



Department for
Business, Energy
& Industrial Strategy

CONTRACTS FOR DIFFERENCE SCHEME FOR RENEWABLE ELECTRICITY GENERATION

Government response to consultation on
changes to the CfD contract, and on a revision to
the CHPQA standard and guidance notes

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Introduction

1. Achieving clean growth while ensuring an affordable energy supply for businesses and consumers is at the heart of the UK's Industrial Strategy. As set out in the Clean Growth Strategy, that means nurturing low carbon technologies, processes and systems that protect our businesses and households from high energy costs and securing an industrial and economic advantage from the global transition to a low carbon economy.
2. The UK has made substantial progress in building a successful renewables industry, as part of our move to a low carbon economy and to support meeting our carbon reduction and renewable energy targets. In 2016, businesses active in the low carbon and renewable energy economy generated £42.6 billion in turnover and employed an estimated 208,000 full-time equivalent employees. Installed capacity of renewable electricity generation has more than quadrupled since the end of 2010, from 9.3GW to 38.9GW at the end of 2017. The Contracts for Difference (CfD) scheme is making a significant contribution to the future of this sector. Our Industrial Strategy¹ sets out how government will ensure that the UK continues to benefit from the transition to a low carbon economy.
3. A CfD is a private law contract between developers of low carbon electricity (referred to in the contracts as *the generator*) and the Low Carbon Contracts Company (LCCC), a government-owned company (the CfD Counterparty). The generator is paid the difference between the 'strike price' – a price for electricity reflecting the cost of investing in a particular low carbon technology – and the 'reference price' – a measure of the average GB market price for electricity. CfDs incentivise investment by giving greater certainty and stability of revenues to electricity generators by reducing their exposure to volatile wholesale prices, whilst protecting consumers from paying for higher support costs when electricity prices are high.
4. Projects² currently supported by the CfD scheme are expected to provide around 10GW of new renewable electricity capacity. The government has confirmed that up to £557 million will be available for further CfDs, with the next auction planned to open by May 2019.

August 2018 consultation on changes to the CfD contract

5. In August, the government published a consultation document on the details of how the changes proposed in the December 2017 consultation³ will be implemented in the contract. It also set out proposals to address associated issues that have arisen as a result of engagement during that consultation process, such as a proposed change to the way in which reference price forecasts are used during the allocation process.
6. The consultation attracted 16 written responses, including from renewable electricity developers, trade associations and energy suppliers.

¹ *Industrial Strategy: building a Britain fit for the future*, published in November 2017 and available at gov.uk

² The CfD Register is published on the Low Carbon Contracts Company's website

³ Contracts for Difference for renewable electricity generation: Consultation on proposed amendments to the scheme

Purpose of this document

7. This is the **government response** to the August 2018 consultation. It provides a brief summary of the responses received and issues raised during the consultation, addresses the key issues raised and sets out the government's response.
8. Where we confirmed our final policy position on issues in the "Government response to consultation on proposed amendments to the scheme – Part B" in August 2018, we do not intend to address those issues further in this document.
9. We expect this document will be of particular interest to current and prospective developers of renewable electricity generation projects, as well as stakeholders with an interest in the renewable energy sector or UK electricity markets.

Responses on specific issues that were consulted on (or, in some cases, wider issues raised by consultees), are indicated as grey boxes.

10. This document refers to "**the CfD contract**", which is composed of two elements: the CfD Agreement and the CfD Standard Terms and Conditions. The CfD Agreement is the document that a successful developer will sign, containing project-specific information and specifying which conditions in the CfD Standard Terms and Conditions apply to that developer.
11. The revised CfD Agreement and the CfD Standard Terms and Conditions incorporating the changes which government has decided to adopt following consultation have been published in draft form (the "December 2018" draft) alongside this government response. The December 2018 draft highlights the changes made to reflect feedback received from consultees. Please note that, whilst no new drafting is highlighted in Annex 3 (Form of Direct Agreement) of the CfD Standard Terms and Conditions, the government has allowed more time to consider consultation feedback before finalising its position on this Annex. This position is without prejudice to any Direct Agreements signed or under discussion in respect of existing CfD contracts, and the government notes that a number of Direct Agreements in this form have already been signed by generators and banks/financiers.
12. The government will also keep the detailed drafting under review in light of the UK's exit from the EU and the associated domestic legislation. Accordingly, the CfD contract may be subject to further clarificatory amendments to reflect the UK's exit from the EU, and the government will consider the need for further guidance at the appropriate time.
13. There are variants of the generic CfD Agreement drafted for phased offshore wind projects ('Phasing Agreements'), Private Network Generators ('Private Network Agreement') and Unincorporated Joint Ventures ('CfD Agreement for Unincorporated Joint Ventures'). The draft CfD contract published alongside this document is the generic CfD Agreement and the CfD Standard Terms and Conditions, and it is the intention that any final changes will be transposed into the other variants of the agreement in advance of the next allocation round.
14. Final contract documents will be published closer to the opening of the allocation round.

Wind on remote islands

In the August 2018 consultation, the government proposed making certain minor amendments to the CfD contract associated with the introduction of remote island wind (RIW) as a new category of eligible generating station. The government proposed that, subject to a limited number of exceptions, RIW should be subject to similar standard terms and conditions as onshore wind projects.

The definition of remote island wind CfD unit in the Allocation Regulations⁴ includes a requirement relating to the minimum length of the electrical connection between the project and the *Main Interconnected Transmission System* as defined in the National Electricity Transmission System Security and Quality of Supply Standard, version 2.3 (the MITS).

The government proposed a minor amendment to the contract making clear that if the MITS were to be extended after the application closing date in respect of the relevant CfD allocation round, the generator will not be deemed to be in breach of the representations in the contract regarding the project continuing to deploy the relevant *Facility Generation Technology* as a result.

Responses received to the consultation

15. **Question 1** in the August 2018 consultation sought views on the proposed changes to the CfD contract in connection with Remote Island Wind (RIW). The three responses that addressed this question specifically were supportive of the proposed amendments to the contract and did not suggest changes.

