

## **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 Speciality Steel UK Limited ("Speciality Steel") against reconsidered decisions made by the Electricity Market Reform Delivery Body ("Delivery Body") in respect of the following Capacity Market Unit ("CMU"):
  - a) SS2020 (T-1 and T-4 Auctions)
2. 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**

3. Speciality Steel submitted an Application for Prequalification for the CMU in Paragraph 1 in respect of the T-1 and T-4 Auctions and sought a Maximum Obligation Period of 1 year.
4. For the CMU 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:

*"The Certificate of Conduct was not submitted for this Application in accordance with Capacity Market Rule 3.12.4, which states each Application must be accompanied by a Certificate of Conduct. The Certificate of Conduct is defined in 1.2 as Exhibit C.*

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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.

*Capacity Market Rule 3.9.6 requires, an Applicant for a Proven DSR CMU to declare that if, after the Capacity Auction to which the Application relates, there is an Emissions Related Material Change to the CMU, it will, as soon as reasonably practicable following that Emissions Related Material Change, provide a Fossil Fuel Emissions Declaration to the Delivery Body. The Delivery Body considers that the Applicant has not fully addressed the matters as per rule 3.9.6, since a Declaration relating to Emissions Related Material Changes has not been provided. Please contact the Delivery Body for more information."*

5. Speciality Steel submitted a request for reconsideration of the Prequalification Decisions on 20 November 2020.
6. The Delivery Body issued a Notice of its Reconsidered Decisions on 11 December 2020 which rejected the dispute on the following Grounds:

*"The Delivery Body has reviewed the Prequalification Decision in accordance with the request to review that decision. The Reconsidered Decision is that the original Prequalification Decision is valid and will be upheld.*

*The Certificate of Conduct was not submitted for this Application in accordance with Capacity Market Rule 3.12.4, which states each Application must be accompanied by a Certificate of Conduct. The Certificate of Conduct is defined in 1.2 as Exhibit C.*

*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) of the Regulations does not allow the Delivery Body to take 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.*

*As a result, this information could not be considered by the Delivery Body in reaching its Reconsidered Decision. For information, the Delivery Body has*

*accepted the other elements of the Application and has updated our records accordingly."*

7. Speciality Steel then submitted its Appeal Notice to the Authority on 23 December 2020 under regulation 70 of the Regulations.

### **Speciality Steel's Grounds for appeal**

8. The Appellant disputes the decision, arguing that the missing information should have been considered by the Delivery Body in its Request for Reconsideration of the Delivery Body's Prequalification Decision ("Tier 1 decision") on the following Grounds:

#### Ground 1

9. The Appellant stated that it submitted its Application "*in good faith*" and in the belief that "*...when the application was submitted that all supporting documents were present. On receiving the rejection notice, citing the missing Certificate of Conduct, it was identified that a duplicate copy of the Pre-qualification Certificate was uploaded in the location where the Certificate of Conduct would be expected.*"
10. The Appellant also states that the Certificate of Conduct was uploaded as part of the original Application for Prequalification, but was subsequently deleted by the Appellant in order to make further amendments to the document, and replaced with the incorrect document, which was the document available when the Prequalification Window<sup>2</sup> closed. The Appellant further states in its Request for Reconsideration that "*...the applicant took the opportunity to rectify and provide a copy of the missing Certificate on appeal to the Delivery Body. The Certificate provided at appeal had a file creation date that matched the date provided with the signature.*"
11. Speciality Steel also note that "*...the Applicant was able to provide a correct file, appropriately time-stamped, to rectify the missing file.*"

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<sup>2</sup> 'Prequalification Window' is defined in Rule 1.2 of the Capacity Market Rules and means, for any Capacity Auction, the period specified in the Auction Guidelines within which Applications for Prequalification are to be made.

### Ground 2

12. The Appellant states that *"...it should also be noted that this asset has participated in the Capacity Market since its inception and has historically prequalified without any issue regarding Exhibits."*

### Ground 3

13. The Appellant also argues that *"the error made in the original application was rectifiable through the Tier 1 dispute process. If an exhibit is missing from the original application, the Delivery Body should accept a correction at Tier 1 if the error is inadvertent, of an administrative nature, and does not impact on the ability of the Delivery Body to assess the merits of the unit to deliver Capacity for the delivery year to which the application relates."*

...

*"The Applicant notes that BEIS have provided policy intent guidance to its regulations that allow for corrections to exhibits if the error is inadvertent and immaterial to the Delivery Body's ability to determine the merits of the application, as the error could easily be rectified during the dispute window.*

*The Applicant therefore argues that the Delivery Body were wrong to declare that the correction was providing new information at the dispute stage, and should have accepted the updated file as a correction of an inadvertent administrative error."*

## **The Legislative Framework**

14. 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

15. 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.
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 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

18. Rule 1.2 defines the 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 the Delivery Body must not Prequalify a CMU if the Application for Prequalification has not been submitted in accordance with the Rules:

*Subject to Rule 3.8.1A(c)(ii)<sup>3</sup>, 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 have assessed Speciality Steel's grounds for appeal and provide our findings below.

