

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 GridBeyond UK Limited (“GridBeyond”) against reconsidered decisions made by the Electricity Market Reform Delivery Body (the “Delivery Body”) in respect of the following Capacity Market Units (“CMUs”):
 - a) END027 (T-1 and T-4 Auctions)
 - b) END028 (T-1 and T-4 Auctions)
 - c) END029 (T-1 and T-4 Auctions)
 - d) END030 (T-1 and T-4 Auctions)
 - e) END031 (T-1 and T-4 Auctions)
 - f) END033 (T-1 and T-4 Auctions)
 - g) END034 (T-1 and T-4 Auctions)
 - h) END035 (T-1 and T-4 Auctions)
 - i) END036 (T-1 and T-4 Auctions)
 - j) END037 (T-4 Auction)
 - k) END038 (T-4 Auction)

I) END039 (T-1 and T-4 Auctions)

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.
3. Pursuant to regulation 71(3) of the Electricity Capacity Regulations 2014 (as amended) (the “Regulations”), where the Authority¹ receives an Appeal Notice that complies with regulation 70, the Authority must review a reconsidered decision made by the Delivery Body.

Appeal Background

4. GridBeyond submitted an Application for Prequalification for the CMUs listed in paragraph 1 of this determination in respect of the 2021 T-1 and T-4 Auctions.
5. For these CMUs, the Delivery Body issued a Notification of Prequalification Decision dated 6 November 2020 (the “Prequalification Decision”). The Delivery Body rejected the CMUs from prequalification on the following grounds:

“The Prequalification Certificate is required as per Capacity Market Rule 3.12.3. The Prequalification Certificate that was submitted in the Application does not conform with the Prequalification Certificate as defined in Capacity Market Rule 1.2 as Exhibit A for the following reason: the company registration number does not match the registered company details on Companies House.

The Certificate of Conduct is required as per Capacity Market Rule 3.12.4. The Certificate of Conduct that was submitted in the Application does not conform with the Certificate of Conduct defined in Capacity Market Rule 1.2 as Exhibit C for the

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.

following reason: the company registration number does not match the registered company details on Companies House.

Capacity Market Rule 4.4.2(i) requires, where relevant, an Applicant to provide a Fossil Fuel Emissions Commitment under Rule 3.7.4, Rule 3.8.3 or Rule 3.10.4. The Application has not done so or has provided a Fossil Fuel Emissions Commitment which the Delivery Body considers does not fully address the matters set out in Exhibit ZB.

Capacity Market Rule 3.4.7 requires Applicants to declare their Low Carbon Exclusion and Low Carbon Grant Status within their Application for a CMU. At least one of the mandatory declarations have not been completed for this Application, therefore has failed to meet the requirements of this rule..."

6. The Delivery Body added the following grounds for CMUs END027, END028:

"Capacity Market Rule 3.4.3(a)(i) requires the Applicant to provide the full postal address and postcode (if assigned) and the two-letter prefix and six-figure Ordnance Survey grid reference number(s), for all the Generating Units / CMU components within the CMU. The OS grid reference does not match the post code/address of at least one Generating Unit / CMU component in the Application, therefore cannot be verified."

7. The Delivery Body added the following ground for CMUs END028, END030:

"Capacity Market Rule 3.4.3(a)(i) requires the Applicant to provide the full postal address and postcode for all Generating Units / CMU components. The postcode of at least one Generating Unit / CMU component in the Application is missing/invalid without cover letter explanation, therefore cannot be verified."

8. The Delivery Body added the following ground for CMUs END035:

“Capacity Market Rule 3.10.1 requires each Applicant for an Unproven DSR CMU to include in each Application a DSR Business Plan for the CMU. The DSR Business Plan declaration, required by Capacity Market Rule 3.10.1(b), has not been completed in the Application, therefore this has failed to meet the requirements of this rule.”

9. The Delivery Body added the following ground for CMUs END037, END039:

“Capacity Market Rule 3.10.1 requires each Applicant for an Unproven DSR CMU to include in each Application a DSR Business Plan for the CMU. The DSR Business Plan provided for this Application does not match the CMU ID that has been applied for and no link can be made to a previous CMU ID, therefore this has failed to meet the requirements of this rule.”