Government Response: Having considered the responses received, the government will be proceeding with the changes to the CfD contract as drafted.

⁴ Contracts for Difference (Allocation) Regulations 2014

Mitigating budgetary risk

The CfD scheme offers increased revenue certainty to generators by paying a top-up from the market price to the strike price. If projects generate more than expected or if future electricity prices are lower than expected, then CfD payments may be higher than initially forecast (although consumers would also benefit from more low carbon electricity and lower electricity prices). The risk of higher than expected CfD payments has been reduced by the use of conservative generation assumptions at the time of the auction and the August 2018 consultation set out further proposals to minimise the risk.

In the August government response, the government confirmed that it will take forward the proposal to require generators to submit additional information ("*Expected Generation Output Data*") on the expected generation output of their project over the CfD contract term in order to increase confidence levels around forecasts of CfD costs. In the August consultation, the government consulted on the proposed contract drafting to implement this change.

The government also proposed to align timings of submissions for generators and improve the accuracy of forecasting the costs of the scheme by:

- amending the deadline for *Forecast Data* from 30 September to 31 January; and
- requiring developers to submit *Forecast Data* 6 months before their expected start date.

In addition, the government proposed to improve the accuracy of the valuation formula in forecasting CfD costs by using different reference prices for baseload and intermittent technology types to take into account the actual market prices that new projects are expected to receive ("*capture prices*").

Responses received to the consultation

16. **Question 2** sought views on the proposal to amend the deadline for *Forecast Data* from 30 September to 31 January. There were five responses, all of which were supportive of the proposal.
17. **Question 3** sought views on the proposal to require developers to submit *Forecast Data* 6 months before their expected *Start Date*. There were five responses, two were wholly supportive and three were supportive but suggested that the drafting should be amended to clarify the term 'expected *Start Date*'.
18. **Question 4** sought views on the proposed changes to the CfD contract to implement the proposal in Question 3. There were four responses, all of which sought clarity on whether data submissions must be broken down by month and the timing of annual submissions. They all proposed various amendments to the drafting to provide further clarity on this subject.
19. In addition, two respondents argued that there was ambiguity in the drafting that permits developers and the LCCC to agree that a submission is not required if there are no "significant" changes since the previous submission. One respondent argued that the drafting that requires developers to notify the LCCC when they become aware of an event or circumstance that is "reasonably likely to" affect the accuracy of their last submission is onerous on the Generator. The government does not propose to make changes in response to these comments. It is considered that the contract drafting reflects the nature of different project and technology types that may be

awarded contracts and strikes an appropriate balance between minimising the administrative burden for generators and protecting consumers and suppliers from unanticipated CfD costs.

Government Response: The government intends to proceed with the proposed changes to the contract, with some minor amendments to provide clarification following comments from respondents.

These amendments include: clarifying that the data submitted under this new requirement are annual totals or averages rather than monthly breakdowns; clarifying that the expected *Start Date* is as provided by the Generator in accordance with Condition 32.1(A)(i); and simplifying the drafting of the requirement for developers to submit annual submissions by the 31 January in each year of the contract term.

20. **Question 5** sought views on the proposal to use different reference prices for baseload and intermittent technology types in the valuation formula. There were 13 responses to this question; 10 responses did not agree with the proposal whilst 3 responses were indeterminate.
21. Some concerns were raised in response to this question. Six respondents claimed that the proposal overlooks the benefit to consumers of reduced wholesale prices due to increased renewables. Seven respondents noted that less capacity would be procured for the same budget (one respondent also argued that project size could reduce as a result of the proposal).
22. The government does not consider that the proposal will lead to less capacity being secured in the next allocation round, compared to if one average reference price is used for all technologies. The government is committed to meeting its ambitions under the Clean Growth Strategy and Industrial Strategy. Although it is not possible to predict auction outcomes, the draft budget for the next allocation round has been set considering the amount of capacity that the government aims to secure. The government also recognises that if CfD payments are higher than forecast because of lower than expected electricity prices, consumers should at the same time benefit from lower electricity prices.
23. Two respondents questioned the assumption that there will be significant deviation between baseload and intermittent prices in future, however no evidence was submitted to support this assertion. The deviation between baseload and capture prices has been highlighted by industry commentators, and the department's internal modelling shows this deviation increasing over time.
24. Eight respondents raised concerns over the complexity of forecasting capture prices and uncertainty around key assumptions, arguing that further consultation and industry engagement is needed on the methodology to set reference prices if a different approach is taken for future allocation rounds.
25. The purpose of the valuation formula is to provide an estimation of the cost of projects in the first few years of the contracts (the 'delivery years' set out in the budget notice and two subsequent valuation years) to protect consumers from paying for more than the budget. Whilst reference price forecasts are uncertain, the assumptions represent the department's best view of future prices and it is important that systematic inaccuracies, such as price cannibalisation, are addressed in the valuation formula so

that consumers are not exposed to additional subsidy costs that were not considered at the time of allocating contracts.

26. Six respondents argued that technology-specific reference prices should be used rather than baseload and intermittent reference prices, given the different generation characteristics of different technologies. Alternatively, six respondents argued that one single, average wholesale price should continue to be used as a reference price to allow for competition on an even playing field.
27. The government recognises that there are some technologies (and projects) that will have different generation patterns and so the assumed capture prices may not be reflective of all projects. However, this is also the case for other assumptions used in the valuation formula such as load factor, because apart from a few key parameters (strike price bid and capacity), currently assumptions for each technology are used rather than specific projects in this formula to avoid undue complexity. The more prices are refined into separate categories, such as the use of technology-specific prices, the more complex the process becomes.
28. The government considers that using intermittent and baseload prices strikes an appropriate balance between removing the systematic underestimation of costs due to price cannibalisation and not introducing overly onerous complexity to the valuation formula and its underlying assumptions.

Government Response: The government intends to proceed with the proposal to use baseload and intermittent reference prices rather than average wholesale prices assumptions for use in valuation formula during CfD allocation.

Advanced Conversion Technologies

The August 2018 consultation proposed amendments to the CfD contract to implement refinements to what is considered Advanced Conversion Technology (ACT). These changes were designed to ensure that only the more advanced and efficient projects are incentivised, and to distinguish effectively between close-coupled combustion and more innovative ACT processes.

