



Department
of Energy &
Climate Change

Energy Company Obligation: Summary of the Contractual and Operational Changes made to Brokerage

February 2016

Energy Company Obligation: Summary of the Contractual and Operational Changes made to Brokerage

Summary

1. Brokerage is a market-based trading mechanism introduced in 2013 to support an open and competitive market for delivering the Energy Company Obligation (ECO). All trading under Brokerage is underpinned by a standard contract.
2. This document sets out the final changes to brokerage in response to the improvements proposed in March 2015 and within the 'Energy Company Obligation: Contractual and Operational Changes to Brokerage' paper published in September 2015.
3. Comments were received from a range of brokerage participants. We would like to thank everyone who submitted comments.
4. The changes introduced are intended to provide increased clarity over the respective roles of buyers and sellers, address concerns about the balance of risk between them and improve the running of the auction.
5. The revised brokerage contract was published on 23rd October 2015, coming into effect from Auction 72. The operational changes were introduced to coincide with this.

Decisions

6. The tables at Annex A and Annex B summarise the proposals in the September 2015 update, responses received and final decisions.

Annex A – Summary of main changes made to the Brokerage contract (version 3.0)

Number	Clause	Category	Original proposal	Comments received	Government response
1	Pre-conditions – 1A	Due Diligence	<p>To include a new set of pre-conditions at 1A. These require the Seller to provide the Buyer with a list of intended contractors or sub-contractors and the mid-installation Monitoring rates the Buyer should expect to receive at the end of the contract.</p> <p>Where these pre-conditions are not satisfied the Buyer can withdraw in writing from the contract.</p> <p>Further to this, clause 7.2 limits the sub-contractors delivering the contract to those previously notified under 1A.</p>	<p>No respondents disagreed with this proposal. However, one respondent queried whether measures could be rejected where a Seller does not complete sufficient levels of Technical Monitoring.</p>	<p>Sellers are required to adhere to the Technical Monitoring rates set by Ofgem. Under the brokerage contract insufficient levels of monitoring would be considered a 'monitoring rate failure' and where this occurs clause 3.7 applies.</p> <p><u>Decision:</u></p> <p>The original proposal was adopted and included in the revised contract.</p>
2	Pre-conditions – 1B	Due Diligence	<p>To include an optional set of due diligence checks at 1B which provides a 14 calendar day 'cooling off' period commencing on receipt of the information provided under 1A, where the Buyer can undertake optional additional standardised due diligence checks.</p> <p>Under this proposal the Buyer can withdraw in writing from the contract during the 14 day cooling off period where any of the following apply -</p> <p>a) Where an installer's technical monitoring failure rate for that buyer is greater than 10% for two consecutive monitoring quarters. This is for all delivery</p>	<p>No respondents disagreed with the inclusion of the proposed due diligence checks and cooling off period.</p> <p>Rejected sub-contractors</p> <p>However, one respondent noted that the original drafting did not allow for the replacement of rejected sub-contractors with the only option being for the Buyer to terminate the contract.</p> <p>Additional proposals</p> <p>In addition to the original proposal, respondents also suggested –</p>	<p>Rejected sub-contractors</p> <p>Where a sub-contractor would fail the due diligence checks, the 14 day 'cooling off' period provides time in which the Buyer and Seller can agree to any changes to the list of sub-contractors.</p> <p><u>Decision:</u></p> <p>The drafting of the contract was revised to allow the Buyer and Seller to agree to changes to the list of sub-contractors, and so that, if changes are not agreed within the 14 day cooling off period, the original list of sub-contractors stands unless the Buyer has withdrawn from the contract</p>

