PROPOSED HEADS OF TERMS FOR NETWORK AND NON-NETWORK SOLUTIONS

Introduction

The table below sets out a non-exhaustive list of the proposed risk allocation between a successful bidder and the consumer which is expected to be delivered via a contract with a contract counter-party for non-network solutions or via a Transmission Licence with Ofgem for network solutions.

This table builds on the positions outlined in this Phase 3 consultation (December 2020). These heads of terms cover both network and non-network solutions and so, unless specified otherwise, the proposed position will apply in both cases.

The contract terms and licence terms will be published as part of the tender documents for each tender process. Except in the case of minor amendments needed to reflect the technical requirements of each project, the contract terms and licence terms will not be negotiable.

The positions of bidders for network and non-network solutions will be balanced, except where a difference is justified; this is one of the reasons why the terms are non-negotiable.

Any sharing of risk in the preliminary works phase referred throughout should be viewed in the context of the proposed post-preliminary works cost assessment process as further detailed in Chapter 4 of this Phase 3 consultation.

	ACTIVITY/RISK ALLOCATION	TERM	NARRATIVE
1.	**DESIGN AND CONSTRUCTION**		
1.1	Design	**Preliminary Works Phase** The network need will be set out during the tender process. An initial solution/reference model may be provided as part of the tender documents. The proposed solution will have to comply with all relevant codes and standards. During the preliminary works phase, the design risk may be shared if changes are required due to externally driven events.	**Preliminary Works Phase** Detailed design work will be carried out in the preliminary works phase before final construction costs are fixed. Changes during the preliminary works phase where risk may be shared, could include changes to the design that are required as a result of conditions attached to a planning consent. From the point that construction costs are fixed, the bidder will be expected to maintain their price. The relevant codes will include the System Operator

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			Transmission Owner Code ("STC") and the Security and Quality of Supply Standards ("SQSS") for network solutions and the Connection and Use of System Code ("CUSC") and the Grid Code for non-network solutions. For the purpose of these heads of terms, it has been assumed that each Transmission Owner ("TO") will be subject to a licence condition to provide information and data required to enable the tender process to proceed.
		Post Preliminary Works Phase The successful bidder shall be liable for the design after the preliminary works phase (i.e. once the construction costs have been fixed via the post-preliminary works cost assessment process). For both network and non-network solutions, there will be no relief available for system failures if the failure is due to a design issue. There will be a limited number of exceptions (such as a change in the network need) where design risk may be re-opened.	**Post Preliminary Works Phase** Design will be solely a bidder risk, subject only to specific re-openers. The purpose of the early competition process is to allow bidders to innovate at an early stage in the process. While innovation can help a bidder to be successful in the process, the bidder should take responsibility for any defects in the solution it has proposed. The design standard will be one of reasonable skill, care and diligence. However, meeting the network need and delivery of certain, other key design output requirements will be absolute obligations.
1.2	Warranties for design/information	The successful bidder may need to provide a royalty free licence for a third-party (including sub-contractors and affiliates) to use the intellectual property rights ("IPR") in the design in certain circumstances e.g. in the event of bidder default or if the need remains and is retendered at the end of the initial revenue period and there is a dependency on the original solution IPR remaining in future.	To protect consumers' interests, a licence may be required by a third-party so that the proposed solution can be replicated, if necessary. For example, if the successful bidder fails to deliver the service and there is a termination, the Procurement Body may need to re-tender the system need. In this type of scenario, the Procurement Body and bidders should have the ability to use the IPR related to the initial solution as part of the new tender process.

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1.3	Design review	Solution to be designed to operate for duration of the initial revenue period. The Procurement Body with the support of the Network Planning Body will have the right to review, comment on or reject design as part of the tender process.	The Procurement Body will have the right to raise questions and seek clarifications relating to the design and the costs of the design as part of the tender process.
1.4	Land rights	Land assembly (being identification of, and acquisition/access to, sites (whether on a temporary or permanent basis)) will be a bidder responsibility and will be secured alongside, or in the case of compulsory acquisition as part of, the planning consent process. The successful bidder will identify land required to fulfil the project. The rights acquired by the successful bidder will need to be transferable to a Competitively Appointed Transmission Owner ("CATO") of last resort. **Preliminary Works Phase** If the land that is required for the project changes during the preliminary works phase for reasons beyond the control of the successful bidder, then there may be some sharing of risk. As an example, if the planning process leads to revisions to the proposed route for a network, then provided that the bidder had taken all reasonable and foreseeable factors into account when preparing its bid, then the risk may be shared. **Post Preliminary Works Phase** Once the preliminary works phase is completed, acquiring land rights will be solely a bidder risk.	For network solutions, the successful bidder may have the rights of a transmission licence holder to assist in obtaining the relevant land rights. The land assembly requirements of non-network solutions are likely to be lesser in extent; compulsory acquisition powers, if needed, would be available under the Development Consent Order ("DCO") process or under a generation licence for generation or storage solutions. While the positions of a network solution and a non-network solution may not be fully aligned, a non-network solution would still have compulsory acquisition powers available to it in many circumstances (such as under a generation licence (if applicable) or the DCO process).

