

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 Infinis Alternative Energies Limited (“Infinis”) against reconsidered decisions made by the Electricity Market Reform Delivery Body (the “Delivery Body”) in respect of the following Capacity Market Unit (“CMU”):
 - a) A1SUTT (T-4 Auction)
2. 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

3. Infinis submitted an Application for Prequalification for the CMUs in paragraph 1 in respect of the 2021 T-4 Auction.
4. For the CMUs listed in paragraph 1, the Delivery Body issued a Notification of Prequalification Decision dated 6 November 2020 (the “Prequalification Decision”). The Delivery Body Rejected the CMU on the following grounds:

“Capacity Market Rule 3.7.2(a)(i) requires Applicants to state how the CMU will meet the Extended Years Criteria, set out in Capacity Market Rule 8.3.6A and 8.3.6B, to Prequalify for an agreement greater than 3 years in duration. 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.

Applicant has not provided all the relevant Extended Years Criteria declarations and/or no comments have been provided to demonstrate that the criteria shall be met or how, therefore fails to meet the requirements of these rules."

5. Infinis submitted a request for reconsideration of the Prequalification Decisions on 13 November 2020.
6. The Delivery Body issued a Notice of Reconsidered Decision on 11 December 2020 which accepted the dispute, resulting in the CMU's prequalification status being changed to 'Conditionally Prequalified' on the following grounds:

"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 accordingly.

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 accordingly.

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 each auction is T-1 Auction - 29th January 2021 and T-4 Auction - 5th February 2021."

7. Infinis then submitted an appeal notice to the Authority on 17 December 2020 under regulation 70 of the Regulations.

Infinis' Grounds for appeal

8. Infinis disputes the Delivery Body's reconsidered decision on the following grounds:

Ground 1

"The Applicant believes a New Build CMU that does not satisfy the Extended Years Criteria should be allowed an Agreement with a maximum Obligation duration of three years and is therefore seeking for this conditional prequalification decision to be amended to allow this CMU to be allowed to bid for at least a three year maximum duration of Obligation.

...

There is nothing in the Rules which limits the Obligation duration of an Agreement a New Build CMU to one year in these circumstances and we note the Delivery Body has provided no justification within its reconsidered decision {1} to limit the maximum duration to one year."

Ground 2

"The Applicant made reference in its Tier 1 appeal {2} to two precedent and one concurrent decisions which it continues to believe support its view that the correct interpretation of the Rules should allow this CMU to bid for a maximum three year duration Obligation."

The Legislative Framework

9. 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

10. 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.

11. Regulation 11 (3) sets out the definition of the terms '15 year minimum £/kW threshold' (the "15 year threshold") and '3 year minimum £/kW threshold' (the "3 year threshold"):

...

"15 year minimum £/kW threshold" means the minimum amount of capital expenditure per kilowatt of de-rated capacity which a bidder must commit to spending on a generating CMU to be eligible to bid for a capacity obligation for a period of more than 3 and up to 15 delivery years;

"3 year minimum £/kW threshold" means the minimum amount of capital expenditure per kilowatt of de-rated capacity which a bidder must commit to spending on a generating CMU to be eligible to bid for a capacity obligation for a period of 2 or 3 delivery years;

...

12. Regulations 68 to 72 set out the process and powers in relation to dispute resolution and appeals.
13. Regulation 69 (3) sets out the duties upon the Delivery Body to provide the outcome of a Reconsidered Decision, and the reasons for the Reconsidered Decision to the affected person.

Capacity Market Rules

14. Rule 1.2 defines the 'Maximum Obligation Period' (the "MOP"):

means, in respect of the T-4 Auction:

(a) fifteen Delivery Years, including the first Delivery Year for which the Capacity Agreement is awarded, for a Prospective Generating CMU:

- (i) for which an Applicant has stated pursuant to Rule 3.7.2(a), that to the best of its knowledge and belief the CMU will meet the Extended Years Criteria when completed;*
- (ii) for which an Applicant has stated pursuant to Rule 3.7.2(d), that Qualifying £/kW Capital Expenditure is expected to equal or exceed the*

Fifteen Year Minimum £/kW Threshold; and

(iii) in respect of which none of the Generating Units comprising the Prospective Generating CMU are already the subject of a Capacity Agreement which has not been terminated;

(aa) fifteen Delivery Years, including the first Delivery Year for which the Capacity Agreement is awarded, for an Unproven DSR CMU for which an Applicant has stated pursuant to Rule 3.10.1(aa)(i) that Qualifying £/kW Capital Expenditure is expected to equal or exceed the Fifteen Year Minimum £/kW Threshold;

(b) three Delivery Years for a Prospective Generating CMU or Unproven DSR CMU for which an Applicant has stated pursuant to Rule 3.7.2(d) or Rule 3.10.1(aa)(i) (as the case may be) that Qualifying £/kW Capital Expenditure is expected to equal or exceed the Three Year Minimum £/kW Threshold and to be lower than the Fifteen Year Minimum £/kW Threshold, including the first Delivery Year for which the Capacity Agreement is awarded; and

(c) for all other CMUs (including Prospective Generating CMUs not included in (a) or (b) or Unproven DSR CMUs not included in (aa) above), one Delivery Year, and, in respect of the T-1 Auction, means one Delivery Year for all CMUs, and, in relation to where Rule 5.16.2 applies to a CMU, means one Delivery Year

15. Rule 1.2 also defines 'Qualifying £/kW Capital Expenditure' (the "QCE"):

means, with respect to a New Build CMU which is a Generating CMU or a Refurbishing CMU which is a Generating CMU or an Unproven DSR CMU, the Total Project Spend divided by the De-rated Capacity of the CMU that is expected in the reasonable opinion of the Applicant to result from the Capital Expenditure comprising the Total Project Spend

16. Rule 3.7.2 describes certain prequalification requirements for New Build Generating CMUs, and states that:

Each Applicant for a New Build CMU must state in the Application:

(a) a description of the nature of the construction, repowering or refurbishment works to be undertaken; and, where the duration of the Capacity Agreement for the CMU is to be greater than three Delivery Years:

(i) that, to the best of its knowledge and belief, the CMU will meet the Extended Years Criteria when completed; and

(ii) a description of how those criteria are to be met;

...