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			<p>not just Brokerage.</p> <p>b) Where an installer's score monitoring failure rate for that buyer is greater than 20% for two consecutive monitoring quarters. This is for all delivery not just Brokerage.</p> <p>c) Where the Administrator has suspended approval of an installer's measures for that buyer. This is for all delivery not just Brokerage.</p> <p>d) Where an installer has reported insufficient monitoring, as per the Administrator's requirements, for that buyer. This is for all delivery for that buyer not just Brokerage.</p> <p>e) Where a sub-contractor has under-delivered by 10% or greater on 2 contracts completed for the Buyer in the previous 12 month period.</p>	<ol style="list-style-type: none"> 1. Buyers should have access to all industry wide Technical Monitoring results. It was also noted that this check presupposes that the Buyer has worked with a Seller previously; 2. That the checks should be allowed on contracts over 12 months old; 3. An additional clause should be added to enable Buyers to check a Sellers financial history and where the results are poor, terminate the contract. 4. An additional clause should be added to allow Buyers to withdraw from the contract if the Seller has an outstanding debt, or is in a legal dispute, with the Buyer. 	<p>during the 14 day cooling off period.</p> <p>Additional proposals</p> <p><i>1 and 2:</i> The intention of the due diligence checks is to offer a Buyer some protection against being required to work with a Seller with which they have previously had a bad experience. Therefore, it is appropriate that Buyers only receive their individual Technical Monitoring results. Checking delivery under contracts that are over 12 months old does not take into account any improvements made subsequently, and an installer could be disadvantaged even if they have since improved.</p> <p><i>3:</i> A financial check has not been included. The primary reasons for this were –</p> <ul style="list-style-type: none"> • There are a number of organisations which conduct financial checks and as such there is no standard credit score; and • There was no way to determine a credit score that would reflect the needs of all Buyers <p><i>4:</i> We considered the option of including an additional check where the Buyer is owed money by a Seller and determined that it was not feasible to implement this in a standardised way that would be fair to Sellers. However, as the obligated party</p>
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					<p>under ECO, we recognised that Buyers should not be required to remain in a contract with a Seller in which they are in a dispute. For this to be standardised, and fair to Sellers, a dispute has been defined as where court proceedings (or similar) have commenced.</p> <p><u>Decision:</u></p> <p>An additional due diligence check enabling Buyers to withdraw from the contract where there is a formal legal dispute was included in the contract.</p>
3	Clause 3	Technical Monitoring	<p>Revise clause 3 to stipulate that the –</p> <ul style="list-style-type: none"> • Seller is responsible for providing and paying for mid-installation Monitoring • Buyer is responsible for providing and paying for post-installation Monitoring • Where there is either a mid or post monitoring failure the Seller is responsible for completing and funding any remediation, re-inspection or rescoring (as applicable). <p>Further to this, failure to complete sufficient Monitoring is to be considered a Monitoring Rate Failure (Clause 3.7) covered by the Cure Options provided to the Buyer under Clause 6.</p>	<p>No respondents disagreed with the changes proposed to Clause 3.</p> <p>Remediation and re-scoring</p> <p>Some respondents felt that the drafting of Clause 3.6 should be revised to reflect the Ofgem guidance and require any remediation or re-scoring to be completed within three months, rather than the six allowed by the brokerage contract.</p> <p>Technical Monitoring Results</p> <p>One respondent also requested that Buyers should be able to receive Technical Monitoring results at the point at which measures are delivered to the Buyer, rather than at the end of the contract.</p>	<p>Remediation and re-scoring</p> <p>Ofgem's guidance states –</p> <p>9.31 – We expect measures to be remediated or rescored within three months of the last day of the month in which the failure was identified by the monitoring agent; and</p> <p>9.32 – If a measure is not remediated or rescored, and in the case of Technical Monitoring re-inspected, within six months of the last day of the month in which the failure was identified by a monitoring agent, we will revoke an earlier decision to attribute savings or refuse to attribute savings to the measure.</p> <p>As it is only at the six month point at which</p>

