

## **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 Shovel Ready 12 Limited ("Shovel Ready") against reconsidered decisions made by the Electricity Market Reform Delivery Body ("Delivery Body") in respect of the following Capacity Market Units ("CMUs"):
  - a) SR1003 (T-3 and T-4 Auction)
2. This decision deals with all of the appeals listed above as they are substantively in respect of the same issue and differ only in so far as concerns the identity of the respective CMUs, and the Auctions for which they are in respect of.
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 the Delivery Body.

### **Appeal Background**

4. Shovel Ready submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the 2020 T-3 and T-4 Auctions and sought a Maximum Obligation Period of 15 years.

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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.

5. For the CMU listed in Paragraph 1, the Delivery Body issued a Notification of Prequalification Decision dated 25 October 2019 (the "Prequalification Decision"). The Delivery Body Conditionally Prequalified the CMU on the following grounds:

*Application is Conditionally Prequalified for the following reason(s): Financial Commitment Milestone:*

*As per Capacity Market 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.*

*Deferred Distribution Connection Agreement: As per Capacity Market 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.*

*Deferred Planning Consents: As per Capacity Market Rule 3.7.1(a)(i), Planning Consents have been deferred; therefore, this Application is Conditionally Prequalified. The deadline for submitting your Planning Consents for the T-3 Auction is 22 Working Days before the auction which is 30th December 2019.*

*Deferred Exhibit ZA: As per Capacity Market 4.5.1(b)(va), Exhibit ZA has been deferred; therefore, this Application is Conditionally Prequalified. The deadline for submitting Exhibit ZA is 15 Working Days after Prequalification Results Day which is 15th November 2019 (in accordance with Rule 3.4.10(b)(ii)).*

*Please note that the Credit Cover requirement has been stated in the T-4 Application letter for this CMU.*

6. Shovel Ready submitted a request for reconsideration of the Prequalification Decision on 29 November 2019.
7. The Delivery Body issued a Notice of Reconsidered Decision on 13 December which rejected the dispute on the following grounds:

*"...following the failure to provide an Exhibit ZA by the prescribed deadline."*

8. Shovel Ready then submitted an appeal notice to the Authority on 17 December 2019 under Regulation 70 of the Regulations.

## **Shovel Ready's Grounds for appeal**

9. Shovel Ready disputes the decision on the following ground.

*"We are disputing the decision made by the delivery body because we believe it failed in its obligation to give sufficient notice that we were required to upload Exhibit ZA by the deadline and did not draw adequate attention in its prequalification guidance to the fact that this new process was a condition of prequalification."*

10. Shovel Ready further elaborate and state the facts on which they rely in relation to their above ground of appeal include:

*"Uploading Exhibit ZA is a new condition of the prequalification process for this prequalification year.*

*No email was sent out to highlight the deadline for this process during the week of the deadline which is standard practice for all prequalification deadlines.*

*There was an email that mentioned the deadline sent out in the week preceeding the deadline. However, this was an email that covered numerous processes that needed to be completed and therefore did not adequately highlight the deadline.*

*The delivery body did not include this process in the 'New Build Checklist' in its prequalification guidance or in the New Build 'Specific Requirements' section.*

*The delivery body did not include this process in the 'Common Errors' section its prequalification guidance, and did not mention it in the section within 'Common Errors' that is specific to the upload of exhibits."*

## The Legislative Framework

11. The Regulations were made by the Secretary of State under the provisions of section 27 of the Energy Act 2013. The Capacity Market Rules 2014 (as amended) ("Rules") were made by the Secretary of State pursuant to powers set out in section 34 of the Energy Act 2013.

## The Regulations

12. The Regulations set out the duties upon the Delivery Body when it determines eligibility. Regulation 22(a) specifies that each Application for Prequalification must be determined in accordance with the Capacity Market Rules.
13. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
14. In particular, Regulation 69(5) sets out the requirements for the Delivery Body 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

15. Rule 3.4.10 (b) sets out the requirement for an Applicant to provide a Fossil Fuel Emissions Declaration by 15 Working Days after the Prequalification Results Day, and states that:

*A relevant Applicant must provide to the Delivery Body a Fossil Fuel Emissions Declaration (that the Delivery Body considers fully addresses the matters set out in Exhibit ZA):*

- (i) in its Application; or*
- (ii) in any case by the date which is 15 Working Days after the Prequalification Results Day.*

