

Contracts for Difference – Eligibility, FCFS and Appeals

16th October 2013

1. Introduction

Introduction – Ronan O’Regan

- The plan is to run through 3 – 4 process maps starting with an overview and then a detailed run through of each map.
- This is the fourth CfD workshop to date.
- Collaborative Development process recap – the process will provide all stakeholders with an understanding of how EMR processes can be implemented in practice.
- We will be focusing on the key roles and interfaces throughout each detailed process map. We are hoping to add more narrative to the process maps.
- This is not the right forum to try and open up policy issues although we will log any policy discussions and feed them back.
- PwC will capture issues and questions raised during workshops which will be answered either by follow up sessions or via key documents/publications.
- Comments made during the workshop will be non-attributable to individuals
- The end product as a result of workshops and following consultations will be a detailed operating model and implementation plan for each stakeholder, detailing what is expected of them.
- We are creating a questions log throughout the workshops which will allow people to track how issues are being resolved.

2. Engagement Map

Introduction – Ronan O’Regan

- **High level policy framework** – This covers the Energy Bill
- **Detailed Policy Design** – This is about the consultation document which was published last week. Throughout the consultation process DECC will be holding sessions to discuss the content. DECC anticipates that an event will be held on 13th November which will cover; Budget Management, CfD Design, CfD Supplier Obligation and the Payments Model.
- **Operating Model** – The government is working with industry to create an operating model complete with process maps.

3. Overview of the CfD Allocation System

Overview of Allocation System

- The Allocation Methodology describes the journey a developer must go through in order to secure and then retain a CfD.
- Within this process there are several clear roles for different bodies
 - o The Secretary of State sets the strike price and rules
 - o The Delivery Body runs the allocation process, assesses eligibility and allocates CfDs
 - o Counterparty Body manages the contract, monitors contract compliance
- Certain information which will be published before the allocation process takes place. This ensures that participants have the required information to decide if and when they want to apply.
- Applicants will need to provide evidence that they have met the Eligibility Criteria before they are allowed to enter the allocation process. Those criteria include planning permission or development consent, evidence that the applicant is validly incorporated under the laws of the jurisdiction in which it is incorporated and evidence of a valid supply chain plan.

Questions/Issues

- Can budgets be modified by the government year on year? Response: yes, the government will have the ability to do this though it remains mindful of the need to strike a balance between providing the market with as much certainty as possible, and effective budget management.

4. Eligibility

Principles

- The principles underpinning the Government’s approach to generic allocation process for renewable low-carbon generation are to:
 - **minimise costs to consumers**
 - **reduce costs to developers** by allowing them to secure a CfD at an early stage in their project’s development; and
 - **support the Government’s decarbonisation objectives**, by ensuring that CfDs are allocated to credible projects, and placing meaningful incentives on developers to develop their projects in a timely fashion.
- The allocation process supports allocation at the administered strike prices, whilst sufficient budget remains.
- Initially, allocation will be on the basis of a ‘First Come, First Served’ process, while at least 50% of the budget in an individual delivery year is available.
- If eligible and there is sufficient budget the Delivery Body will direct the CfD Counterparty to offer a contract

Supply Chain Plans

- The Secretary of State will issue a consultation on the detailed proposals in November; it is expected that this consultation will close on the same date as the present consultation.
- This consultation will set out the information that a supply chain plan will need to include, as well as the criteria that they will be assessed against, and how each plan will be assessed.
- The consultation published last week set out our emerging thinking. We expect that supply chain plans would need to provide details of:
 - workforce skills necessary to undertake the project;
 - how the skills will be assured;
 - whether the project is subject to competitive procurement;
 - whether approaches have been taken or will be taken to implement this project in an innovative manner
- It will be up to the developer when they submit their supply chain for approval, but it is expected that the approval process would typically take circa 30 days and the approval is expected to last for one year, although there may be circumstances when the approval could take 90 days.

