



Department for
Business, Energy
& Industrial Strategy

CONTRACTS FOR DIFFERENCE SCHEME FOR RENEWABLE ELECTRICITY

Government response to consultation on
changes to the CfD contract (supplementary)

April 2019



OGL

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Introduction

The government has carried out a series of consultations and issued several government responses¹ since December 2017 on proposed changes to the Contracts for Difference (CfD) scheme and contract documents in advance of the third CfD allocation round, which is planned for May 2019. On 18 December 2018, the government published a government response² confirming its final decisions on most of the changes consulted on during the preceding year.

The government confirmed in the December 2018 government response that it would keep the detailed contract drafting under review in respect of the UK's forthcoming exit from the European Union (EU) and the associated domestic legislation. The government indicated then that the CfD contract may be subject to further clarificatory amendments to reflect the UK's exit from the EU, and that consideration would be given to the need for further guidance at the appropriate time. The government has amended the CfD Standard Terms and Conditions to clarify how CfD holders should interpret references to EU Directives, Regulations and Decisions over the life of their contracts. These changes are marked up in the Standard Terms and Conditions for visibility. The approach taken to drafting is intended to ensure that the CfD contract continues to function as originally intended after the UK has left the EU.

In a consultation published in August 2018, the government proposed changes to the Form of Direct Agreement at Annex 3 of the CfD Standard Terms and Conditions to bring the contract into alignment with the revised Direct Agreement implemented by the Low Carbon Contracts Company (LCCC) in respect of existing CfD contracts. The December 2018 government response indicated that the government would be allowing more time for the consideration of several complex matters concerning the draft Direct Agreement that were raised in consultation, before finalising its position on Annex 3.

Following further stakeholder engagement, the government has decided to proceed with the text of the Direct Agreement published on 18 December 2018 apart from a small number of tidying up amendments. In addition, the government has agreed with the LCCC that the LCCC will provide further guidance on the evidence that would be acceptable in demonstrating, in accordance with Clause 3.4, that a Non-Qualification Event has not occurred.

This response sets out the government's final decisions on these two issues together with some minor administrative and tidying up amendments.

Explanation of changes to the CfD Standard Terms

Regulation 4(1) of the Contracts for Difference (Standard Terms) Regulations 2014 (as amended) requires that where the Secretary of State publishes revised standard terms in compliance with section 11(5) of the Energy Act 2013, the Secretary of State must also publish an explanation of why the revisions have been made. This government response, together with

¹ <https://www.gov.uk/government/publications/contracts-for-difference/contract-for-difference>

² Government response to consultation on changes to the CfD contract, and on a revision to the CHPQA standard and guidance notes, BEIS, December 2018.

the government response published in August 2018³ and the government response published in December 2018, explain why revisions to the standard terms have been made.

In this respect, 'standard terms' includes the revised Version 3 of the CfD Standard Terms and Conditions and the corresponding versions of the Phased (Apportioned Metering) Terms, Phased (Single Metering) Terms, Private Network Terms and Unincorporated Joint Ventures Terms, which are published in draft on the same date as this response.

³ Government response to consultation on proposed amendments to the scheme – Part B, & Follow-up consultation on implementation, contract changes, and a revised CHPQA standard, BEIS, August 2018.

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EU Exit-related changes to the CfD contract

One respondent to the August 2018 consultation queried whether government needed to amend a reference to an EU Regulation relating to the “GB Day Ahead Hourly Price” to reflect EU exit. Another respondent requested clarification on whether EU exit-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.

The government response of December 2018 indicated that the government will ensure that the contract is clear on how references to EU law should be read after EU exit. The government’s policy intention in this area remains that the CfD contract continues to function as originally intended. The government also undertook to keep the detailed drafting under review in light of the UK’s forthcoming exit from the EU, and to make further clarificatory amendments as necessary.

