

**DETERMINATION PURSUANT TO REGULATION 71(3)(b) OF THE ELECTRICITY CAPACITY REGULATIONS 2014 (AS AMENDED) FOLLOWING AN APPEAL MADE TO THE AUTHORITY PURSUANT TO REGULATION 70(1)(a)**

**Introduction**

1. This determination relates to appeals made by GBSL Nursling Limited (“the appellant”) against reconsidered decisions made by the EMR Delivery Body (National Grid Electricity Transmission plc (“NGET”)) in respect of the following Capacity Market Unit (CMU):
  - a) GBSL Nursling (GB2N17)
2. This decision deals with all of the appeals for the CMU listed above as they are substantively in respect of the same issue and differ only in so far as concerns the T-1 or T-4 auctions.
3. Pursuant to Regulation 71(3) of the Electricity Capacity Regulations 2014 (as amended) (the “Regulations”), where the Authority<sup>1</sup> receives an appeal notice that complies with Regulation 70, the Authority must review a reconsidered decision made by NGET.

**Appeal Background**

4. The appellant submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the 2018 T-1 and T-4 Auctions.
5. NGET then issued a Notification of Prequalification Decision dated 11 November 2017 (the “Prequalification Decision”). NGET rejected the CMU on the following grounds:

*“Capacity Market Rule 3.4.1 (ca) states that where an Applicant is a member of a Group, the name of the direct Holding Company for the Applicant is required. The*

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<sup>1</sup> 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.

*Parent Company has not been specified despite submitting a letter that identifies Grid Battery Storage Limited as 100% subsidiary in the Group at time of application.*

*The Prequalification Certificate that you have submitted in your application does not conform with the Prequalification Certificate as defined in CM Rule 1.2 as Exhibit A for the following reason: The VAT number has not been stated, or if not applicable, NA has not been stated. Whether the company is SME or Large Enterprise has not been clarified.*

*The Certificate of Conduct was not submitted for this Application in accordance with CM Rule 3.12.4, which states Each Application must be accompanied by a Certificate of Conduct signed by two directors of the Applicant. The Certificate of Conduct is defined in 1.2 as Exhibit C and must be signed by two directors. The Certificate of Conduct submitted with this Application refers to the incorrect Company name, "GBSL Dorking Limited" and the incorrect Registration number."*

6. The appellant submitted a request for reconsideration of the Prequalification Decisions before the deadline of 20 November 2017.
7. NGET issued a Notice of Reconsidered Decision on 1 December 2017 which accepted the appellant's first two grounds, but rejected the dispute as:

*"The Certificate of Conduct was not submitted for this Application in accordance with CM Rule 3.12.4, which states Each Application must be accompanied by a Certificate of Conduct signed by two directors of the Applicant. The Certificate of Conduct is defined in 1.2 as Exhibit C and must be signed by two directors. The Certificate of Conduct submitted with this Application refers to the incorrect Company name and the incorrect Registration number."*

8. The appellant then submitted an Notification of Appeal to the Authority on 7 December 2017 under regulation 70 of the Regulations.

#### **GSBL Nursling Limited's Grounds for appeal**

9. GSBL Nursling Limited disputes the decision, arguing it should have been able to correct the information on the following grounds.

#### **Ground 1**

10. As required by Rule 3.12.4, the submitted Certificate of Conduct was signed by two directors of the appellant. The appellant notes that:

*“The Certificate of Conduct was signed by Andrew Blumfield and James McKellar who are shown to be two Directors of GSBL Nursling Limited by the GSBL Nursling Limited Prequalification Certificate that formed part of Application. Additionally, the GSBL Board Minutes dated 14 August 2017 confirm this.”*

#### **Ground 2**

11. The appellant confirmed its compliance in the part “Further Declarations” of the Company and CMU Summary Page of the Application.
12. In its request for reconsideration of the Prequalification Decision to NGET, the appellant refers to the minutes of the Board meeting of the Group holding company Grid Battery Storage Limited (GBSL) held on 14 August 2017 to review and sign the Certificate of Conduct prior to submission.

#### **Ground 3**

13. The company name and registered number were incorrectly stated, but verifiable in other sections of the Prequalification Application. The appellant states that:

*“The correct company name and registered number GBSL Nursling Limited (company number 10264197), were clearly stated in the Company Details on the Company and CMU Summary tab of the Application (attachment 10 to this appeal, page 3); on the GBSL Nursling Limited Prequalification Certificate (attachment 8 to this appeal) that formed part of Application; and on the associated Note on Group (attachment 9 to this appeal).”*

### **The Legislative Framework**

14. The Electricity Capacity Regulations 2014 were made by the Secretary of State under the provisions of section 27 of the Energy Act 2013. The Capacity Market Rules were made by the Secretary of State pursuant to powers set out in section 34 of the Energy Act 2013.
15. The Regulations set out the duties upon NGET when it determines eligibility. Regulation 22(a) specifies that each application for prequalification must be determined in accordance with the Capacity Market Rules.
16. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
17. In particular, Regulation 69(5) sets out the requirements for NGET reconsidering a prequalification decision:

*69(5) Subject to [regulations 29(10A) and 87(7)], in reconsidering a prequalification decision or a decision to issue a termination notice or a notice of intention to terminate, the Delivery Body must not take into account any information or evidence which—*

- (a) the affected person was required by these Regulations or capacity market rules to provide to the Delivery Body before the decision was taken; and*
- (b) the affected person failed to provide in accordance with that requirement.*

### **Capacity Market Rules**

18. Rule 1.1 defines the Certificate of Conduct as follows:

*Certificate of Conduct means a certificate of conduct in the form set out in Exhibit C.*

19. Rule 3.12.4 outlines that each Prequalification Application must be accompanied by an Exhibit C:

*Each Application and each Opt-out Notification must be accompanied by a Certificate of Conduct signed by two directors of the Applicant or the person submitting the Opt-out Notification (as applicable).*

20. Rule 4.4.2(a) outlines that NGET must not prequalify a CMU if the Application for Prequalification has not been submitted in accordance with the Rules:

*4.4.2 Subject to Rule 3.8.1A(c)(ii), the Delivery Body must not Prequalify a CMU where:*

- (a) it is aware that the Application has not been completed or submitted in accordance with the Rules.*

### **Our Findings**

21. We address the appellant's grounds together as they all relate to the argument that NGET should have considered that, even though the submitted Certificate of Conduct did not refer to the correct Applicant, this should not have prevented the appellant from prequalifying for the capacity market auctions.
22. As preliminary remarks, it is worth noting that Rule 3.12.4. requires each application to be accompanied by a Certificate of Conduct signed by two directors of the appellant. The Certificate of Conduct is defined in Rule 1.1 as the form set out in Exhibit C. In order to complete the Certificate of Conduct, a company is required to enter their name, registration number, address and the signatures of two directors to confirm the statements in the form.

23. The appellant accepts that it mistakenly submitted the Certificate of Conduct for its sister company, GBSL Dorking Limited. It requested that NGET change the name and the registered number on the certificate to read the name and the registration number of GBSL Nursling Limited.
24. However, it should be noted that the purpose of the certificate is to confirm the appellant has complied with the conduct requirements set by the Capacity Market Rules. By submitting the Certificate of Conduct for its sister company, it meant the Delivery Body was not in a position to assess that the appellant had complied with the conduct requirements, and the purpose of the certificate was defeated.
25. Therefore, we consider that the appellant has not submitted the relevant Certificate of Conduct and that the certificate should be considered missing. Changing the name and registration number of the certificate would amount to submitting a new certificate.
26. We furthermore took into account Regulation 69(5) which requires that in reconsidering a prequalification decision, the Delivery Body must not take into account any information or evidence, which the appellant was required to provide to the Delivery Body and the appellant failed to provide in accordance with that requirement.
27. As the Certificate of Conduct was required to be provided to the Delivery Body by virtue of Rule 3.12.4, we do not believe it was possible for NGET to accept the appellant's request to amend the name of the company and registration number on the exhibit, which would have amounted to submitting a new Certificate of Conduct.
28. With regards to the three grounds listed by the appellant to support its argument, we have adopted the following considerations:
  - a) The appellant argues that the form was signed by the relevant directors. We agree that the signatories are the right persons, and that evidence has been provided to this effect. However, this fact is irrelevant as the appellant has still

provided a Certificate of Conduct for the wrong company. As above, we believe changing the name of the company and registration number would amount to submitting a new exhibit, that the relevant Certificate of Conduct was missing and therefore that the application did not comply with Rule 3.12.4.

- b) The appellant also argues that its compliance with the Rules was verifiable elsewhere in the application, as they had made other declarations which covered all parts of Exhibit. We agree the appellant has provided other declarations, which mirror the requirements of Exhibit C. However, Rule 3.12.4 still requires a valid Certificate of Conduct to be submitted. As above, we conclude that the relevant Certificate of Conduct was missing and therefore the application did not comply with Rule 3.12.4.
- c) The appellant finally argues that the company name and registration number were verifiable elsewhere in the application. We agree that the appellant provided the relevant company information elsewhere in the application. However, as above, Rule 3.12.4 still requires a valid Certificate of Conduct to be submitted. As above, we conclude that the relevant Certificate of Conduct was missing and therefore that the application did not comply with Rule 3.12.4.

29. Based on the above, we conclude that NGET was correct in applying Rule 4.4.2(a) to prevent the CMU in paragraph 1 from prequalifying.

### **Conclusion**

30. NGET reached the correct reconsidered decision to not prequalify GBSL Nursling (GB2N17) for the T-4 and T-1 Auction on the basis that

- a) The Certificate of Conduct required under Capacity Market Rule 3.12.4 was not provided with the application. In accordance with regulation 69(5), when making a reconsidered decision, the Delivery Body must not take in consideration any information or evidence which the appellant was required to and failed to produce before the decision was taken.
- b) For this reason, NGET correctly did not allow the appellant to prequalify as specified in Rule 4.4.2(a).

**Determination**

31. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that NGET's reconsidered decision to reject the Appellant for Prequalification be upheld in respect of the CMUs listed in paragraph 1 for the T-4 and T-1 Auction.



Julian Roberts

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

12 January 2018