These refinements will require ACT projects to meet a minimum ACT Efficiency Standard of 60%, as well as requiring the physical separation of the gasification or liquefaction process and the combustion process. In addition, projects will also need to include in their design a purification or compression unit between the synthesis and combustion chambers.

Responses received to the consultation

29. Two responses were received on **Question 6** and they were broadly supportive of the proposed amendments to the contract and only made suggestions for minor changes.
30. One response suggested that there should be a requirement for both a purification and compression unit to be included. However, we do not consider this necessary to distinguish between ACT and projects based on conventional combustion and it would add an additional financial burden to developers. The government considers the addition of one of these units enough to ensure that close coupled combustion is not being supported.
31. The other response touched on the technical details of the proposals and made a number of suggestions that were not related to the contract drafting. Technical guidance for applicants on the new ACT requirements has been published alongside this government response, which addresses these points.

Government Response: Having considered the responses received, the government will be proceeding with the proposed changes to the contract.

Combined Heat and Power

The August 2018 consultation set out the government's intention to no longer require developers of 'optional' Combined Heat and Power (CHP) technologies (ACT, Anaerobic Digestion (AD) and Geothermal technologies) to declare as being either 'with CHP' or 'without CHP' at the point of application. Those developers will instead be free to make their own commercial judgements as to whether to deploy with CHP throughout the duration of their CfD.

The government also proposed making certain changes to the CfD contract to simplify the treatment of 'optional' CHP technologies, including asking for views on:

- applying a single discount rate for each of the 'optional CHP' technologies (equivalent to the 'without CHP' rate);
- removing certain CHP-specific milestone requirements in respect of the 'optional CHP' technologies;
- retaining the option for generators deploying an 'optional CHP' technology to be subject to the CHP specific variant of the GHG emissions calculation formula which applies in respect of solid and gaseous biomass fuels and which is provided for at Part B of Annex 7 (*FMS arrangements, Sustainability Criteria and RQM Calculation Methodology*) of the CfD Standard Terms and Conditions; and
- the form of evidence which developers might provide to the LCCC regarding the amount of heat supplied during the relevant calculation period in order to enable the 'with CHP' variant of the GHG emissions formula to apply, (which applies in respect of solid and gaseous biomass fuels).

The August 2018 consultation also asked for views on the proposed new Issue 7 of the *CHPQA standard and Guidance Note 44* which were published alongside the consultation document on the gov.uk website and which were prepared in order to give effect to the revised efficiency requirements first consulted on in the December 2017 consultation.

The August 2018 consultation also set out the government's intention to amend the definition of the term CHPQA in the CfD Standard Terms and Conditions to refer to Issue 7 of the CHPQA standard, once published.

Responses received to the consultation

32. There were no responses to **Questions 7, 8 or 9** in the August 2018 consultation regarding the proposed amendments to the CfD contract on CHP technologies.

Government Response: As no responses were received in relation to Question 7, the government will be proceeding with the proposed changes to the CfD contract in order to simplify the treatment of optional CHP technologies. To note, the CHP specific variant of the GHG emissions calculation formula, (which applies in respect of solid and gaseous biomass fuels at Part B of Annex 7 of the CfD Standard Terms and Conditions), will only apply in respect of the 'optional CHP' technologies to the extent that the relevant generator is able to provide evidence regarding the energy content of heat supplied in the relevant calculation period in a form which is satisfactory to the LCCC.

As no responses were received in connection with Question 8 or Question 9, the government will publish Issue 7 of the *CHPQA standard* and *Guidance Note 44* in the form published alongside the August 2018 consultation and will update the definition of the term *CHPQA* in the Standard Terms and Conditions to refer to that revised standard, once published.

Changes to improve the operation and clarity of the CfD

The August 2018 government response set out the government's decisions on a range of proposed changes to the CfD Standard Terms and Conditions designed to improve the operation and clarity of the CfD contract, and, in certain respects, ensure the contract is giving effect to the intended balance of risks between developers and consumers. These included amendments relating to force majeure, to the handling of grid connection delays, to the definition of *Installed Capacity*, and to the definition of a *Facility*. The August 2018 document also confirmed the government's decisions on changes to implement EU requirements in respect of Indirect Land Use Change and the definition of *waste*.

Responses received to the consultation

Force majeure: Questions 10 and 12

33. This August 2018 document invited views on three questions on amendments to the force majeure provisions in the CfD contract. The responses to Questions 10 and 12 are treated together in this part of the government response as they are closely related.
34. **Question 10** concerned drafting changes to implement the government's decision on when force majeure relief can be claimed. **Question 12** concerned drafting changes to implement the government's decision on prompt notification by generators of potential force majeure events or circumstances.
35. Each question attracted comments from the same seven respondents. Several of these respondents reiterated their opposition put forward in response to the December 2017 consultation to any changes being made to the current force majeure arrangements in the CfD contract. However, in the government's views, these responses contained no new arguments to justify a review of the policy decisions on these matters set out in the August 2018 government response.
36. Most of the concerns were directed at the use of the term "*potential Force Majeure*" and making access to relief conditional on the generator notifying a potential force majeure event and taking steps to mitigate the effects before they have occurred. Several respondents were concerned that the proposed drafting at Condition 69.3(A) and (B) meant that in order to benefit from force majeure protection, a generator would have to (i) anticipate a force majeure event before it had occurred (ii) predict its effects in advance and (iii) potentially take pre-emptive action to try to mitigate those potential effects in case any issue later develops into an actual force majeure event which led to a contract breach.
37. One respondent, while supporting the proposed change in principle, said that it was hard to predict when force majeure might happen and consequently how these provisions would be interpreted by the LCCC. They said that it created a high burden on the generator to be constantly assessing what could be a potential force majeure so they do not lose their ability to claim relief when a potential event becomes an actual force majeure event at a later stage. They suggested that the pre-condition to

notify should be replaced by an unconditional obligation to keep the LCCC reasonably informed of potential force majeure events.