Questions/Issues

- Are the assessment criteria going to be on a technology specific basis? There is a need to strike a balance between an efficient, transparent process and capturing technology specific issues. This is something DECC will consider when developing criteria and guidance relating to the supply chain plans. Consultation to be released in November.
- What is the rationale for a 90 day process? To be taken offline with supply chain team

Eligibility Criteria – Policy Objectives

- The Eligibility Criteria will provide:
 - o simple;
 - o objective;
 - o easy to apply;
 requirements against which an application can be quickly assessed to determine whether it may be

eligible to have a CfD allocated.

- They will also minimise requirements for new information and the probability that an application will be rejected if the requirements are met. This should minimise the number of potential appeals against non-allocation

What is Included in the Eligibility Criteria

- The criteria set out what documents or evidence must be presented on application to enable the Delivery Body to determine quickly that an application is eligible for allocation of a CfD.
- These criteria have been published as an appendix to the consultation document of 10 October 2013.
- They are in two categories – generic requirements (e.g. that the application is for a new low-carbon generating station) and requirements for the applicant to submit information necessary for completion of the CfD by the Counterparty Body (which may be technology-specific).
- In both categories, the eligibility criteria will be met by a simple check that the requisite information has been provided.
-

What is *not* Included in the Eligibility Criteria

- To enable use of the Eligibility Criteria as a simple checklist against which to assess whether a project should be allocated a CfD, the criteria do not set out the *content* of the documents required.
- E.G. the criteria do not specify the calorific value of biomass fuels from gasification or pyrolysis, or the detail of the Supply Chain Plan. These will be in the ATF (or regulations).
- The Delivery Body’s action for eligibility is to confirm that the documents containing that information are included in the application.
- It is the responsibility of the applicant to ensure that the information provided is sufficient for the allocation process.

Questions/Issues

- Will ATF include additional eligibility criteria? It may include an additional level of detail in relation to the existing criteria.
- Industry feel that requirement to have a confirmed grid connection at the point of application, creates an unfair hurdle on small generators in particular given the costs incurred relative to the risk of not getting a CfD. Industry voiced that they have raised this point several times.

5. B. CfD Pre-Application (All Allocation Types)

Process Map Details

- 1. Delivery body publishes the application forms online for applicants to view.
- 2. Applicant will request any supporting documentation needed in order to complete the application which they do not already have. Applicants may already have some of the information required and therefore they may not need to make all the following requests to external parties.
- 3. The applicant will need to get DECCs agreement on their supply chain plan.
- 4. The applicant will need to provide a copy of a signed copy of a Grid Connection Agreement with the National System Operator (or equivalent from the DNO if connected directly to the distribution network)
- 5. Upon request, Ofgem will provide the applicant with confirmation that the project is not in another scheme. DECC are currently deciding whether the applicants could self-certify this and therefore may not require Ofgem’s input.
- 6. The applicant will need to provide evidence of planning permission from the relevant Planning Authority
- 7. Applicants would be able to approach the Counterparty body in order to change a small number of specific terms in the CfD contract. The Counterparty body would then provide confirmation of these contract negotiations.
- 8. The prospective applicant collates all the supporting evidence required for their application
- 9. The prospective applicant must collect additional internal data e.g. proof of proper incorporation standard company data, information on projects, dates, megawatts etc. If the process is already in constrained allocation rounds then the applicant will need to submit a sealed bid.

- 10. The applicant collates all the application data which they have gathered internally and from external sources and checks these against the rules and evidence check list before submitting.
- 11. The applicant produces an eligibility data pack which contains all the above information which they then submit.
- 12. Throughout the duration of the data gathering process the Delivery Body will manage any queries relating to the application.

Questions/Issues

- B7. There is a need to understand what is negotiable in the CfD contract with a steer from DECC that these need to be kept to an absolute minimum to forecast the likely volume of variations to avoid potential bottlenecks.
- B7. Concerns were raised about whether this would create a bottleneck within the counterparty around having to deal with lots of requests for variation. As such it might be helpful to forecast the demand for contract variations
- B7. What's the timeframe associated with the variation of contract terms? Duty on Counterparty to process in a timely manner. There will be clear guidance on terms for variation, to be set out in advance.
- B7. Are variations that are subsequently agreed with the counterparty going to be made public? Industry felt that this would increase overall efficiency Response: DECC are considering how the variation process will work.