16. Rule 4.4.2(i) outlines that the Delivery Body must not Prequalify a CMU where the Applicant has not provided a suitable Fossil Fuels Emissions Declaration and states:

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

- (i) Rule 3.4.10 applies to the Applicant for the CMU, and the Applicant has not provided a Fossil Fuel Emissions Declaration in accordance with Rule 3.4.10(b).*

17. Rule 4.5.1 (b) (va) clarifies that the Prequalification status, as notified by the Delivery Body in the Prequalification Results Letter, is conditional on complying with Rule 3.4.10 (b) and states that:

*On the Prequalification Results Day, the Delivery Body will notify each Applicant other than a Secondary Trading Entrant, the Secretary of State, the CM Settlement Body and the Authority of the following information:...*

*(b) where the Prequalification Decision is that the CMU has Prequalified:...*

*(va) if the CMU is a New Build CMU which comprises or will comprise of one or more Fossil Fuel Components or is an Unproven DSR CMU and either the Applicant in respect of the CMU has not provided a Fossil Fuel Emissions Declaration in accordance with Rule 3.4.10(b)(i) or the Delivery Body has provided a notice to the Applicant under Rule 3.4.10(c), that the Prequalification of the CMU is conditional upon the Applicant complying with Rule 3.4.10(b);*

18. Rule 4.7A.1 outlines the notice that the Delivery Body should provide to an Applicant should they satisfy the requirements of 3.4.10(b) and states that:

*By 20 Working Days after Prequalification Results Day, the Delivery Body must give a notice to an Applicant to which Rule 3.4.10 applies that a CMU is fully Prequalified if the Delivery Body has received from the Applicant a Fossil Fuel Emissions Declaration that satisfies the requirements of Rule 3.4.10(b).*

## **Our Findings**

19. We have assessed Shovel Ready's ground for appeal, which is set out below.
20. Shovel Ready believe that the Delivery Body provided insufficient notice to applicants of their requirement to provide Exhibit ZA by the associated deadline. However, Shovel Ready recognise that they did not provide the required Exhibit ZA by the deadline set out in Rule 3.4.10 (b).

### Our Findings with respect to the Rules:

21. As per Paragraph 5, the Notification of Prequalification Decision issued to Shovel Ready on 25 October 2019 stated that the CMUs listed in Paragraph 1 had been Conditionally Prequalified withstanding the requirement to provide Exhibit ZA by 15th November 2019, in accordance with Rule 3.4.10(b) (ii). The Delivery Body thus issued the correct notice to Shovel Ready in accordance with Rule 4.5.1 as detailed above.
22. In our view, Shovel Ready, by submitting their Exhibit ZA on Friday 29 November 2019, which was longer than the allowed 15 Working Days after Prequalification Results Day, failed to comply with Rule 3.4.10(b).
23. It is the Applicant's responsibility to ensure that an Application for Prequalification is made in accordance with the Rules and that when information is submitted it should be done in accordance with the Rules, or any relevant guidance provided by the Delivery Body.

24. As outlined above, the operation of Regulation 69(5) prohibits the Delivery Body from taking into account any information or evidence that was required to be provided to the Delivery Body by the Regulations or Rules before the original decision was made. Therefore, the Delivery Body was correct in not considering the Exhibit ZA submitted after the deadline laid out in Rule 3.4.10 (b).

Our Findings with respect to the Delivery Body's communications on the requirement to submit Exhibit ZA:

25. We have looked at the information provided to Applicants on their requirement to provide Exhibit ZA, above the fact that its stipulated in the Rules, and note the additional communications informing Shovel Ready of the requirement to provide this Exhibit, and the deadline by which it must be provided for them to prequalify:
- a) The Prequalification guidance<sup>2</sup> published by the Delivery Body on 16 August 2019 stipulates on slide 109 that *"it is optional to provide Exhibit ZA at Prequalification but if it is not provided or an error is found within the Exhibit, the Application will be set as 'Conditionally Prequalified' and Exhibit ZA will need to be provided by 15 Working Days after PQRD and then we will assess and update the Prequalification status"*;
  - b) The Delivery Body's disputes guidance<sup>3</sup> published on 23 October 2019 outlines on slide 34 the process by which an Applicant is required to follow, in accordance with the Rules, should they have opted to defer submission of the Exhibit ZA beyond the Prequalification deadline;
  - c) The Prequalification Decisions issued to Shovel Ready on 25 October 2019, referenced in Paragraph 5, highlighted that the CMUs listed in Paragraph 1 were Conditionally Prequalified withstanding several requirements, one of which being the requirement to submit Exhibit ZA. The deadline by which

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<sup>2</sup>

<https://www.emrdeliverybody.com/Capacity%20Markets%20Document%20Library/Prequalification%20guidance%20v2.2%202019.pdf>

<sup>3</sup>

<https://www.emrdeliverybody.com/Capacity%20Markets%20Document%20Library/Disputes%20guidance%202019.pdf>

Exhibit ZA needed to be provided to meet this condition was also explicitly stated.