10. The Delivery Body further noted that Prequalification was conditional on the Applicant satisfying the requirement in Rule 4.6 to provide Applicant Credit Cover.
11. GridBeyond submitted a request for reconsideration of the Prequalification Decision (“Tier 1 Appeal”) on 19 November 2020 in accordance with the requirements of regulation 69(1) of the Regulations.
12. The Delivery Body issued a Notice of Reconsidered Decision on 11 December 2020 which rejected this appeal on the following grounds:

“The Delivery Body acknowledges that the Applicant has addressed the point as part of the request to review the Prequalification Decision, however Regulation 69(5) as updated by BEIS, after considering the Application as a whole the Delivery Body considers the error or omission of Part 2c of the Exhibit ZB document, prevents the ability of the Delivery Body to enforce the relevant requirement to which it relates.

For information, the Delivery Body has accepted the other elements of the Application and has updated its records accordingly.”

13. GridBeyond then submitted an Appeal Notice to the Authority on 29 December 2020 under Regulation 70(1) of the Regulations (“Tier 2 Appeal”).

GridBeyond’s Grounds for appeal

14. We have established that the Delivery Body did not consider Exhibit ZB during its review of GridBeyond’s Application for Prequalification. GridBeyond say that this is because: *“The Exhibit ZB was incorrectly uploaded under the CMU section of the EMR Delivery Body portal through clerical error. There was no drop-down menu within the application to upload an Exhibit ZB therefore the Exhibit ZB was submitted under ‘other documents’ in the CMU section of the EMR Delivery Body Portal.”*
15. GridBeyond then resubmitted an identical Exhibit ZB as part of their Tier 1 Appeal. The Delivery Body nevertheless upheld their Prequalification Decision because *“...the Delivery Body considers the error or omission of Part 2c of the Exhibit ZB document, prevents the ability of the Delivery Body to enforce the relevant requirement to which it relates”*.
16. GridBeyond’s central contention under both Grounds 1 and 2 of its Tier 2 Appeal is that it should be permitted to correct the omission of Part 2(c) of Exhibit ZB, and with that declaration made, that it should be approved for Prequalification for the 2021 T-1 and T-4 Auctions. It is noted that GridBeyond has provided a revised Exhibit ZB which includes a completed Part 2(c) in its Tier 2 Appeal to Ofgem.
17. GridBeyond disputes the Delivery Body’s reconsidered decision on the following grounds:

Ground 1

18. GridBeyond contends that uploading Exhibit ZB to the “other documents” in the CMU section of the EMR Delivery Body Portal (“EMR Portal”) was the result of a clerical error. GridBeyond argues that this occurred because the EMR Delivery Body Prequalification Guidance (“Prequalification Guidance”) and the EMR Portal are confusing in relation to Exhibit ZB submission:

“...we believe that the EMR Delivery Body Prequalification Guidance is confusing in relation to Exhibit ZB submission. We believed that as we selected whether we had fossil fuel components under the emissions declaration tab under the CMU section that it would be plausible that the Exhibit ZB would be uploaded in this section too. Further to this there is no drop down for a submission of an Exhibit ZB under the Application section. Other types of units can submit their fossil fuel declarations through the CMU section of the website therefore it is also plausible that the Exhibit B for unproven DSR units could be uploaded here too.

This error was rectified under a Tier 1 Dispute.”

19. GridBeyond further state:

“Had GridBeyond known during prequalification that Part 2c was omitted from the Exhibit ZB we would have rectified this during our Tier 1 dispute. However as the Exhibit ZB was uploaded to an incorrect location, it was not reviewed and thus the omission of Part 2C was only identified by the Delivery Body within the Tier 1 Dispute review.

As the Delivery Body accepted the submission of our Exhibit ZB during Tier 1 Dispute under the rules of Regulation 69, we would like to hope that OFGEM may be able to accept our revised Exhibit ZB attached to this dispute that includes Part 2C as per Regulation 69 also under clerical error.”