- B1 How many times in a year would the Delivery Body publish a form? The intent is that only one form will be published. Between now and go live the Delivery Body anticipate publishing the application form for feedback. Once the Delivery Body have a form that is fit for purpose, they plan to keep the same form for each application. Need clarity on when in the rounds you will be able to submit a form.
- Will there be an opportunity to speak to someone once an applicant has submitted their eligibility pack?
Response: There will be resources for people who are unsure about how the process works (step B12 on the process map) but DECC and the Delivery Body don't anticipate that there will be a "pre-vetting" service. If an application is rejected the applicant will be informed as to why. Industry felt that a platform for dialogue to help in the pre-application stage would be very helpful.
- B6. Planning permission: if an applicant applies with planning permission and then there is an appeal which results in the applicant losing their planning permission what would happen? At a more general level, if you pass these eligibility criteria and then your situation changes what happens? Are these enduring criteria or gateway criteria? How are changes in circumstances picked up? Is it the responsibility of the applicant to inform DECC of their change in circumstance?
- Confidentiality - like connection agreements it is proposed that individual contract details would stay within Grid. NG would have to give anonymised details of volumes / budget etc. Amount of information that will be published in the public domain is under consideration.
- Application forms will be available one month before application window opens, so that they can be familiar with the mechanics - up to applicants whether they would want to pre-load. The actual content will be known well before then. Would be a form-based process? Or capable of being downloaded completed offline and then uploaded? Looking for simplicity and user-friendliness. Would FCFS be run on a second-by-second process - is this beneficial? Or would it be done by day/week windows? This is particularly relevant for the initial period when the window opens for the first time.
- B3 The aim is that the supply chain document will not cause an undue delay in the process. Should be a case of getting confirmation that a supply chain plan which is acceptable in light of the guidance and criteria which will have been published has been provided.. Would be a tick-box in the eligibility process.
- B3 If there's insufficient time for 90 days to assess supply chain plan, would the date FCFS starts be pushed back? Should be sufficient time. First come first served principles on supply chain plans.

Might be an idea to bring out the individual supply chain approval elements - period for assessment. Process could start well before application forms filled in. There are start dates on each of these. Concern over supply chain check timings vs FCFS.

- Industry raised their concerns about the first come first serve process which could result in applicants missing out on a CfD due to a huge flood of applications in the first few minutes. If this were to happen would DECC consider moving from first come first serve to allocation rounds for all those who submitted an application on the first day.
- Industry would like more detail around each point of the process map, particularly box B3 'Provide Supply Chain Document'
- B5. If applicants need a letter from Ofgem then they will need to know what information they need from Ofgem in advance.

6. A. CfD Eligibility (All Allocation Types) Process Map

Process Map Summary

- 1. The Delivery Body retrieves the eligibility data (collated by the prospective applicant in process map B)
- 2. The Delivery Body checks that all the eligibility data contains the correct data
- 3. The Delivery Body logs whether or not the applicant is eligible based on the eligibility data they provided. This outcome is logged and stored..
- 4. If the applicant is eligible, the Delivery Body will notify them in writing. A copy of the eligibility confirmation letter is stored and the process returns to 'Allocation Process'.
- 5. If the applicant is ineligible, the Delivery Body will notify the applicant in writing and will give detailed reasons why the applicant has failed. A copy of both eligibility rejection letters and confirmation letters are stored.
- 6. The applicant has the decision whether or not to lodge an appeal. The right to appeal would be on the basis that an applicant has evidence to suggest the delivery body has made an error in fact, or misapplied the eligibility criteria.
- If the applicant decides not to appeal then the process returns to 'Allocation Process' where the application is terminated and any budget set aside is recovered
- 7. If the prospective applicant does decide to go to appeal / review then the CfD Eligibility Review/Appeal process begins.

Questions/Issues

- An applicant's place in the queue is held during an appeal. If the appeal is dragged out then there is a risk of a block on the entire process. However appeals are time limited between Grid and Ofgem (2 months in total).
- If an early application is rejected, the applicant could reapply under FCFS but they don't hold their original place in the queue.