- d) The Delivery Body issued an email on 25 October 2019 to Applicants notifying them of the requirement to provide Exhibit ZA by the 15 November 2019 deadline as stipulated in the Rules. The email also contained a link to the Exhibit ZA guidance document<sup>4</sup> published by the Delivery Body.
- e) The Delivery Body then issued a further email on 7 November 2019 to Applicants notifying them of the requirement to provide Exhibit ZA by the 15 November 2019. A link to the Exhibit ZA guidance document was also included in the aforementioned email.

26. Through Paragraph 25, we note that Applicants were provided with sufficient guidance by the Delivery Body regarding the requirement for an Exhibit ZA.

Our Findings with respect to the Formal notice to Shovel Ready of the requirement for an Exhibit ZA:

- 27. The original Prequalification Decision notice issued on 25 October 2019 clearly stated the conditionality of Shovel Ready's Prequalification status. It explained that Exhibit ZA must be provided by 15 November 2019, as stipulated in Rule 3.4.10(b).
- 28. The conditional nature of the Prequalification Decision notice implies that if an Applicant does not meet the conditions, expressly stipulated based on Rule requirements, the Applicant becomes non-compliant with the terms of their conditional Prequalification. Therefore, following the failure to meet these requirements or comply with the unequivocal conditions by the prescribed deadlines, an Applicant's conditional Prequalification status should reasonably be considered to be withdrawn and become "Not Prequalified".

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<https://www.emrdeliverybody.com/Capacity%20Markets%20Document%20Library/Exhibit%20ZA%20guidance%20v1.0%202019.pdf>



29. In regard to Shovel Ready's argument that the Delivery Body decided not to change the Prequalification status following failure to provide an Exhibit ZA, we note that the Rules only provides for two instances whereby the Delivery Body **must** give notice to an Applicant in relation to Exhibit ZA about the associated Prequalification status of the Applicant in question:
- a) Rule 4.5.1 (as highlighted in Paragraph 17) outlines the requirement for the Delivery Body to submit a Prequalification Decision notice to an Applicant, which if the CMU has Prequalified, is conditional on the Applicant fulfilling Rule 3.4.10 (b).
  - b) Rule 4.7A.1 (as highlighted in Paragraph 18) stipulates for a notice to be provided by the Delivery Body to an Applicant, should they satisfy the requirements of 3.4.10(b) and thus fulfil the conditionality criteria outlined in 4.5.1. This would have resulted in the status being altered from "Conditionally Prequalified" to "Prequalified" as long as all other conditions stipulated in the Prequalification Decision had been met. We note that there is no counter factual to this Rule and the Delivery Body is not required to give additional notice when an Applicant fails to successfully submit an Exhibit ZA.
30. Shovel Ready failed to fulfil the requirements of Rule 3.4.10(b) and comply with the conditions set out in the Prequalification Decision. The Delivery Body was not obliged to send further notification of this failure. Notice was implicit in the conditionality and time frame provided in the original Prequalification Decision.

## Conclusion

31. The Delivery Body reached the correct reconsidered decision to not prequalify the CMUs listed in Paragraph 1 for the T-3 and T-4 Auctions on the basis that
- a) the Exhibit ZA required under Rule 3.4.10 (b) was not provided by the deferred deadline. In accordance with Regulation 69(5), when making a reconsidered decision, the Delivery Body must not take into consideration

any information or evidence which Shovel Ready was required to and failed to produce before the decision was taken; and

- b) we believe that the Delivery Body provided sufficient information to Shovel Ready about the requirement to submit an Exhibit ZA before the deadline of 15 November 2019, including providing formal notice in the Prequalification Decision as stipulated in the Rules.

## **Determination**

- 32. For the reasons set out in this determination the Authority hereby determines pursuant to Regulation 71(3) that the Delivery Body's reconsidered decision to reject Shovel Ready for Prequalification be upheld in respect of the CMU listed in Paragraph 1 for the T-3 and T-4 Auctions.



Mark Carolan

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

15 January 2020