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1.5	Consents - Planning permission and related consents	**Preliminary Works Phase** The successful bidder will be responsible for the process and costs of applying for, and obtaining, the primary planning consent, as well as all other consents from statutory authorities and those third-party agreements and land agreements necessary to remove objections to the planning consent. The nature of the planning consent required will depend on the details of each proposed project but could include (i) a DCO; (ii) s36/37 of the Electricity Act 1989; or (iii) Town & Country Planning Act consent. The successful bidder will not be required to include costs for an appeal against its planning application being rejected or the costs associated with a judicial review challenge to the granting of planning consents to the project. If these scenarios occur, then the costs risk may be shared. The successful bidder will have responsibility for identifying and obtaining any further consents which are required (including those required under the primary consents – for example protective provisions or asset protection agreements, or further consents required as a consequence of the specifics of its detailed design) and compliance with them. If the consent will have impacts on the wider national electricity transmission system, then Electricity System Operator ("ESO")/TO consent may be required. Where this is the case it will be appropriate for the ESO/TO to require reasonable rights of consent to the successful bidder agreeing such additional consents.	**Preliminary Works Phase** The impact of the planning consent on design and land assembly are shared because the final costs of the project are not fixed until after planning consent is obtained. If the conditions included in a planning consent are reasonably foreseeable then the successful bidder would be expected to pay the costs of fulfilling those conditions. If the conditions could not be foreseen or are the first of their kind, then the costs impact of fulfilling those conditions may be shared.

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		Post Preliminary Works Phase The successful bidder will be required to discharge all consents, including complying with all conditions forming part of a planning consent.	**Post Preliminary Works Phase** From the point that costs are fixed, the successful bidder will be expected to maintain their price subject to permitted re-openers.
1.6	Ground conditions	**Preliminary Works Phase** To the extent that the incumbent TO has undertaken any ground condition surveys which may be relevant to the tender process, those surveys will be made available as part of the tender process. The successful bidder will need to carry out their own due diligence in relation to ground conditions whether it receives the ground condition reports prepared by/for the TO or not. All other ground condition surveys are to be undertaken during preliminary works by the successful bidder before final construction costs are fixed. As a result, ground condition risk before construction costs are fixed can be shared. **Post Preliminary Works Phase** From the point that construction costs are fixed the successful bidder would be expected to maintain their price and take any further ground condition risk.	The bidders will be expected to carry out desktop assessments of the ground conditions of all areas required for their solution as part of their bidding process. If ground condition issues should have been discovered or were reasonably foreseeable as part of that process, then the successful bidder should take that risk.
1.7	Liability for failure to meet planned service commencement date	**Impact of failure on duration of revenue stream** If the successful bidder fails to meet the service commencement date, then the revenue period will be shortened to the extent of the delay. **Impact of failure on amount of revenue** If the planned service commencement date is not achieved, there may be re-profiling of the Tender Revenue Stream ("TRS") within the shortened revenue	The successful bidder will only achieve payment of full revenue once the solution has been commissioned. This is considered to be sufficient motivation for the successful bidder to deliver in accordance with the contract or licence. For a no-default delay, the bidder will be held whole for their lost equity return but will not benefit from the delay (for example through receiving revenue for operations

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		period (Chapter 5 Section 9.2 sets out further details on this point). Where the successful bidder is at fault there will be no increase to the TRS once payments start. For non-default events the TRS (once it commences) will be adjusted to return the equity to the base case Internal Rate of Return ("IRR") over the term of the TRS. If the delay is due to a no-fault event, then the TRS shall be adjusted to allow for the return to equity but not for debt service payments or avoided costs. The above principles can either be applied by a contract/licence calculation or via liquidated damages There is no reward for early commissioning. Longstop date provisions will apply, as set out in section 1.15 below.	and maintenance costs which would not have occurred and would not be incurred in the future). Where there is a delay for an unacceptable reason, the bidder is not held whole for their lost equity return and that they do not benefit from the delay. The concept of an acceptable reason and an unacceptable reason would be determined in accordance with the contract or licence, as appropriate. Bidders are expected to put in place liquidated damages with their contractors and insurance to cover debt service obligations during any delays in the bidder fault and no-fault scenarios.
1.8	Liability for property damage	The regimes set out in the CUSC and STC shall be applied in these arrangements. In summary, this would involve the successful bidder being liable for damage to the physical property of the counterparty, or any third party, subject to a specified cap. The successful bidder would not be liable for loss of revenue or profit suffered by any other person, or any consequential losses.	This aligns the position of network and non-network solution providers. For full details of the liability regimes, the CUSC and the STC are available on the ESO website.
1.9	Liability for regulatory breaches	The successful bidder will indemnify the ESO against regulatory fines that the ESO incurs as a result of failures by the successful bidder that cause the ESO to incur a fine from a regulatory authority. This will cover enforcement action by any competent authority, including Ofgem and the Information Commissioner's Office.	The ESO should not be exposed to regulatory fines caused by the defaults of the successful bidder.

