequalification is a specific exercise for each auction.
26. Rule 3.3.7(a) states that “An Application will not be considered or accepted unless it is submitted... during the Prequalification Window”. As NGET did not receive a specific Application for TOWN03 for the T-4 auction during the Prequalification Window it would not be able to prequalify TOWN03 after the Prequalification Window had closed.
27. Further, as the Applicant selected the Supplementary Auction on both occasions, in accordance with rule 4.2.3 the latter application has had the effect of cancelling the earlier application and prevailing.

Second Ground

28. RDCL have argued that “The inadequacy of the sytem [sic] to allow a CMU to be entered into both T-1 and T-4 auction lead [sic] to an error in submission” and that “The duplication was only carried out due to the Prequalification system not functioning as requires [sic].”
29. Rule 3.3.6(a) makes it clear that a separate application must be submitted for each auction that an Applicant wishes to Prequalify for. The IT system was therefore not required to allow a single Application to be submitted for more than one Auction.

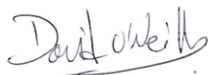
30. RDCL also state that *“the guidance notes and communications did not state this requirement.”* We note that page 55 of the Prequalification Application User Support Guide, available on NGET’s website, states that *“To participate in a specific Capacity Auction, an Application needs to be made for each CMU”*.
31. It is the Applicant’s responsibility to ensure that an Application to Prequalify is made in accordance with the Rules and that when information is submitted it should be done in accordance with any guidance provided by the Delivery Body.

Conclusion

32. NGET reached the correct decision to not Prequalify TOWN03 for the T-4 Capacity Auction on the basis that no application was made for T-4 auction in respect of this CMU but instead for the Supplementary Auction.
33. On Ground 1: NGET has correctly interpreted and applied the provisions of rule 4.2.3 and rule 3.3.7, in particular that *“an Application will not be considered or accepted unless it is submitted during the Prequalification Window.”*
34. On Ground 2: In accordance with rule 3.3.6(a) applicants were required to submit separate Applications *“For each CMU which an Applicant wishes to Prequalify, and for each Capacity Auction”*.

Determination

35. For the reasons set out in this determination the Authority hereby determines pursuant to regulation 71(3) that the NGET Reconsidered Decision to Conditionally Prequalify the TOWN 03 for the Supplementary Auction be upheld.



David O’Neill

Head of Security of Supply

For and on behalf of the Gas and Electricity Markets Authority

2 December 2016