38. Other respondents also pointed out that a force majeure event is, by definition, unforeseen and that it is not always possible for a generator to know that a force majeure event will, or is likely to, arise. They argued that a generator should not be under an obligation to take mitigation steps for an event that is not within their knowledge.
39. Most of the respondents to these questions were concerned that the proposed drafting left too much room for different interpretations between the generator and the LCCC as to what would count as a “*potential*” force majeure event. This created doubt over when a notification should be submitted or when and to what extent mitigating action should be taken, potentially jeopardising a generator’s entitlement to force majeure if they judged these matters incorrectly in the LCCC’s opinion.
40. Several respondents said that in order not to jeopardise their entitlement to relief, prudent generators are likely to ‘err on the side of caution’ and serve a series of notices in respect of any event that could feasibly be construed as a *potential Force Majeure*, resulting in a larger administrative burden (and associated costs) on generators, but also on the LCCC in processing, reviewing and responding to such notices.
41. It is not the government’s intention to expect generators to predict force majeure events before they happen. However, the government acknowledges that the proposed new contract drafting at Condition 69.3(A) and (B) in particular, could be interpreted in that way. For the avoidance of doubt, the government’s policy intention is that generators should notify the LCCC of any force majeure event that has occurred, whether or not it has had an effect, and to use “*reasonable endeavours*” (a concept that is already well-established within the CfD contract) to mitigate those effects. Where the force majeure has not yet caused a delay or contract breach, but is likely to do so, the government expects generators to use reasonable endeavours to mitigate the effects before they occur. This does not mean that generators will be expected to prevent the effects of force majeure from happening if that is beyond their capability having used reasonable endeavours. This prompt notification requirement is also intended to facilitate early discussion between the generator and the LCCC on actions to keep projects on track where possible, for the mutual benefit of both parties.
42. The government remains of the view that the requirement for prompt notification of force majeure is a reasonable condition to place on generators, including in circumstances where the force majeure has not yet had an effect on contract performance or caused a delay to the *Project*. However, we accept that the terms “*potential Force Majeure*”, “*actual Force Majeure*” and the language requiring generators to mitigate “*before, following and throughout the continuation of Force Majeure*” is potentially confusing. The government has therefore amended its proposed contract drafting at Condition 69(A) and (B) to:
 - clarify that a generator must notify a force majeure (i.e. which has already occurred) if it has caused, is causing or will or is likely to cause, a failure or delay in performance and/or delay to the *Project*;
 - delete the phrase “*before, following and throughout the continuation of Force Majeure*” and rely instead on the existing requirement for generators to use reasonable endeavours to mitigate the effects of force majeure, carry out its

obligations under the contract and resume performance as soon as reasonably practicable.

Other issues raised by respondents relating to Question 10

43. Several respondents raised concerns about the additional language in the proposed new limb (B)(i) of the definition of *Target Commissioning Window* (TCW). This was intended to clarify the government's policy intent that the TCW cannot be extended for force majeure or grid delay if the *Start Date* has occurred (i.e. if the project has started generating) or the TCW has ended, but that the *Longstop Date* can be extended if there is a force majeure after the end of the TCW. However, as this proposed amendment is not essential to deliver the government's policy, the government has decided not to retain the proposed new drafting in order to avoid any misunderstanding.
44. One respondent disagreed with the proposed new requirement on generators, at Condition 69.5(B), to provide information to the LCCC every 20 business days to demonstrate that a force majeure is ongoing. However, this requirement is necessary to implement the government's policy decision that generators must demonstrate that an ongoing force majeure remains beyond their reasonable control, or that of their representatives, and remains one which they could not easily have avoided or overcome. The provision of information within 20 business days is consistent with similar requirements in the contract. The government has therefore decided to keep this new requirement. The government has also replaced the term "*Supporting Information*" with "*Information*" for consistency with other requirements for the provision of force majeure information in Condition 69.4 and 69.5 of the CfD contract and to reflect the government's intention.
45. The August 2018 consultation document proposed to amend the definitions of *Milestone Delivery Date*, *Longstop Date* and *Target Commissioning Window* to stipulate that these may only be extended day for day if force majeure or grid delay is the "*principal cause*" of the delay. One respondent objected to this new language because they felt it would be unduly onerous for generators to demonstrate that a delay due to force majeure or grid delay was the "*principal cause*" of the delay. The government agrees that the addition of a "*principal cause*" test could add complexity and uncertainty around the consideration of claims for force majeure and grid delay relief. The government has therefore decided to revert to the current contract drafting, which uses the phrase "*by reason of*", and to remove the phrase "*the principal cause of which*".

Government Response: The government will (a) proceed with changes to the CfD contract to implement its policy on access to force majeure relief and prompt notification set out in the August 2018 government response, (b) amend its proposed contract drafting as summarised above and (c) make several minor amendments to improve the clarity of the contract requirements.

Force majeure: Foreseeable events or circumstances (Question 11)

46. The August 2018 government response confirmed the government's intention to change the CfD contract to limit the extent of force majeure protection so that protection is not provided where an event or circumstance has occurred prior to the *FiT CfD Application Date* which the generator was aware of or, having made all due and careful enquiries and acting to a *Reasonable and Prudent Standard*, could be

expected to have been aware of, and which impacts the developer's ability to meet their obligations under the contract.