The government is aware that in the coming years there may be several phases to the UK’s relationship with the EU, with the effect that EU law may apply in the UK in a variety of different ways over the term of a CfD. It is important that parties to the CfD are able to understand and interpret the references to EU law in the CfD Standard Terms and Conditions against this backdrop.

Consultees will be aware that rights, powers, liabilities and obligations subsisting in the United Kingdom that are created by or arise by or under treaties relating to the European Union are within the defined term “Law” in the current CfD Standard Terms and Conditions. This is by means of the reference to “enforceable EU rights” in that term. Government has made adjustments to the defined term “Law” with a view to ensuring that rights and obligations arising out of EU law that subsist in the United Kingdom as a result of any future treaty or international agreement will also be within the defined term “Law”.

There are a variety of references to EU law in the contract, including references to EU Directives, Regulations and Decisions. The government has made some minor changes to the drafting of the CfD Standard Terms and Conditions which clarify how these references to EU instruments are to be read over the life of the contract.

A reference to a Directive is to be read as a reference to the Directive as it takes effect in EU law on the date the CfD is signed, regardless of the UK’s relationship with the EU at that time. These references will update to reflect changes in EU law made by the EU if the UK is required to implement EU law on an ongoing basis, for example under the terms of a Withdrawal Agreement negotiated with the EU. If, when the change is made, the UK is not so required, these references will not update. This is the effect of the new drafting at Condition 1.10(C) of the CfD Standard Terms and Conditions.

A reference to an EU Regulation or Decision is to be read as a reference to the Regulation or Decision as it takes effect in domestic law from time to time. This is intended to do no more than continue the position which applies now. References in the contract are to whatever form of the relevant EU Regulation or Decision applies at the relevant time under the applicable domestic legal framework.

References to the EU Regulation regarding the “GB Day Ahead Hourly Price” are therefore references to that Regulation as it applies under domestic law in accordance with the

European Communities Act 1972 (for so long as the UK remains a Member State of the EU), and any domestic legislation which subsequently applies thereafter.

As noted above, the government has made some minor changes to the drafting of the CfD Standard Terms and Conditions which clarify how these references are to be read over the life of the contract. Government would encourage potential CfD applicants to consider those changes with their advisers to ensure that they understand what is intended.

The government's intention is that these principles should also be implemented in existing contracts. Any changes made to existing contracts to achieve this will be managed by the CCC. The LCCC advise that some minor changes may be required to existing contracts, to the extent necessary to ensure that the CfD contract continues to function as originally intended. Any questions about implementing EU exit-related changes into existing contracts should be directed to the LCCC.

Government response: As previously indicated, the government's policy intention in this area remains that the CfD contract continues to function as originally intended. The government has therefore amended the CfD Standard Terms and Conditions to clarify how CfD holders should interpret references to EU Directives, Regulations and Decisions over the life of their contracts. Amendments to existing contracts will be managed by the LCCC.

Proposed minor and technical changes to the CfD contract

Form of Direct Agreement (Annex 3)

In order to be eligible to enter into a Direct Agreement with the LCCC, a party must be a Lender or Affected Person (or an agent or Security Trustee of the Affected Person) with the benefit of first ranking security over all, or substantially all, of the assets of the Generator, and in whose favour the Generator assigns its rights under the CfD contract. The Direct Agreement safeguards the interests of the Lender, Affected Person or Security Trustee (as the case may be), and entitles them to step in to prevent the contract from being terminated should the Generator fail to meet their contractual obligations.

The August 2018 consultation proposed the inclusion of the new concept of a "Non-Qualification Event" which would occur if a party that entered into a Direct Agreement with the LCCC ceased to be eligible to hold a Direct Agreement, or there were no parties eligible to hold a Direct Agreement. This might occur, for example, if a Lender ceases to be a party to the financing arrangements of the project, is replaced by another Lender, or the debt is repaid and there are no Lenders to the project. The occurrence of a "Non-Qualification Event" would trigger a mechanism in the contract enabling the LCCC to terminate the Direct Agreement.