20. Accordingly, GridBeyond maintains that had the Delivery Body reviewed the Exhibit ZB submitted in its Application for Prequalification, it would have then been told by the Delivery Body that Part 2(c) of Exhibit ZB was required, and that this would have been provided as part of GridBeyond's Tier 1 Appeal. Because of this, GridBeyond says it should be permitted to rectify the error in its appeal to the Authority.

Ground 2

21. GridBeyond disputes the Delivery Body's reconsidered decisions, secondly, on the basis that the form of Exhibit ZB is not clear in the requirement for Part 2(c) to be maintained, and specifically that:

"...Part 1 includes 3 parts where a selection of A, B or C must be selected. Part 2 includes 3 parts where a selection of A or B is required and C must maintain. We understood the form to require a selection of A, B or C in Part 2 similar to Part 1 hence the omission of Part 2C from our submission through clerical error.

As this error was only highlighted during the Tier 1 Dispute Process, GridBeyond can only now address this clerical error. We believe that under Regulation 69 we can resubmit our Exhibit ZB here under a Tier 2 Dispute to reiterate our intention that this DSR unit does not and will not have any fossil fuel components in its unit now or in the future."

The Legislative Framework

22. 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) (the "Rules") were made by the Secretary of State pursuant to powers set out in section 34 of the Energy Act 2013.

The Regulations

23. 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 Rules.
24. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals. In particular, regulation 69(5) provides for what the Delivery Body may not take into account in reconsidering a Prequalification Decision:

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

25. Rule 1.2 contains the definitions used throughout the CM Rules, and, in particular, defines the Fossil Fuel Emissions Commitment as “a declaration in the form set out in Exhibit ZB”.
26. 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; and*
- (iii) such other requirements as may be specified by the Delivery Body from time to time.*

27. Rule 3.10.4 requires Unproven DSR CMUs to submit a Fossil Fuel Emissions Commitment (i.e. Exhibit ZB) and states that:

An Applicant for an Unproven DSR CMU must provide to the Delivery Body a Fossil Fuel Emissions Commitment signed by two directors (or two officers, in the case of a body other than a company).

28. Rule 4.4.2 provides further in respect of Exhibit ZB that:

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

...

- (i) the Applicant is required to provide a Fossil Fuel Emissions Commitment under Rule 3.7.4, Rule 3.8.3 or Rule 3.10.4, but has not done so or has provided a Fossil Fuel Emissions Commitment which the Delivery Body considers does not fully address the matters set out in Exhibit ZB...*

Our Findings

29. Regulation 71(3)(b) requires the Authority to determine whether the reconsidered decision made by the Delivery Body was correct on the basis of the information which the Delivery Body had when it made the decision. We have set out our assessment and analysis below.

Ground 1

30. GridBeyond contends that uploading Exhibit ZB to the “other documents” in the CMU section of the EMR Portal was the result of a clerical error. GridBeyond argues that this occurred because the Prequalification Guidance and the EMR Portal are confusing in relation to Exhibit ZB submission.
31. We note Rule 3.3.7 sets out the requirements that must be met for Applications for Prequalification to be accepted. Rule 3.3.7(b)(i) states that Applications for Prequalification must be submitted *“in accordance with the Regulations and the Rules.”* Rule 3.3.7(b)(iii) states that Applications for Prequalification must be in accordance with *“such other requirements as may be specified by the Delivery Body from time to time.”*
32. It follows from this that an Application for Prequalification will not be considered or accepted unless submitted in accordance with the Regulations and the Rules, and with such other requirements as may be specified by the Delivery Body from time to time. This entitles the Delivery Body to issue guidance to applicants, which imposes requirements itself (e.g. the requirement to apply online). However, the Delivery Body must still act reasonably when imposing its requirements, which moreover, must be in accordance with the Rules and Regulations.
33. The Delivery Body have confirmed that during the Application for Prequalification stage, GridBeyond did in fact submit the Exhibit ZB for all of its Applications under the *“...‘other documents’ in the CMU section of the EMR Delivery Body Portal...”*.
34. The Delivery Body have informed us that they did not consider this before the Tier 1 appeal, for the following reason:

“From what we understand from the Tier 1 Dispute, the Applicant was not able to upload their Exhibit ZB in the Emissions field due to there not being a drop down available. As part of the Prequal guidance, we asked New Build and Refurb CMUs to upload their Exhibit ZB as part of the Cover Letter field due to the Portal functionality

issues if they do not have Fossil Fuel Emissions. If they did have FFE they could upload when ticking the relevant box with the application itself. The applicant however, uploaded the Exhibit ZB document in the My CMU section of the portal under 'Other Documents' which does not form part of the application and therefore we do not use this during our assessment. The guidance to support this can be found on page 76 for New Build CMUs, page 92 for Unproven DSRs and page 109 for Refurb CMUs. ...

The applicant didn't notify us of any issues when trying to upload documents to My Applications. The Delivery Body did not consider the Exhibit ZB document uploaded in the incorrect area of My CMU - Other Documents as part of the original application, hence why the application was Rejected during Prequalification."

35. We note that GridBeyond submitted the Exhibit ZB to the Delivery Body, during the Prequalification Window, and at the correct time. Therefore, whilst this may not have been uploaded to the area of the EMR Portal as provided for by the Prequalification Guidance, ultimately the Delivery Body had access to the document at the relevant time.
36. As we have said, the Delivery Body is entitled under the Rules to issue guidance to applicants, which imposes requirements itself. However, it must act reasonably when imposing these requirements, and further, ensure that the EMR Portal has appropriate functionality to permit the fulfilment of these requirements by applicants.
37. If the EMR Portal cannot be sufficiently adapted to allow functionality for new requirements ahead of the Prequalification Window, applicants should not be penalised, to the extent that the outcome of their Application is to be not prequalified, due to where Exhibits are uploaded within a given CMU's area of the EMR Portal.
38. Given the confusion arising from the document uploading process in the EMR Portal it would have been reasonable for the Delivery Body to consider the Exhibit ZB that was provided by GridBeyond in its Application for Prequalification; indeed this would have been entirely in line

with the provisions of regulation 69(5). Further, if the Delivery Body had considered the Exhibit ZB provided in the Application for Prequalification, GridBeyond would have been made aware of the omission of Part 2(c) and thus would have been afforded the opportunity to rectify this omission in its Tier 1 Appeal.

39. As a consequence, we consider that the Delivery Body has taken a decision which offends the principles of procedural fairness and which therefore frustrated the Delivery Body from correctly reviewing its original decision under regulation 69(5) of the Regulations. We therefore consider that as a direct result of the Delivery Body's failure to address the cause of this procedural unfairness, GridBeyond should be afforded the opportunity to rectify the omission of Part 2(c) of Exhibit ZB in its Appeal to the Authority.

Ground 2

40. GridBeyond's second ground is concerned with the form of Exhibit ZB itself, and specifically that the form is confusing in its drafting and thus does not make it clear that Part 2(c) must be retained, regardless of an applicant's particular circumstances.
41. Capacity Market Rule 3.10.4 requires Unproven DSR CMUs to submit a Fossil Fuel Emissions Commitment, and Rule 1.2 defines it as "*a declaration in the form set out in Exhibit ZB*".
42. The Prequalification Guidance and Prequalification Fossil Fuel Emissions Exhibits Guidance² ("Exhibits Guidance") are explicit about Part 2 requiring all applicants to retain Part 2(c) and selecting either Part 2(a) or Part 2(b) to retain.
43. As we have said, the Delivery Body is entitled to establish application requirements in guidance. However, such guidance must be in accordance with the Rules and Regulations.

² See slide 14. Available at:

<https://www.emrdeliverybody.com/Capacity%20Markets%20Document%20Library/Prequalification%20Fossil%20Fuel%20Emissions%20Exhibits%20Guidance%20v4.0.pdf>

Part 2 of Exhibit ZB contains three declarations (i.e. Part 2(a), Part 2(b), and Part 2(c)), whereas the definition of “Fossil Fuel Emissions Commitment” under Rule 1.2 means “*a declaration*”; not two or more declarations. By requiring two declarations to be made under Part 2, the Prequalification Guidance and Exhibits Guidance are asking applicants to provide something that is beyond what is strictly required by the Rules.