47. **Question 11** attracted comments from eight respondents, seven of whom also replied to questions 10 and 12. Two of the eight respondents supported the government's policy and proposed contract drafting, saying either that they regard the government's refined proposal as workable or that it represents an appropriate balance of risk between generators and the LCCC. A further two, while having concerns about other parts of the government's proposal, specifically welcomed the decision to move the cut-off point at which an event or circumstance would be regarded as foreseeable from the *Agreement Date* to the *FiT CfD Application Date*.
48. One of the respondents who welcomed the change to the cut-off date said that this would give bidders additional ability to manage foreseeable risks. On the other hand, they disagreed with the government's assumption that all such risks could be addressed by an increase in cost. However, this does not fully reflect the government's view as set out in the August consultation in which it identified other risk mitigation options in addition to increasing costs.
49. Two respondents were concerned about what they referred to as the "deemed awareness" or "constructive knowledge" test, i.e. the requirement that a generator "*could be expected to have been aware*" of an event or circumstance that arose before the CfD application date. One respondent said that the test should be restricted to events or circumstances which the generator is actually aware of. However, the government has already decided that the requirement will apply to events or circumstances of which a generator is aware or "*could be expected to have been aware*" and has not received new evidence or arguments to change its position.
50. The other respondent was concerned that force majeure relief might not be forthcoming if the potential for an event to become a force majeure at a later stage was not apparent to the generator before the CfD application date. However, inclusion of a "*Reasonable and Prudent Standard*" test is intended to protect a generator's position in such circumstances. If an event occurs before the CfD application date which the generator is not aware of, "*having made all due and careful enquiries and acted to a Reasonable and Prudent Standard*", then the government's policy intent is that the generator should not be denied relief if the event or circumstance later becomes a force majeure. In other words, a generator should not be denied force majeure relief for not knowing something it would not have been reasonable to expect them to know about.
51. One respondent asked for clarification as to the underlying rationale and policy intent behind the proposal to provide that a "*Foreseeable Change in Law*" is not to be considered a *Force Majeure*. The government's policy intention here is to align the *Force Majeure* regime with the *Qualifying Change in Law* regime, in so far as a "*Foreseeable Change in Law*" should constitute neither a *Force Majeure* nor a *Qualifying Change in Law*.

Government Response: Having considered the responses received, the government will be proceeding with the changes to the CfD contract as drafted.

Grid connection delay

52. The August 2018 government response confirmed the government's intention to change the definitions of *Longstop Date*, *Milestone Delivery Date* and *Target Commissioning Window* in the CfD contract to require generators to give notice to the LCCC of any failure by the *Transmission System Operator* or similar body to carry out grid connection works and to use reasonable endeavours to (a) act in a timely manner, enforce, and comply with the obligations in the relevant construction agreement, (b) avoid such failure and (c) to continue to mitigate the effects on contract performance of such failure.
53. There were seven responses to **Question 13**. Several of these reiterated previously expressed opposition to any changes being made to the current grid connection delay arrangements in the CfD contract. However, the government is satisfied that these responses contained no new arguments to justify a review of the policy decisions on grid connection delay set out in the August 2018 response. Several typographical corrections highlighted have been adopted.
54. Concerns were expressed that the proposed contract drafting would seem to require generators to predict the effects of a grid delay before it had occurred and to take pre-emptive action to mitigate those potential effects in case a grid delay did occur, in order to qualify for a grid delay extension. A further complication was outlined in that generators may not be notified until a late stage by those undertaking the grid connection works (with whom they might have only an indirect contractual relationship) that there has been a delay. It was suggested that this could leave generators in a position where they are unable to accurately assess the extent and impact of a delay and identify and implement effective mitigation.
55. The government wishes to clarify that its policy on this aspect of the grid connection delay provisions is that a generator must use reasonable endeavours to mitigate the effects of the delay to the grid connection works where a delay occurs. It follows, therefore, that it is not the government's policy to require generators to predict the effects of a grid delay before it has occurred. However, the government would expect generators to manage risks responsibly and take proportionate mitigating actions and believes that generators themselves would want to do this to minimise delays and costs to their projects. The government has decided to delete the phrase "*before, following and throughout the continuation of such failure*" from new limb B(ii) of the definitions of *Longstop Date*, *Milestone Delivery Date* and *Target Commissioning Window*. However, the government wishes to draw attention to its policy decision, reflected in the revised contract drafting, that generators should use reasonable endeavours to avoid delays to grid connection and grid works agreements occurring and to comply with relevant construction agreements.
56. There was also a concern that generators would be required to use reasonable endeavours to mitigate the effects of a grid delay that were outside of their control, e.g. actions reliant on the *Transmission System Operator* and similar parties responsible for undertaking grid connection works. The use of reasonable endeavours might include seeking the support of other parties, such as the *Transmission System Operator*, to resolve a delay, even if those other parties were unable or unwilling to support, assist or cooperate with the generator. However, what counts as reasonable endeavours will depend on the circumstances in each case.
57. One respondent suggested that there is no need for a requirement to notify the LCCC of grid connection failures as this will result in generators having to notify grid delays

even if the generator does not know at the time of notification that the failure will cause a delay to the *Project* or a contract breach and create unnecessary administrative burdens. As with the requirement for the prompt notification of force majeure, this notification requirement is also intended to facilitate early discussion between the generator and the LCCC on what reasonable endeavours have been undertaken to mitigate delay to the *Project* or a contract breach occurring. Furthermore, a requirement to give notice as soon as reasonably practicable after the generator has been aware of the failure should make it easier for generators to demonstrate that they have used reasonable endeavours to mitigate the effects of that failure.

58. Another respondent mentioned that a generator might receive informal notice from the *Transmission System Operator* or other party responsible for undertaking the grid connection works of a potential delay to the grid connection works. The generator might subsequently receive a formal notice of delay. The respondent sought clarification on whether generators should notify the LCCC on receipt of an informal delay notice or wait until the formal notice of delay has been received from the *Transmission System Operator*. The government wishes to point out that the requirement is on the generator to notify “*the nature and extent of the failure*”, i.e. the failure on the part of the *Transmission System Operator* or other relevant party to undertake the grid connection works having already occurred. It therefore follows that the revised contract drafting would not require a generator to notify on the basis of an informal notification received from the *Transmission System Operator*.

Government Response: The government will (a) proceed with changes to the CfD contract to implement its policy on access to grid connection delay set out in the August 2018 government response, (b) amend its proposed contract drafting as summarised in paragraph 55 above and (c) make several minor typographical corrections.

Installed capacity

59. **Question 14** invited comments on proposed several changes to the drafting of the definition of *Installed Capacity* to clarify, for the avoidance of doubt, that CfD difference payments should be paid on electrical output net of parasitic loads and electrical losses, as measured at the *Boundary Point*. Five respondents addressed this question, four of which either supported or indicated that they had no concerns with the government’s proposals.