7. First Come, First Served Allocation

Valuation

- The Delivery Body will value projects.
- They will use the assumptions provided by DECC for:
 - o Reference price;
 - o Load Factors;

-
- It is anticipated these will be consistent with those used for strike price setting in the Delivery Plan.
- Delivery Body will publish the CfD Budget, updating as budget is expended.
- They will also update Budget when:
 - Counterparty informs them of capacity adjustments, strike price adjustments or terminations for let contracts; or
 - As DECC assumptions are updated

Budget Management

- Ahead of allocation commencing, developers can expect to know the annual CfD budget as well as any constraints applying to their technology.
- Information on the budget available will be updated frequently, with an appropriate level of financial data made public via a website
- Having valued the potential projects the Delivery body will assess whether they can be supported within the CfD allocation Budget and within any maxima or minima which apply.
- The Delivery Body will approach DECC before moving to allocation rounds and check whether any additional money is available to prolong the operation of First Come, First Served allocation.
- DECC will be closely monitoring the use of the CfD Allocation Budget and will already have been proactively preparing for such a query.
- It is envisaged that such decisions will be taken as swiftly as possible (for example within approximately 10 working days in most circumstances).

Questions/Issues

- DECC will manage the budget in relation to outturn reference prices / load factors being different to that forecast. Industry highlighted that there was huge uncertainty and potential issues of using a single load factor assumption on all wind turbines for example. So should budget valuation be done on a project level? A more granular level of assumptions might make sense for DECC - ultimately they bear the risk but would also reduce the DECC headroom built in. If budget used up more quickly than expected, how would DECC manage that? Reduce future years? Under / over-budgeting won't be apparent for a while for DECC. There would be a process that DECC could follow to firm up the budget data over time (e.g. at SFC)
- There is an issue about 'powering up' of wind farms in early stages. The budget needs to be sophisticated enough to reflect this.
- Notifications need to be included on process map and made clearer (NG made clear that this was covered under separate process)
- What are the timings from getting from box 4 to 10? Would determine how much information needs to be made public in relation to individual CfD applications.
- The decision about whether or not there will be minima or maxima allocation, or which technologies would be subject to a minima or maxima, has not yet been made.
- Discussion on budget and publication of this data – the budget could be moved by external parameters, market, and CfD applications. A lot more detail is needed on the mechanism and how it will be calculated. This will be included in delivery plan and ATF early next year.
- Industry asked when they would know what the annual CfD budget is? DECC are unable to give a set date but are aware that they need to publish it as soon as possible.
- If DECC are able to increase the budget or if the 50% trigger is met then DECC will publish this news.
- The CfD budget level will be published frequently – perhaps each time a CfD is allocated.
- The budgets for contracts which have already been entered into will be secure.



8. D. CfD Allocation FCFS Process Map

Process Map Summary

- 1 – 3 cover the publication of the budget and FCFS Guidance by DECC and the Delivery Body respectively.
- 5 – 6 cover the prospective applicant compiling their eligibility data and submitting their application to the Delivery Body (see CfD Pre-Application for more detail).
- 4. The Delivery Body logs the application in the order they were submitted to define the queue. During stages 4 – 6 an applicant will be able to raise a query with the Delivery Body.
- 7 – 11 cover the valuation of the application and checks whether there is sufficient headroom.
- If the application is in breach then the process follows 14 – 17
- If the application is not in breach then the process follows steps 19 – 21 in which the reserved budget becomes allocated to the application in questions and the new budget position is published.

Process Map Details

- DECC will publish details at points 1, 2 & 10. Industry also felt that there should be a publication at point 4 so that they are aware of the aggregate figures going into the system.

Questions/Issues

- Industry asked whether maxima and minimum are calculated on an annual or cumulative basis? In terms of the budget you are required to stay within budget for each of the years.
- If the trigger is met and there is a move to allocation rounds do all applicants have to reapply? From a systems perspective DECC will look into making it simple for applicants to resubmit their information once they have confirmed that all the information remains correct. Applicants will have to provide some additional information such as sealed bids.
- Industry felt that all information should be made public unless there is a good reason to withhold information.
- Industry need to have confidence that DECC have correctly calculated the budget
- When will the first budget and underlying assumptions be published? When would DECC revise the budget?
- At the very least the market will be informed of the budget level on a yearly basis.
- Only applications up to the last LCF budget year for which strike prices are published (18/19) will be accepted at this stage. Subsequently, only applications up to the last LCF budget year (20/21) will be accepted until the LCF Budget for the period beyond 2021 has been set. What about large nuclear? Potential for the budget to be eaten up in advance (dependent on investment contracts signed). These projects would need to be included in the CfD register (publicly available?)
- If a large project triggers allocation rounds, what happens to remaining FCFS budget? The default is that it will not be used, everyone goes to allocation rounds - potential for flexibility through budget review process by DECC. Industry suggested it would be useful to have more information on the decision-making process under this review.