### *Ground 1*

22. Speciality Steel's first Ground was that the Certificate of Conduct was not uploaded owing to an '*inadvertent administrative error*'.
23. Rule 3.12.3 provides that each Application must be accompanied by a Certificate of Conduct signed by two Directors. The Appellant did not provide this document for the CMU in Paragraph 1, as required by Rule 3.12.3. Regulation 69(5) provides that, when making a reconsidered decision, the Delivery Body must not take into consideration any information or evidence which the Appellant is required, and fails, to provide before that decision is taken. Therefore, pursuant to Rule 4.4.2(a), the Delivery Body was correct to not Prequalify the CMU.
24. The Authority take note of the Appellant's claim that the correct document was uploaded to the Application for Prequalification and subsequently removed and replaced with a duplicate Prequalification Certificate. The Delivery Body have confirmed, upon a request made by the Authority, that it did not have sight of the Certificate of Conduct during the Prequalification Window. The Delivery Body has also confirmed that it did not begin a review of the information submitted by Speciality Steel until the Prequalification

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<sup>3</sup> Rule 3.8.1A(c)(ii) is an exception to the application of Rule 4.4.2(a) and is not relevant to these appeals. This Rule makes provisions for Refurbishing CMUs, whereby the Delivery Body must Prequalify a CMU if the Application otherwise has been submitted in accordance with the Rules.

Assessment Window<sup>4</sup>. The Certificate of Conduct was therefore not available to be taken into consideration by the Delivery Body during the Prequalification Assessment Window, contrary to the requirement in Rule 3.12.4. Therefore, the Certificate of Conduct being initially uploaded, but deleted before the Application for Prequalification was submitted, has no material significance as it did not form part of the Prequalification Application.

25. Speciality Steel's first Ground also provides that the Certificate of Conduct had a file creation date that matched the date provided with the signature, "...*appropriately time-stamped, to rectify the missing file.*" The Authority do not consider this to have any material significance. The Delivery Body was not able to take these factors into consideration in the assessment of the Application, as the Certificate of Conduct was not provided in the Application for Prequalification.

#### *Ground 2*

26. Speciality Steel's second Ground is that the asset has participated in the Capacity Market since its inception and has historically been Prequalified without issues regarding its Exhibits.
27. The Authority must consider each appeal according to its own merits and we therefore do not consider this Ground to have any merit. The asset having been historically Prequalified by the Delivery Body does not create a legitimate expectation that the Delivery Body should have Prequalified this application.

#### *Ground 3*

28. Speciality Steel's third Ground is that the Delivery Body should have accepted the Certificate of Conduct at Tier 1 as a correction of an *inadvertent administrative error*. The Appellant, in its Appeal Notice, states that "...*BEIS have provided policy intent guidance to its regulations...*", and refers to the Delivery Body's Capacity Market Disputes Guidance (the "guidance"), which provides a summary of the Delivery Body's understanding of how

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<sup>4</sup> Prequalification Assessment Window' is defined in the Capacity Market Rules and means, for any Capacity Auction, the period from which the Prequalification Window closes until the Prequalification Results Day as set out in the Auction Guidelines.

regulation 69(5) may be interpreted, under certain conditions, to allow an error or omission to be corrected at Tier 1.

29. As Speciality Steel point out, the Delivery Body states in the guidance<sup>5</sup> that "... *information or evidence can be accepted by the Delivery Body for consideration at Tier 1 disputes stage in the following scenarios provided that, when the Application is considered as a whole, the error or omission is: Inadvertent, obvious, isolated or trivial...*". The guidance further states "*Whilst the policy guidance allows for the submission of this information to support a Tier 1 dispute, it must be emphasised that this does not have to be accepted by the Delivery Body as evidencing the Applicant's compliance with the prequalification obligation that they were rejected for on Prequalification Results Day.*" This is an update to the guidance, following clarification of the policy intent behind regulation 69(5) by the UK Government Department for Business, Energy and Industrial Strategy ("BEIS").
30. Hence, the Delivery Body may reach the view, when the Application is considered as a whole, that correction of an error or omission, which is "*inadvertent, obvious, isolated or trivial*", is permissible. In applying the guidance, the relevant Rules and regulation 69(5), the Delivery Body has determined that the missing Certificate of Conduct cannot be accepted. Rules 3.12.4 and 4.4.2(a) state that, in order to Prequalify, the Certificate of Conduct must be provided in the original application. It is the Authority's view that the Delivery Body correctly applied Rule 3.12.4 and regulation 69(5) when it rejected Speciality Steel's application for prequalification of the CMUs listed in Paragraph 1.

## Conclusion

31. The Delivery Body reached the correct reconsidered decision to not Prequalify CMU SS2020 for the T-4 Auction and T-1 Auction on the basis that:
- a) The Certificate of Conduct, required under Rule 3.12.4, was not provided in the Application for Prequalification. In accordance with regulation 69(5), when making a reconsidered decision, the Delivery Body must not take into consideration any information or evidence which Speciality Steel was

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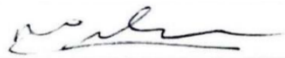
<sup>5</sup> [Disputes guidance \(emrdeliverybody.com\)](https://www.emrdeliverybody.com), Version 6.0, November 2020, Page 13.



required to provide to the Delivery Body before the decision was taken, and which it failed to provide at that stage.

## **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 Speciality Steel for Prequalification be upheld in respect of the CMU listed in Paragraph 1 for the T-4 Auction and T-1 Auction.



Mark Carolan

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

12 February 2021