60. One respondent was concerned that the proposed amendments to the *Installed Capacity* definition, especially “*operated at optimal operating conditions...for a sustained period at the maximum capacity*”, could limit a generator’s opportunity to install a power boost option to maximise a technology’s full potential. They also suggested that either the drafting of the *Installed Capacity* definition should be clarified, to confirm if nameplate capacity or maximum capacity should be used, or supplemental guidance should be provided in advance of the next allocation round, to ensure that developers have clarity and do not exceed the *Final Installed Capacity* on final commissioning.

61. The definition of *Installed Capacity* (and related definitions including, *Final Installed Capacity* and *Maximum Contract Capacity* once the station is generating) is in part designed to cap the level of metered output on which a generator can receive difference payments until the end of the contract term. It follows that these clarificatory amendments could limit a generator’s ability to install power boosts if

these caused the power station to operate above the *Maximum Contract Capacity* for a sustained period. This is in line with how the government intends that the CfD contract should operate, and the contract changes are considered to be necessary to ensure that CfD bids are valued correctly and on the same basis across technologies, and to help manage scheme costs. However, if a generator were planning on installing of power boosts or equivalent for sustained periods (which could impact the load factor/CfD payments), then the generator should reflect any additional output that could be achieved in the *Initial Installed Capacity Estimate* submitted during the application process. Therefore, the government does not believe that there is a good case to change its proposed approach.

Government Response: Having considered the responses received, the government will be proceeding with the changes to the CfD contract as drafted.

Facility description

62. **Question 15** sought views on proposed amendments to the definition of *Facility* in the CfD generic Agreement and the description of *Facility* in Schedule 1 of the Standard Terms to ensure clarity between the generator and the LCCC as to the assets that comprise the *Facility*.
63. Five respondents commented on this question, three of which either supported or confirmed that they had no comment on our proposals. Two respondents sought clarification on how the reference to the aerial view of the unique geographical location of the *Facility* in Schedule 1 of the Standard Terms works with the reference to the geographical coordinates in Annex 1 of the CfD Agreement (*Description of the Facility*). The implication seems to be that the relationship is unclear and could have negative implications for the contract if not clarified. The government wishes to point out that it is a long-standing requirement of the contract that the unique geographical coordinates of the *Facility* must be within the shaded area on the aerial map that generators must provide in accordance with Schedule 1 of the Standard Terms. The government's proposed drafting changes do not affect these existing requirements and consequently does not believe that a change in drafting or further explanation is required.

Government Response: Having considered the responses received, the government will be proceeding with the changes to the CfD contract as drafted.

Indirect Land Use Change amendments

64. Two responses were received to **Question 16**, both of which confirmed that they had no comments on the proposed changes to transpose the requirements of EU Directive 2015/1513⁵ into the CfD contract to ensure that future contracts awarded under the scheme comply with the requirements of the Directive. The Directive requires that where bioliquids are used in CfD generating stations, they comply with the new sustainability requirements.

⁵ "Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources", is available at the europa.eu website

Government Response: Having considered the responses received, the government will be proceeding with the changes to the CfD contract as drafted.

Amending the definition of Waste

65. Two responses were received to **Question 17**, both of which confirmed that they had no comments on the proposed changes to bring the CfD contract into line with the new definition of “waste” in the EU Renewable Energy Directive as amended by Directive 2015/1513. The new definition will apply to future CfD contracts awarded under the scheme. As reported in the August 2018 consultation response, the LCCC has updated existing CfD contracts with the amended definition, and this has also been enshrined into legislation through The Contracts for Difference (Miscellaneous Amendments) Regulations 2018.

Government Response: Having considered the responses received, the government will be proceeding with the changes to the CfD contract as drafted.

Brexit-related changes to the CfD contract

The August 2018 consultation proposed amendments to the CfD contract to take account of the UK's imminent exit from the EU.

Responses received to the consultation

66. Four consultees responded to **question 18**. One respondent asked for further information about the role of the CMA after EU exit, however the CMA has issued its own communications on this. Two of the respondents asked for the contract to define “*retained EU law*” by reference to the European Union (Withdrawal) Act 2018, but this has already been done in the draft amendments.
67. One respondent queried whether government needed to amend a reference to an EU Regulation relating to the “*GB Day Ahead Hourly Price*” to reflect EU exit. Government will ensure that the contract is clear on how references to EU law should be read after EU exit. Government will also ensure that references to EU legislation in the contract accord with the domestic legislation that the government puts in place to reflect the UK's exit from the EU.
68. One respondent questioned whether the amendments to “*Qualifying Shutdown Event*” could be clearer. Government's view is that the amendments consulted on are clear, and further amendments to the lengthy and complex definition of “*Qualifying Shutdown Event*” would not aid clarity.
69. Lastly, one respondent requested clarification on whether Brexit-related changes need to be made to existing CfD contracts in order to ensure that they continue to function as originally intended once the UK has left the EU. Changes to existing contracts will be managed by the LCCC.

Government response: Having considered the responses received, the government will be proceeding with its approach to drafting the CfD contract. The government will keep the detailed drafting under review in light of the UK's exit from the EU and the associated domestic legislation. Accordingly, the CfD contract may be subject to further clarificatory amendments to reflect the UK's exit from the EU, and government will consider the need for further guidance at that time. The government's policy intention in this area remains that the CfD contract continues to function as originally intended.

Proposed minor and technical changes to the CfD contract

In the August 2018 consultation the government identified several minor and technical changes that it considered will improve the operation of the CfD.

Responses received to the consultation

70. Comments were received in response to six of the minor and technical changes proposed in the August 2018 consultation. The following table summarises the responses received and the government's response in each case.