(d) for a Generating CMU, whether the Qualifying £/kW Capital Expenditure is:

(i) equal to or greater than the Fifteen Year Minimum £/kW Threshold;

(ii) equal to or greater than the Three Year Minimum £/kW Threshold and less than the Fifteen Year Minimum £/kW Threshold; or

(iii) less than the Three Year Minimum £/kW Threshold;

...

Our Findings

17. We have assessed Infinis' grounds for appeal, and our views are summarised below.

Ground 1

18. Infinis believe that the CMU listed in paragraph 1 should be entitled to a MOP of 3 years, noting that there is "...nothing in the Rules which limits the Obligation duration of an Agreement a New Build CMU to one year in these circumstances...". Infinis further point out that the Delivery Body did not provide reasoning for conditionally prequalifying the CMU for 1 year.

19. We note that regulation 69(3) requires the Delivery Body to give reasons of their reconsidered decisions to affected parties, and we agree that, in this case, the Delivery Body did not provide sufficient justification for their decision in their Notice of a Reconsidered Decision to the applicant.
20. The definition of MOP, as set out in paragraph 14, is such that a MOP of 3 years can be awarded where “...an Applicant has stated pursuant to Rule 3.7.2(d) or Rule 3.10.1(aa)(i) (as the case may be) that Qualifying £/kW Capital Expenditure is expected to equal or exceed the Three Year Minimum £/kW Threshold and to be lower than the Fifteen Year Minimum £/kW Threshold...” (emphasis added).
21. Rule 3.7.2(d), as per paragraph 16, requires an applicant to state which category of QCE their CMU meets.
22. The Delivery Body confirmed that Infinis indicated, in its Application for Prequalification, that the QCE will exceed the relevant 15 year threshold, as they were required to do by Rule 3.7.2(d). The applicant further stated that they will not meet the Extended Years Criteria (“EYC”) (i.e. meet the requirement of Rule 3.7.2(a)(i)). Hence, referring to the definition of MOP, the literal reading of the Rules is that Infinis can only be eligible for a 1 year MOP. As a result, we disagree with the applicant’s argument that there is “...nothing in the Rules which limits the Obligation duration of an Agreement a New Build CMU to one year in these circumstances...”.
23. However, we have considered this matter further, given that, in these specific circumstances, a literal reading of the Rules appears to result in an irrational outcome.
24. The Authority is satisfied that the requirement of the Rules that applicants bidding for a 3 year agreement should not exceed the 15 year threshold for QCE, if read literally, appears to lead to an irrational result – namely, that an Applicant would be precluded from bidding for 3 years (rather than 1 year) because its QCE is too high. The definition of MOP at paragraph (b) must be interpreted as not giving rise to that irrational result but as meaning that applicants who have QCE of more than 3 years should be permitted a MOP of 3 years; and that the words “and to be lower than the 15 year minimum” are intended to convey that those applicants who comply with the other requirements for 15

years, but have QCE of more than the 3 year threshold and less than the 15 year threshold, may only have a 3 year MOP rather than 15 year MOP.

25. As a result, our view is that the current drafting of the Rules leads to an irrational outcome in these specific circumstances.
26. Hence it is our view that in this specific case, the Delivery Body's decision to Conditionally Prequalify the CMU listed in paragraph 1 for a MOP of 1 year should be substituted with a decision to Conditionally Prequalify the CMU for a MOP of 3 years.

Ground 2

27. The applicant raised a ground of appeal based on Inifinis' view that there have been two previous prequalification decisions, and one decision made in this same prequalification year which support Inifinis' view that their CMU should be Conditionally Prequalified for a MOP of 3 years.
28. We have not considered the previous, or concurrent decisions highlighted in the appeal notice to the Authority. These decisions have not been the subject of an appeal to the Authority, hence it is outside of the scope of our decision, with respect to the CMUs highlighted in paragraph 1.
29. Further, given the position highlighted in paragraph 26, it is the Authority's view that considering this ground of appeal does not add anything further to the analysis of the position and would not lead to a different conclusion.

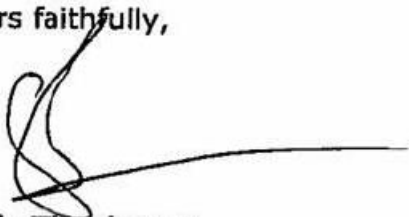
Conclusion

30. It is the view of the Authority that the Delivery Body's reconsidered decision to Conditionally Prequalify A1SUTT for a MOP of 1 year for the T-4 Auction, should be substituted with a decision to Conditionally Prequalify the CMU for a MOP of 3 years, on the basis that
 - a) The literal reading of the Rules results in an irrational outcome for the specific circumstances arising in this Appeal.

Determination

31. 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 Conditionally Prequalify Infinis for a MOP of 1 year for Prequalification be substituted such that Infinis is Conditionally Prequalified for a MOP of 3 years, in respect of the CMUs listed in paragraph 1 for the T-4 Auction.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Chris Thackeray', written over a horizontal line.

Chris Thackeray
Head of GB Wholesale Markets

For and on behalf of the Gas and Electricity Markets Authority

19 February 2021