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				<p>Pathways to Compliance</p> <p>Some respondents requested for the contract to clarify the party responsible for the costs of any additional Technical Monitoring required where a sub-contractor is placed on a Pathway to Compliance.</p>	<p>the savings attributed would be affected, it is appropriate that the trigger point in the brokerage contract is consistent with this.</p> <p><u>Decision:</u></p> <p>Clause 3 was revised as proposed without changes to the deadline for remediation and rescoring.</p> <p>Technical Monitoring Results</p> <p>The contract requires Technical Monitoring to be carried out in accordance with the Applicable Rules.</p> <p><u>Decision:</u></p> <p>No changes were made in the contract to the point at which Technical Monitoring results are to be provided.</p> <p>Pathways to Compliance</p> <p>We recognised that Buyers should not be required to pay for any additional Technical Monitoring where the cause is due to the poor performance of the sub-contractor.</p> <p><u>Decision:</u></p> <p>The contract was revised to provide clarity over the party responsible for the costs of</p>
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					additional Technical Monitoring.
4	Clause 4	Reporting	Revise clause 4.1 so that measures must be notified within 20 days of installation or where installed after the 27 th of the month, must be notified within 15 days of installation.	<p>Some respondents disagreed with the proposal noting that this created additional complexity within the contract. Specifically, points raised were –</p> <ul style="list-style-type: none"> • Two different notification deadlines makes the process more complicated than it needs to be; • The proposed change will delay notification of measures to the buyer, adding difficulty to their ability to meet the reporting requirements of the Relevant Authority. Notification 15 days after the date of installation would be preferable; • Instead of the current proposal, the contract should require that measures should be notified within 20 calendar days of installation, and no later than the 15th of the following month, whichever is sooner 	<p>In response to the feedback received, we reviewed and revised the original proposal.</p> <p><u>Decision:</u></p> <p>The notification deadline was changed to reflect the alternative proposal of requiring that measures to be notified within 20 calendar days of installation, and no later than the 15th of the following month, whichever is sooner.</p>
5	Clause 4	Reporting	<p>Expand clause 4.5 to require the Seller to provide the Buyer with the following additional information –</p> <ul style="list-style-type: none"> • Copy of Qualifying Boiler Repair Guarantee; • Gas Safety Certificate (or equivalent for other fuel types); • Part P of the electrical safety certificate; • Landlord or Management Company Permission; and/or • AWG and Householder checklist 	<p>Providing additional information</p> <p>One respondent disagreed with requiring a Seller to provide this information as it is not required for a measure to be approved; however, this approach was generally supported.</p> <p>Data matching</p> <p>In addition to this documentation, some respondents requested that where appropriate Sellers should be required to provide evidence of using data matching to confirm eligibility.</p>	<p>Providing additional information</p> <p><u>Decision:</u></p> <p>The proposed change was adopted and included in the revised contract.</p> <p>Data matching</p> <p>As it is not a mandatory requirement of ECO for the data matching service to be used, we cannot make it a requirement under Brokerage.</p> <p><u>Decision:</u></p>

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				<p>Timeframe for reporting additional evidence</p> <p>One respondent also noted that the revised contract allowed for supporting evidence to be provided in two tranches, with the documents listed under Clause 4.5 required 5 days after submission of the original completion notice. They felt that this added confusion and also queried the need for this to be separated as the Seller should have documents required under Clause 4.5 available to submit alongside the completion notice.</p>	<p>This proposal was not taken forward.</p> <p>Timeframe for reporting additional evidence</p> <p>In response to the feedback received regarding the timeframes for providing the Completion Notice and supporting documentation, we reviewed and revised the original proposal.</p> <p><u>Decision:</u></p> <p>The contract was revised to require the documentation listed under Clause 4.5 to be provided alongside the Completion Notice.</p>
6	Clause 5	Payment	Revise clause 5 to provide additional clarity and mitigate concerns about payment delay and queries relating to compliance.	One respondent disagreed with the proposal requesting for the payment terms within the contract to be amended from 20 to 30 days.	<p>To facilitate prompt payment the Brokerage contract provides participants with clarity as to the requirements that must be met for payment to be triggered and when this will be made.</p> <p><u>Decision:</u></p> <p>The proposed change was adopted and included in the revised contract. The payment term remains 20 days.</p>
7	Clause 5	Payment	Revise clause 5 and define a period of 5 calendar days for the Buyer and Seller to agree the amount.	No comments were received on this proposal.	<p><u>Decision:</u></p> <p>The proposed change was adopted and included in the revised contract.</p>
8	Clause 6	Cure Option	Revise clause 6.3 and sets out the new Cure Options. This provides the Buyer	No respondents disagreed with the changes proposed; however, some	Provisions for set-off have not been included in the contract, in order to retain a