A small number of respondents to the consultation raised concerns about the proposed new evidential requirements at Clause 3.4 of the draft Direct Agreement to demonstrate that a "Non-Qualification Event" has not occurred. The practicalities around requiring an external law firm to provide the factual and other confirmations listed in the amended Direct Agreement were questioned and there were concerns that there is a degree of uncertainty as to exactly what evidence may be required to satisfy the LCCC at the relevant time. It was suggested that, as the LCCC already carries out a very detailed qualification process to establish an eligible party's entitlement to hold a Direct Agreement, it should be sufficient for the Lender or Security Trustee (rather than their external legal advisers) to provide confirmation that no change has been made to the financing structure following entry into the Direct Agreement. It was also pointed out that the Direct Agreement is a critical protection for third party lenders and 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.

While noting that several direct agreements in the form consulted on in August 2018 have already been signed between generators and banks/financiers and the LCCC, given the complexity of the issues raised, the government decided to allow more time to consider consultation feedback before finalising its position on changes to the Direct Agreement.

Further stakeholder engagement

The government undertook further engagement with those respondents who expressed concerns about the proposed new requirements at Clause 3.4 of the Direct Agreement. While these respondents restated the points made in their original consultation responses, they were mainly concerned about a lack of clarity around what evidence would be acceptable to the

LCCC when set against the risk that a Direct Agreement could be terminated if the evidence provided fell short of the LCCC's requirements. These respondents felt that greater clarity was needed around the meaning of terms such as "clear letter", "corporate details" and "changes to...the underlying financial arrangements", so that they can be confident that evidence would be assessed against objective requirements.

These respondents also drew attention to the limited amount of time (15 business days) in which such evidence would have to be assembled and submitted by the external legal advisers to the Lender or Security Trustee. They were concerned that the drafting of Clause 3.4 seemed to anticipate that the external legal advisers would have an extensive and intimate knowledge of the financial arrangements put in place and of the corporate details of all parties to those arrangements, and could therefore provide the requisite information quickly, which those respondents felt would not necessarily be the case. They were therefore concerned that the possible need for protracted discussions with the LCCC to clarify what evidence would be acceptable could delay investment decisions or, in the worst case, result in the Direct Agreement being terminated for failure to meet the tight deadlines for the submission of evidence specified in the revised Direct Agreement.

The new requirements at Clause 3.4 are intended to ensure that the LCCC has the information it needs to reconfirm a party's entitlement to enter into a Direct Agreement and to exercise these rights should this be necessary. The LCCC has advised government that in most cases they would expect the external legal adviser to the Lender or Security Trustee to be able to provide a letter setting out the evidence in accordance with Clause 3.4 within the relevant timeframe, especially where there have been no changes to the financing structure. The proposed NQE Confirmation letter under Clause 3.4 serves a similar purpose to the external solicitor's letter which is provided prior to signing a direct agreement, the requirements for which are set out in paragraph 5.5 of LCCC's Direct Agreement guidance⁴, and that therefore any NQE Confirmation letter would not be expected to substantially differ from the initial external solicitor's letter. As noted above, the LCCC has also advised government that direct agreements in the form consulted on have already been signed and external solicitors' letters have been agreed prior to such signing.

However, the LCCC has also advised of the obligation on them under Clause 3.4(A)(ii) to act reasonably when considering whether evidence provided in the NQE Confirmation letter is satisfactory, and the discretion available to them under Clause 3.4(B) to consider alternative forms of evidence in demonstrating that a Non-Qualification Event has not taken place. Such flexibility could be particularly useful if the letter from the Lender's external legal adviser is proving difficult to obtain.

Accordingly, the LCCC would expect to take a flexible and pragmatic approach in considering alternative forms of evidence which can be provided within the relevant timeframes.