Change proposed	Summary of consultation responses and Government Response
<p><i>CfD Standard Terms and Conditions</i></p> <p>Condition 1.1 – Notification of Start Date</p>	<p>The government proposed to change the contract at Condition 3.21(E) to clarify that generators cannot backdate the start date in their <i>Start Date Notice</i> and therefore claim retrospective generation payments. One respondent disagreed with this change and argued that the <i>Start Date</i> should be allowed to occur before the date of the <i>Start Date Notice</i>. They claimed that from a practical perspective, the finalising and issuing of a <i>Start Date Notice</i>, together with obtaining the required <i>Directors' Certificate</i> (confirming that certain contractual conditions had been met as of the <i>Start Date</i>), would not be instantaneous, and so it should be possible to refer to an earlier start date in the <i>Start Date Notice</i>.</p> <p>The government believes that the current arrangements impose reasonable requirements, and operational experience indicates that generators are able to comply with them. The government has therefore decided to proceed with the changes to the CfD contract as drafted.</p>
<p><i>CfD Standard Terms and Conditions</i></p> <p>Condition 7 – Final Installed Capacity; Maximum Contract Capacity</p>	<p>The government proposed to amend Condition 7 of the contract to incentivise the timely determination of the <i>Final Installed Capacity</i> and to allow the LCCC to deem the <i>Final Installed Capacity</i> to be 80% until such time as (i) the Generator provides sufficient additional or revised Supporting Information to the LCCC, or (ii) otherwise demonstrates the determination of the <i>Final Installed Capacity</i> to the LCCC's satisfaction.</p> <p>Two respondents felt that the proposals were unclear as to their practical application and that they introduced an element of uncertainty into the CfD contract. The respondents did not elaborate on what elements of the proposal were unclear. The respondents further suggested that the proposed deeming arrangements</p>

	<p>meant that generators would have to agree to the LCCC’s conclusions and did not give generators a fair opportunity to dispute the LCCC’s position. In addition, the respondents suggested that the <i>Final Installed Capacity</i> of a project would be a question of fact and therefore a speedy reference to an independent expert would be a preferable way to resolve any disagreement.</p> <p>The government notes these concerns but maintains the view that these amendments are necessary to address the current open-ended arrangements in the contract which allow for a protracted process before the <i>Final Installed Capacity</i> is agreed. With regard to the suggestion that disagreements could be referred to an independent expert for resolution, the government notes that the contract already contains dispute resolution procedures, which allow for either party to a CfD contract to refer a dispute to be determined by an expert (Condition 59 - <i>Expert Determination Procedure</i>). The government has decided to proceed with the changes to the CfD contract as drafted.</p>
<p><i>CfD Standard Terms and Conditions</i></p> <p>Part 5A Payment Calculations: Baseload Technologies, Strike Price Adjustments</p> <p>Condition 14 - Strike Price Adjustments</p> <p>Part 5A Payment Calculations: Intermittent Technologies</p> <p>Condition 20 - Strike Price Adjustments</p>	<p>The government proposed to amend the annual strike price indexation methodology so that CPI is not re-applied to the actual annual <i>Balancing System Charges</i> and the <i>Transmission Loss Multiplier</i> price adjustments to avoid the possibility of overcompensating generators connected to the transmission system.</p> <p>One respondent commented that they would welcome further information and clarity on how these changes will work. They suggested that a numerical example, showing the price index clearly, would be useful to help generators understand how the revised methodology should be interpreted. The LCCC has published guidance on strike price adjustments on their web page and will update this as needed. The government has decided to proceed with the changes to the CfD contract as drafted.</p>
<p><i>CfD Standard Terms and Conditions:</i></p> <p>Part 7, Representations, warranties and undertakings. - Generator “<i>no litigation</i>” representation</p> <p>Condition 28</p>	<p>The government proposed to extend the “<i>no litigation</i>” warranty at Condition 28.1 to include litigation which might directly relate to the <i>Project</i>.</p> <p>Five respondents expressed concerns about this proposed change, with several of them disagreeing with its introduction. The main concerns were that it broadened the scope of the warranty requirement, increased ambiguity and room for interpretation. Several respondents made the point that a generator would not necessarily be made aware of litigation, especially threatened litigation, against a third party, and suggested that if the proposed amendment were</p>

	<p>to be implemented, it should be qualified with an awareness test. The government has decided to retain this amendment with the addition of an awareness test.</p>
<p><i>CfD Standard Terms and Conditions</i></p> <p>Generator Undertakings – Provision of Information to the LCCC</p> <p>Condition 32</p>	<p>The government proposed to change the contract to require Generators to keep project records to a <i>Reasonable and Prudent Standard</i> and to enable the LCCC to request this information when considering requests from Generators, for example, in relation to relief from force majeure or a grid connection delay.</p> <p>This proposal attracted three consultation responses. One respondent regarded the requirement as onerous and suggested that if such a requirement is to be introduced, the timescale for the provision of such information should be extended from “<i>as soon as reasonably practicable</i>” to 20 business days to permit the information to be compiled accurately and in an appropriate format. The government believes that placing a specific time limit for generators to respond would be more onerous and that “<i>as soon as reasonably practicable</i>” offers greater flexibility.</p> <p>Another respondent, while agreeing that the changes appeared reasonable in principle, suggested that the LCCC’s information gathering powers should be qualified in line with established principles, such as those applying to Ofgem under the Electricity Act 1989 (as amended). They further proposed that the LCCC’s information gathering powers should not extend to any requirement to produce documents which are subject to legal privilege. The government wishes to point out that its proposed drafting already includes the qualification that “<i>all Information</i>” should be “<i>reasonably requested</i>” and believes that this language, which is used in relation to other requirements in Condition 32, gives generators appropriate protection in this regard.</p> <p>A third respondent, while supporting the principle of open and transparent transfer of information to the LCCC, were concerned that these provisions could inadvertently put the generator in breach of its contract and said that further clarification should be provided. The government believes that the proposed contract changes are already clearly drafted and suggests that potential CfD applicants can seek clarification on the interpretation of any aspect of the CfD contract from the LCCC. The government has decided to proceed with the changes to the CfD contract as drafted.</p>
<p><i>CfD Standard Terms and Conditions</i></p>	<p>The government proposed changes to the <i>Direct Agreement</i> to ensure that the <i>Direct Agreement</i> will terminate if the beneficiary, pursuant to Condition 79.6</p>

Annex 3, Form of Direct Agreement

of the Standard Terms, ceases to be an entitled person. These changes included requirements on parties to the agreement to demonstrate their eligibility to take over the *Project* and exercise their 'step in' rights if there is a contractual default.