9. Eligibility Appeals

Overview

- Focus is on the appeals process itself.

Slide Content

- A Detailed overview of appeals on eligibility:
 - o in the context of first come first served;
 - o in the context of first come first served moving to allocation rounds; and
 - o in the context of allocation rounds (whether constrained or otherwise).
- The current thinking on checks on Delivery Body calculations:
 - o where the Delivery Body is calculating whether the move from first come first served to allocation rounds has been triggered;
 - o where the Delivery Body is calculating whether the trigger for an allocation round being constrained has been triggered; and
 - o where the Delivery Body is calculating the cleared Strike Prices and successful and unsuccessful applicants where we have constrained allocation.

Appeals on Eligibility

- Where an applicant for a CfD is notified by the Delivery Body they have been unsuccessful on the grounds that they have failed to meet the eligibility criteria there will be a right, under legislation, to:
 - o appeal to the Delivery Body to reconsider its original decision (based on the information that was originally submitted);
 - o if the applicant remains unhappy with the decision, to appeal to Ofgem to re-evaluate the Delivery Body's decision (based upon the evidence originally provided to the Delivery Body); and
 - o (subject to Government approvals) we are minded to include a further right of appeal to the High Court where the applicant remains unhappy with the decision. If this is not approved by the Government then the appeal will go through judicial review.
- The timescales on the above process will be:
 - o Time period to appeal to the Delivery Body – 5 WDs.
 - o Time period for Delivery Body to notify applicant of its decision – 10 WDs.
 - o Time period for applicant to then appeal to Ofgem – 5 WDs.
 - o Target time period for Ofgem to notify the applicant of its decision – 30 WDs
 - o Time period to appeal to the High Court – to be confirmed
 - o There will be no specified time period which the High Court would have to reach a verdict.
- Industry felt that 5 working days to build an evidence based case in order to raise an appeal is insufficient if an evidence base is required.
- Industry felt that at each stage they only have 5 working days whereas Ofgem have up to 30 days. Ofgem highlighted that they may be dealing with a high volume of potentially complex cases.
- The appeals process is around clarifying material that applicants have already provided rather than offering applicants to provide extra evidence.
- Date of deemed receipt will be the date from which an applicant is able to appeal.
- Industry felt there was a need to compromise between 'ruthless fairness' of FCFS and some flexibility / discretion.

Appeals On Eligibility in First Come First Served Allocation

- Where an applicant appealed during first come first served phase and the process was still in first

come first serve by the end of the appeals process, in the event the applicant's appeal was successful they would then be granted a CfD.

- Where the allocation process was moving from first come first served to allocation rounds, there would be a delay in announcing whether this move had been triggered until any appeals being considered by the Delivery Body and/or Ofgem were resolved, in order to be confident only eligible projects' budgets were being considered in the calculation.
- Court proceedings (whether under a statutory process or judicial review) are too uncertain in length to factor into the allocation process. Where DECC are able to legislate for a court process, they will recommend that the Court should not impact existing allocation processes/successful applicants with its decision.
- If the court determines that the applicant should be granted a CfD but then this would have to be complied with, notwithstanding budget issues this presented. It is not possible at this point in time to map-out the process that would apply in such circumstances, given the uncertainty of Court proceedings..
- The right to appeal is only open to the applicant rather than another party appealing against an applicant being granted eligibility.