Having discussed stakeholders' concerns with the LCCC, government and the LCCC agree that it would be appropriate for the LCCC to provide more clarity on the type of evidence that would be acceptable to the LCCC to demonstrate that a Non-Qualification Event had not taken place. Given the wide range of possible financial arrangements and nature of the underlying financing structures associated with future CfD contracts, it would not be practical to describe in detail in the Direct Agreement the evidence that would need to be set out in an NQE Confirmation letter or acceptable alternative forms of evidence. Therefore, both the

⁴ Direct Agreement Guidance for CFD Generators, LCCC, Version 1.0, 09 April 2018; available on LCCC's website www.lowcarboncontracts.uk

government and the LCCC believe that the most practical solution would be for the LCCC, in due course, to provide specific guidance on this matter after having engaged with generators as to the form of any letter or alternative evidence that could be used.

Government response: The government has decided to proceed with the text of the Form of Direct Agreement published on 18 December 2018 apart from a small number of tidying up amendments. However, the government notes the concerns expressed by certain respondents about the clarity of evidential requirements and the fact that a direct agreement could be terminated if the evidence provided fell short of the LCCC's requirements. The government agrees that it would be helpful for specific guidance to be provided on the nature of the evidence that would be acceptable to the LCCC to demonstrate that a Non-Qualification Event has not taken place and to ensure that such evidence is assessed on a clear and objective basis.

The government has discussed these concerns with the LCCC who have agreed that they will engage with generators following the completion of the third CfD allocation round to discuss how best to update their guidance on the Direct Agreement to provide an appropriate level of clarification.

Minor administrative and tidying up amendments to the CfD contract

The government has decided to make several minor administrative and tidying up amendments in the Standard Terms and Conditions to improve clarity and consistency, for example to align the definitions of Lender in the Standard Terms and Conditions and Annex 3: Form of Direct Agreement. Several minor changes have also been made to the generic CfD Agreement to remove redundant text. These amendments, which are explained in the first table below, are highlighted for visibility in the updated version 3 of the Standard Terms and Conditions and the CfD Agreement published alongside this government response. The final versions of these documents will be published before the third allocation round commences.

Contract reference	Description of change
CfD Agreement	
Condition 6 – Accrual of Payments Prior to State Aid Approval & Annex 6: Conditional Start Date Notice	<p>This Condition and Notice apply only to Biomass Conversions with an Initial Installed Capacity Estimate of 250MW or more. As this technology is not a “less established” technology, and as such not eligible to apply for a CfD in the third allocation round, Condition 6 and Annex 6 are not required for this round and have been deleted from the CfD Agreement.</p> <p>Corresponding changes have been made to the Private Network and Unincorporated Joint Ventures variants of the CfD Agreement (see table below).</p>
CfD Standard Terms and Conditions	
Definitions and Interpretation Condition 1.1 – amendment of definition of “Lender”	<p>The definition of “Lender” in the Standard Terms and Conditions will be amended as follows, to align with the definition of “Lender” in Annex 3: Form of Direct Agreement and to ensure consistency in the use of this term across the contract:</p> <ul style="list-style-type: none"> • ““Lender” means any bank or financial institution (excluding any direct or indirect shareholder of the Generator) which provides debt financing or refinancing in relation to the Facility.” <p>The purpose of the definition is to exclude anyone with an equity interest in the Generator, which is more accurately captured by “direct or indirect shareholder” as opposed to the term “affiliate” (which may also extend to subsidiaries or holding companies which have no equity interest).</p>