44. Accordingly, in this respect, we find that the Prequalification Guidance and Exhibits Guidance are not in accordance with the Rules, and therefore the requirements of the Rules prevail. We note that the importance of this matter to GridBeyond is significant; it decides whether or not they are able to prequalify to participate in the Capacity Market Auctions, and consequently, it is vital that the Rules and the Regulations are applied correctly.
45. We find in favour of GridBeyond’s argument that the requirement to retain Part 2(c) is confusing based on the form of Exhibit ZB itself. In particular we note that:
- a) the Delivery Body’s requirement to retain Part 2(c) does not flow naturally from Part 2(a), which provides that “*the Relevant CMU will not comprise of any Fossil Fuel Component*”, and so applicants could have reasonably concluded that Part 2(c) was not applicable to their circumstances; and
 - b) the presence of square brackets (“[]”) around Part 2(a) and Part 2(b), in the absence of further explanation in the form of Exhibit ZB, does not provide sufficient clarity to applicants in terms of the Delivery Body’s requirement in the Prequalification Guidance and Exhibits Guidance to retain Part 2(c) .
46. Further, we find that the lack of clarity in the form of Exhibit ZB is compounded by the Prequalification Guidance’s Frequently Asked Questions section,³ which is also confusing.

³ See last question in slide 3. Available at:

<https://www.emrdeliverybody.com/Capacity%20Markets%20Document%20Library/FAQ%20Prequalification%202020.pdf>

Firstly, it sets out that applicants must choose between Part 2(a) and Part 2(b), while they must retain Part 2(c). Secondly, it sets out that choosing which section of Part 2 is applicable is solely down to the applicant to decide. This type of instruction is ambiguous and unclear, and one can see how this has created the confusion claimed by GridBeyond.

Conclusion

47. We find in favour of GridBeyond under both Grounds 1 and 2 of its Tier 2 Appeal.
48. In relation to Ground 1, we have found that the EMR Portal is confusing with regards to uploading Exhibit ZB for Unproven DSR CMUs. We conclude that it would have been reasonable for the Delivery Body to consider the Exhibit ZB submitted by GridBeyond in its Application for Prequalification, given that the Exhibit ZB had been submitted (albeit under a different section), and this would not have offended the provisions of regulation 69(5). Consequently, and as a direct result of the Delivery Body's failure to address the cause of this confusion, there has been procedural unfairness in the circumstances and the Delivery Body missed the opportunity to rectify a simple error at Tier 1.
49. In relation to Ground 2, we have found that the form of Exhibit ZB itself is confusing, which is compounded by a lack of clarity in the Prequalification Guidance's Frequently Asked Questions section. Moreover, by requiring two declarations to be made under Part 2, the Prequalification Guidance and Exhibits Guidance are asking applicants to provide something that is beyond what is strictly required by the Rules (per the definition of "Fossil Fuel Emissions Commitment" under Rule 1.2). Accordingly, in this respect, the Prequalification Guidance and Exhibits Guidance are not in accordance with the Rules, and therefore the requirements of the Rules prevail.
50. Therefore, we direct the Delivery Body to overturn their reconsidered decision to reject the CMUs listed in paragraph 1 of this determination for the respective auctions, and to "Conditionally Prequalify" the CMUs listed in paragraph 1 on the condition that the Delivery

Body is provided with a complete Exhibit ZB for each Application for Prequalification by the deadline required by Rule 5.5.14 (i.e. by the date falling 10 Working Days prior to the commencement of the first Bidding Window), for the relevant 2021 auctions, as well as any other conditions associated with their Prequalification status, as required by the Regulations and the Rules.

Determination

51. 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 GridBeyond for Prequalification be overturned in respect of the CMUs listed in paragraph 1 of this determination for the respective auctions.
52. The Authority directs the Applicant to submit the additional evidence to the Delivery Body, and the Delivery Body to accept and file where appropriate the corresponding Exhibits ZB.

Yours faithfully,



Chris Thackeray
Head of GB Wholesale Markets

For and on behalf of the Gas and Electricity Markets Authority

12 February 2021