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			with the right to determine the method of remediation where the Seller is at fault.	<p>respondents asked for the contract to provide –</p> <ul style="list-style-type: none"> • Payment terms where a Buyer is owed money by a Seller; and • Additional clarity that the Cure Options are applicable in the event of less ECO points in the final determination 	<p>balance between the interests of Seller's and Buyer's and not add a risk of payment delays.</p> <p>Delivery failure, reporting failure, measure failure, revocation, monitoring failure and monitoring rate failure can all give rise to requirements to cure the failure (if it is capable of cure). There is no additional provision for cure in circumstances arising as a result of the final determination of a supplier's compliance with its obligations under ECO, as these could be due to the Sellers or the Buyers error.</p> <p><u>Decision:</u></p> <p>The original proposal was adopted and included in the revised contract.</p>
9	Clause 7	Contract Delivery	Revise clause 7 to require the Seller to use only those sub-contractors that they notified to the Buyer at the start of the contract, unless the Buyer consents to the use of a different sub-contractor. Such consent cannot be unreasonably withheld or delayed. The grounds on which the Buyer may withhold consent are restricted to those listed in clause 7.3.	No comments were received on this proposal.	<p><u>Decision:</u></p> <p>The original proposal was adopted and included in the revised contract.</p>
10	Clause 7	Contract Delivery	Revise clause 7.1(c) to provide an obligation on the Seller to remove redundant material from site.	No comments were received on this proposal.	<p><u>Decision:</u></p> <p>The original proposal was adopted and included in the revised contract.</p>
11	Schedule 1 –	Liquidated Damages	Change the definition of Buyer's Liquidated Damages to a market based	No respondents disagreed with the changes proposed; however, some	The Liquidated Damages clause is one that is used in standard commercial

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	definitions		calculation	<p>respondents requested for the contract to provide a formula for calculating the damages.</p> <p>Additionally, one responded requested clarity as to why the 'Buyers Replacement Costs' were still being calculated using a price platform quote, but the Liquidated Damages were not.</p>	<p>contracts. The Definition of Buyer's Liquidated Damages in Schedule 1 sets out how the damages should be calculated; therefore, no formula has been specified.</p> <p>The Platform Price Quote (PPQ) has been retained for the Buyer's replacement costs as under the Cure Option the Buyer has the option of seeking replacement costs or additional measures.</p> <p><u>Decision:</u></p> <p>The original proposal was adopted and included in the revised contract.</p>
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Annex B – Operational changes to ECO Brokerage

Number	Proposed change	Comments received	Government response
1	Only under delivery of contractual requirements, i.e. less than 95% contract volume, will contribute to a reduction in the Seller rating. Seller ratings will not be penalised for any over delivery. This will not change the tolerance requirements in the contract.	No comments were received on the proposed change.	Decision: Ratings The proposed change was introduced alongside the revised contract.
2	To provide increased delivery confidence the number of 'lots' that a Seller is able to place will be reduced from 10 to 5 per Carbon and Affordable Warmth auction.	No comments were received on the proposed change.	Decision: Lots per auction The proposed change was introduced alongside the revised contract.
3	The auction duration will be shortened from 3 to 2 hours per Carbon and Affordable Warmth auction.	No comments were received on the proposed change.	Decision: Auction duration The proposed change was introduced alongside the revised contract.

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