<p>Annex 3: Form of Direct Agreement</p> <p>Deletion of Clause 3.4(D)(ii)</p>	<p>If the Lender/Security Trustee gives notice of a Non-Qualification Event under Clause 10.3, the Direct Agreement will terminate on the date of that notice. Clause 3.4(D)(ii) is therefore both redundant and incorrect and has been deleted.</p>
<p>Annex 3: Form of Direct Agreement</p> <p>Clause 3.4(D) – corrections</p>	<p>The term “Further NQE Confirmation” was inadvertently omitted from the consultation text and is being inserted into the final version of the Direct Agreement.</p> <p>The term “NQE Written Confirmation” appeared in the consultation text but should have read “NQE Confirmation”. The final text of the Direct Agreement has been amended accordingly.</p>
<p>Annex 3: Form of Direct Agreement</p> <p>Clauses 12.1 & 12.2</p>	<p>References to the use of fax as a means of written communication have been deleted as the LCCC no longer accept fax as a method of service.</p>
<p>Annex 7: FMS arrangements, Sustainability Criteria, RQM Calculation Methodology and ACT Efficiency</p> <p>Default Value Method (Solid and Gaseous Biomass) – Clauses 2.25 and 2.26</p>	<p>Clauses 2.25 and 2.26 allow the Default Value Method to be used to establish whether a solid or gaseous biomass satisfies certain sustainability criteria, provided the solid or gaseous biomass is one described in the first column of Part 2 of Schedule 3B to the Renewables Obligation Order 2009.</p> <p>This reference has updated as a result of the consolidation of the Renewables Obligation Order in 2015. The references in Clauses 2.25 and 2.26 will be amended therefore to refer to Part 4 of Schedule 2 to the Renewables Obligation Order 2015.</p>

The government is also publishing alongside this response the other variants of the CfD contract. These variants have been amended to bring them into line with the final changes made to the CfD Standard Terms and Conditions and the generic CfD Agreement. The main changes are summarised in the following table and all amendments are marked up in the attached contract documents to aid visibility. The changes are shown against the versions of these contract documents that were published for the second CfD allocation round on 13 March 2017. The final versions of these documents will be published before the third allocation round commences.

Contract reference	Description of change
CfD (Phases 1-3) Agreement (i.e. single metering) - offshore wind	
Definitions and Interpretation 1.2 Definition of 'Facility'	This definition has been amended to bring it into line with changes to the corresponding definition in the generic CfD Agreement.
Condition 4.1 – Facility Generation Technology	Remote Island Wind has been added to the list of technologies that may be deemed to be a Facility Generation Technology.
ACT Efficiency Multiplier – new condition 4.3B in each phase	This new condition 4.3B has been added to each phase of the single metering agreement to confirm that the ACT Efficiency Multiplier does not apply to these agreements.
Condition 5.3 – description of 'Longstop Period'	The definition of 'Longstop Period' has been amended to reflect the corresponding definition in the Standard Terms and Conditions.
CfD (Phase 1-3) Agreement (Apportioned Metering) – offshore wind	
Same changes as in the single metering phased agreements above	Same changes as in the single metering phased agreements above.
Private Network Agreement	
Definitions and Interpretation 1.2 Definition of 'Expected Generation Output Data'	This new definition is inserted into this Agreement to reflect corresponding changes made to the Standard Terms and Conditions. It describes the information that generators must submit to the LCCC on the expected generation output of their project over the CfD contract term in order to increase confidence levels around forecasts of CfD costs. The requirement in limb (A) (ii) that Generators estimate the total electrical output of the facility before having made any Line Loss Factor adjustments applies only to Private Network Agreements.
Definitions and Interpretation 1.2 Definition of 'Facility'	This definition has been amended to bring it into line with changes to the corresponding definition in the generic CfD Agreement.
Definitions and Interpretation 1.2 Definition of 'Force Majeure'	This definition has been amended to bring it into line with changes to the corresponding definition in the CfD Standard Terms and Conditions.