There were three responses to this part of the consultation. One respondent felt that the *Direct Agreement* should accommodate the possibility of a joint venture company structure and suggested that this could be addressed by indicating in a footnote that the form of the *Direct Agreement* may be adjusted to reflect alternative structures if relevant, in particular *Unincorporated Joint Ventures*. The government is satisfied that the form of the *Direct Agreement* is sufficiently flexible to allow it to be adapted to accommodate arrangements in respect of *Unincorporated Joint Ventures*.

One respondent suggested adding to paragraph (b) of the definition of "*Non-Qualification Event*" the words "(or in favour of any agent or security trustee on the Affected Person's behalf)" to reflect greater accuracy and precision for situations where an agent or security trustee is acting on behalf of the *Affected Persons*. The government does not consider the wording proposed is needed as the *Security Trustee* is already defined in the '*Parties*' section of the *Direct Agreement* as someone who is acting as agent or security trustee on behalf of the *Finance Parties*.

All three respondents expressed concerns about the proposed new evidential requirements, particularly at clause 3.4 of the draft *Direct Agreement*, relating to the demonstration that a "*Non-Qualification Event*" has not occurred.

One of these respondents suggested that as the LCCC already carries out a very detailed qualification process to establish a beneficiary's entitlement to be party to a *Direct Agreement*, it should be sufficient for the security trustee, rather than their external legal adviser, to provide confirmation that no change has been made to the financing structure following entry into the *Direct Agreement*. This respondent was also concerned that there is a degree of uncertainty as to exactly what evidence may be required to satisfy the LCCC at the relevant time.

The other two respondents expressed concerns about the proposed evidential requirements and said that they did not support the proposed changes. They

questioned how practicable it might be for an external law firm to provide the factual and other confirmations requested and were concerned that the proposed requirements could have the unintended consequence of resulting in the *Direct Agreement* being terminated by the LCCC due simply to the practical difficulties of complying with such requirements. They felt that as the *Direct Agreement* is a critical protection for third party lenders, the additional obligations proposed for inclusion in the *Form of Direct Agreement* could create bankability issues for some investors.

Given the complexity of the issues raised, the government has decided to allow more time to consider consultation feedback before finalising its position on changes to the Direct Agreement, while noting that a number of Direct Agreements in this form have already been signed by generators and banks/financiers.

71. There were no responses to the other proposed minor and technical changes set out in the August 2018 government response and consultation document.

Government response: In the absence of responses to the proposed changes not covered in the table at paragraph 70 above, the government will be proceeding with the changes to the CfD contract as drafted in respect of those proposals.

Annex: List of consultation questions

Wind on Remote Islands

Question 1. The government welcomes views on the proposed changes to the CfD contract in connection with Remote Island Wind.

Mitigating budgetary risk

Question 2. The government welcomes views on the proposal to amend the deadline for *Forecast Data* from 30 September to 31 January.

Mitigating budgetary risk

Question 3. The government welcomes views on the proposal to require developers to submit *Forecast Data* 6 months before their expected Start Date.

Mitigating budgetary risk

Question 4. The government welcomes views on the proposed changes to the CfD contract to implement this proposal (which have been published alongside this document).

Mitigating budgetary risk

Question 5. The government welcomes views on the proposal to improve the accuracy of the reference price forecast in the valuation formula, by taking account of expected capture prices for new intermittent and baseload projects. Points respondents may wish to consider include:

- The potential effect of the changes, and whether the impact could vary for different scheme participants.
- Whether the proposal is likely to have the required impact.

Any other proposals regarding how to produce a more accurate valuation.

Advanced Conversion Technologies

Question 6. The government welcomes views on the proposed changes to the CfD contract to implement this proposal.

Combined Heat and Power

Question 7. The government welcomes views on the following:

- The proposal to apply a single discount rate for each of the 'optional CHP' technologies (equivalent to the 'without CHP' rate).
- The proposal to remove certain CHP-specific milestone requirements in respect of the 'optional CHP' technologies (and the associated contract

changes in *Annex 5, Part B: Technology Specific Project Commitments* of the CfD Agreement).

- The proposed approaches to the calculation of GHG emissions for ‘optional CHP’ projects (and the associated contract changes in *Annex 7: FMS arrangements, Sustainability Criteria and RQM Calculation Methodology* of the Standard Terms and Conditions).

What forms of evidence developers could potentially provide to LCCC regarding the supply of heat during the relevant calculation period, to enable LCCC to apply the ‘with CHP’ variant of the GHG emissions formula.

Combined Heat and Power

Question 8. The government welcomes views on any aspects of the proposed new Issue 7 of the *CHPQA standard and Guidance Note 44*. In particular, the government welcomes views on whether the changes have the effect to the requirements set out in Part A of the government response.

Combined Heat and Power

Question 9. The government welcomes views on the proposed changes to the contract.

Force majeure: clarification in when relief can be claimed

Question 10. The government welcomes views on the proposed changes to the CfD contract to implement this decision.

Force majeure: Foreseeable events or circumstances

Question 11. The government welcomes views on the proposed changes to the CfD contract to implement this decision.

Prompt notification of potential force majeure event or circumstance

Question 12. The government welcomes views on the proposed changes to the CfD contract to implement this decision.

Grid connection delay

Question 13. The government welcomes views on the proposed changes to the CfD contract to implement this decision.

Installed capacity

Question 14. The government welcomes views on the proposed changes to the CfD contract to implement this decision.

Facility description

Question 15. The government welcomes views on the proposed changes to the CfD contract to implement this decision.

Indirect Land Use Change amendments

Question 16. The government welcomes views on the proposed changes to the CfD contract to implement this decision.

Amending the definition of *Waste*

Question 17. The government welcomes views on the proposed changes to the CfD contract to implement this decision.

Brexit-related changes to the CfD contract

Question 18. The government welcomes views on these proposals, and the proposed changes to the CfD contract.

Proposed minor and technical changes to the CfD contract

Question 19. The government welcomes any views on these proposed minor and technical changes to the CfD contract.



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