Appeals On Eligibility in an Allocation Round

- Where the process was in an allocation round, in order to manage budget we would envisage the following process:
 - o deadline for applications in the relevant round;
 - o applicants are notified whether the Delivery Body deems them eligible or ineligible;
 - o applicants then have the ability to appeal to the Delivery Body and then Ofgem (with the same timescales as articulated in slide 2 applying);
 - o once all appeals have been resolved, the Delivery Body then has sufficient information to calculate whether either (1) there is sufficient budget for all applicants to be granted a CfD, or (2) whether constrained allocation applies, in which case the constrained allocation process would be used.
- As for appeals in first come first served, appeals to the High Court (whether under an appeals process in secondary legislation or under Judicial Review) would involve too much High Court discretion for us to be able to legislate for precisely how the rounds system would interface with such an appeal. As for appeals in a first come first served situation, where we are able to legislate for a High Court based appeals process we will recommend that the High Court does not impact existing CfD allocation processes/successful applicants
- Appeals to the High Court would not prevent allocation processes continuing, given the uncertain length of such appeals. .

Checks on Delivery Body Allocation

- DECC are currently exploring the possibility of providing for an independent audit of Delivery Body calculations on:
 - o moving to allocation rounds;
 - o moving to constrained allocation; and
 - o cleared Strike Prices and successful/unsuccessful applicants.
- This would involve legislating for such an independent audit to be carried out as part of the Delivery Body's processes prior to each of the above announcements being made.
- This proposed approach is driven by concerns for maintaining an ordered process with reasonably predictable timescales, which we think would be challenging were there to be scope for individual applicant challenges of the above decisions. Therefore the above proposal would be in place of a specific right to appeal the above decisions.
- There would of course be the potential for Judicial Review around these areas. However, DECC hope

that developing an independent audit process in which we can all have confidence will provide an effective check on the relevant calculations.

10. C. CfD Eligibility Review / Appeal (All Application Types) Process Map

Process Map Summary

- 1 – 2 the applicant lodges an eligibility which is then logged by the Delivery Body
- 3 – 5 the delivery body reviews the appeal and either deems the applicant eligible (go back to finish eligibility) or the application fail its review and is still deemed ineligible. In both cases the applicant is informed. Ofgem is also informed in the case of a failed review.
- 6. The applicant considers the outcome of the delivery body's review. If it accepts the decision then the appeals process ends.
- 7 – 9 The applicant may decide to appeal to Ofgem. The Delivery Body will need to provide ofgem with the applicant's eligibility data. Ofgem reviews the eligibility appeal and either accepts or rejects the appeal.
- 10 – 12. If the appeal is accepted then the delivery body and the prospective applicant are informed, the decision is logged and the process returns to finish eligibility.
- 13 – 16. If the appeal is rejected the delivery body, DECC and applicant are informed. This decision is logged by the delivery body and the reserved budget is released and the process returns to finish eligibility. The applicant may decide to request a judicial review (or appeal to the High Court assuming such a right of appeal is legislated for within the allocation regulations). In this the process is beyond the Contracts for Different Process. Essentially the High Court would request all eligibility data and relevant information from Ofgem and the Delivery Body and would review the rejected Ofgem appeal in order to come to a decision. It is difficult to predict with certainty the timescales where appeal was made to the High Court

Questions/Issues

- Industry asked whether or not there is an incentive process for the Delivery Body to get this correct? Currently there is nothing like this in place.
- If an applicant has been through a lengthy appeals process (50 working days) but is ultimately awarded a CfD will the applicant have the opportunity to restate their milestones? Yes potentially would need to build that into the contract – DECC will take this concern away.
- Industry asked about the level of dialogue that will accompany the appeals process. An applicant will receive a letter saying that Ofgem have received their appeal and will aim to respond within 30 working days.
- Industry asked what is driving the 30 day window that Ofgem have to respond to the appeal? Ofgem have to familiarise themselves with all the material, then take a decision and assess whether their decision aligns with that originally made by the Delivery Body.
- Industry asked if the process map could be updated to reflect a discovery of a systematic error which would force the delivery body to reassess all application.
- Process map does not reflect that Ofgem communicates with the applicant that their appeal is under consideration and that they may need more information from the applicant.
- If the Delivery Body discover that there is a fundamental problem/error in the system that would have affected all applicants that have previously been through the allocation process, would the delivery body have to undo and correct all the errors? Should this be reflected on the process map?