Condition 5.1 – Facility Generation Technology	Remote Island Wind has been added to the list of technologies that may be deemed to be a Facility Generation Technology.
ACT Efficiency Multiplier – conditions 5.5A and 5.5B	These new conditions 5.5A and 5.5B have been added to confirm how the ACT Efficiency Multiplier should be applied to new Advanced Conversion Technology plants. Several other consequential amendments have been made to reflect the addition of this new provision.
Condition 7.1 – Termination Events: Route to Market	Cross references to provisions in Condition 53.1 (Termination Events) of the Standard Terms and Conditions have been amended to reflect the insertion of a new termination event at (H) of Condition 53.1.
Condition 9.3 – description of ‘Longstop Period’	The definition of ‘Longstop Period’ has been amended to reflect the corresponding definition in the Standard Terms and Conditions.
Condition 10 – Accrual of Payments Prior to State Aid Approval & Conditional Start Date Notice	This Condition and Notice have been deleted for the reasons given in relation to the corresponding changes to Condition 6 and Annex 6 of the generic CfD Agreement explained in the previous table.
Annex 4 – Fuelling Criteria Definitions – Clause 1.1	Minor changes have been made to the definitions of “Advanced Fuels”, “Permitted Ancillary Activities” and “Waste” to bring them into line with changes to the corresponding definitions in the generic CfD Agreement.
Annex 4 – Fuelling Criteria Clauses 2 and 3	These section headings have been amended to remove the headings of the fuelled optional CHP technologies (ACT and AD) to reflect corresponding changes in the generic CfD Agreement.
Annex 5 – Project Commitments Part B: Technology Specific Project Commitments	The project commitments for the optional CHP technologies (ACT, AD and Geothermal) have been removed and project commitments have been added for Remote Island Wind (at new clause 13A) to reflect corresponding changes in the generic CfD Agreement.
Unincorporated Joint Ventures Agreement	
Definitions and Interpretation 1.2 Definition of ‘Facility’	This definition has been amended to bring it into line with changes to the corresponding definition in the generic CfD Agreement.

Condition 4.1 – Facility Generation Technology	Remote Island Wind has been added to the list of technologies that may be deemed to be one Facility Generation Technology.
ACT Efficiency Multiplier – new conditions 4.5B and 4.5C	These new conditions 4.5B and 4.5C have been added to confirm how the ACT Efficiency Multiplier should be applied to new Advanced Conversion Technology plants. Several other consequential amendments have been made to reflect the addition of this new provision.
Condition 5.3 – description of ‘Longstop Period’	The definition of ‘Longstop Period’ has been amended to reflect the corresponding definition in the Standard Terms and Conditions.
Condition 6 – Accrual of Payments Prior to State Aid Approval & Conditional Start Date Notice	This Condition and Notice have been deleted for the reasons given in relation to the corresponding changes to Condition 6 and Annex 6 of the generic CfD Agreement explained in the previous table.
Annex 4 – (Fuelling Criteria) Definitions – Clause 1.1	Minor changes have been made to the definitions of “Advanced Fuels”, “Permitted Ancillary Activities” and “Waste” to bring them into line with changes to the corresponding definitions in the generic CfD Agreement.
Annex 4 – (Fuelling Criteria) Clauses 2 and 3	These section headings have been amended to remove the headings of the fuelled optional CHP technologies (ACT and AD) to reflect corresponding changes in the generic CfD Agreement.
Annex 5 – (Project Commitments) Part B: Technology Specific Project Commitments	The project commitments for the optional CHP technologies (ACT, AD and Geothermal) have been removed and project commitments have been added for Remote Island Wind (at new clause 13A) to reflect corresponding changes in the generic CfD Agreement.

Annex 7 –
(Unincorporated Joint
Venture Changes)

The following sections have been amended to bring the UJV contract into alignment with the corresponding changes in the Standard Terms and Conditions:

- Clause 14(G) – definition of Force Majeure;
- Clause 17 amending Condition 28.1(G) of the Standard Terms and Conditions in relation to ‘no litigation’;
- Clause 17 amending Condition 28.2(B) concerning Start Date representation in relation to Remote Island Wind projects covered by a UJV contract.

This consultation is available from: <https://www.gov.uk/government/consultations/contracts-for-difference-cfd-proposed-amendments-to-the-contract>

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