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1.10	Bidder default: Preliminary works and Construction security	The successful bidder will have to provide acceptable security to the relevant counterparty to guard against the risk of the successful bidder defaulting during the preliminary works phase. As a separate obligation, the successful bidder will also have to provide security against the risk of it defaulting during the construction phase of the project. **Preliminary Works Phase** The security to be provided to the relevant counterparty remains to be confirmed for the preliminary works phase. **Post Preliminary Works Phase** While further consideration needs to be given the amount of security required, for the solution delivery / construction period, we are proposing that it will be based on the provisions of the offshore transmission ownership ("OFTO") regime in relation to the amount of security to be provided. The ESO is considering the form of security that would be provided as the ESO may have a preference for a specific type of security, such as a bond. In order to protect delivery and minimise risk to both the counterparties and consumers, the counterparties will require a security package to be effected by the successful bidder from the point of award through to the commissioning of the solution. If a CATO of last resort is appointed, the security package will need to be claimed by the ESO	A robust security package gives important comfort to the relevant counterparty that the successful bidder and supply chain are sufficiently motivated to each deliver the project's stated aims. This, in turn, gives comfort to the relevant counterparty that there is sufficient construction contractor financial exposure to ensure delivery. The preliminary works phase security supports the obligation on the successful bidder to progress its solution in line with the agreed programme. The construction period security addresses the risk of successful bidder failure during the construction period. Whilst the levels of appropriate construction security will be determined by a number of factors (including the market and the nature of the construction risk) it is expected that the successful bidder would provide, performance bonds and other security to support its performance obligations. In project finance transactions, bond and related performance security is normally determined by the financiers, however typically it is set at between 10 and 20% of capital expenditure. The level of the security in the construction period may need to take into account the benefit to consumers and whether this could be shared to avoid double counting. The forms of security that will be acceptable are (i) a guarantee from a parent or affiliated company that has and maintains an approved credit rating; (ii) cash on deposit; and (iii) irrevocable letter of credit or bank guarantee where the issuer has and maintains an approved credit rating. The OFTO regime seems to be the most comparable example. For the OFTO regime, the amount of security is 20% of the capital value.

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			On a case-by-case basis the ESO will consider whether any additional measures are required to align the financial covenant obligations of network and non-network solution providers.
1.11	Construction cost	**Preliminary Works Phase** To the extent that construction costs are incurred in the preliminary works phase (as opposed to construction costs that are incurred as a result of the preliminary works) and there are over-runs in those costs that are not caused by the successful bidder failing to act in an economic and efficient manner, then those costs over-runs may be shared. This will be subject to the successful bidder meeting certain conditions. **Post Preliminary Works Phase** Once the construction costs have been fixed via the post-preliminary works cost assessment, then the risk of construction cost overruns sits with the successful bidder, save where the overrun is caused by any particular risks wholly/partially retained by consumers (see price re-openers below).	**Preliminary Works Phase** Cost overruns incurred economically and efficiently will be subject to a cap (likely set as a % of bid TRS). Cumulative costs which exceed this cap will be for the bidder to absorb. **Post Preliminary Works Phase** Fixed price contracts (with limited price-reopeners) allocate construction risks to the successful bidder, as the party best placed to price and manage that risk.
1.12	Uncertainty price reopeners	**General risk allocation** The successful bidder shall be responsible for financing, design, construction, operation and maintenance of the solution. The successful bidder will specify a level of contingency (as a fixed risk margin percentage as per Section 3.2, Chapter 4) as part of its bid and will be expected to maintain that contingency level when updating the TRS post preliminary works. The successful bidder will also be expected to set a fixed profit margin with each of its	Trigger thresholds of a similar scale to the ones which exist in the offshore regime for the IAE mechanism may be suitable as a basis for early competition. The capital costs set through the cost assessment could be utilised as the reference by which the IAE trigger threshold is set for the remainder of the revenue period. There may be project specific re-openers that would apply due to the unique characteristics of a particular solution. IAEs are certain specified events that:

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		contractors, and to maintain this when updating the TRS post preliminary works. All bidders will be expected to carry out appropriate due diligence prior to submitting their bids. No re-opener will be allowed in respect of an event that due diligence should have revealed. **Preliminary Works Phase** As described above, there are certain risks that may be shared during the preliminary works phase. The trigger point following which those risks will cease to be shared will be the point at which construction costs are fixed under the cost assessment process. **Post Preliminary Works Phase** Once construction costs have been fixed, the successful bidder will be expected to maintain that figure. Exceptions to this would include: • Changes in the system need • Pass through costs (e.g. changes to business rates) • Certain changes in law • Decommissioning • Uninsurable events • Income Adjusting Events (“IAEs”) • Pass-through costs	• are not the fault of either party and/or beyond their control; • are unforeseeable or, in certain circumstances, have a very low level of foreseeability; and • have a high impact on the solution being delivered. If insurance can be obtained at reasonable rates to guard against particular risks, the successful bidder will be expected to obtain insurance cover and not to seek to re-open the TRS. IAEs for network solutions will require Ofgem consent. Trigger thresholds of a similar scale to those existing in the OFTO regime would be used for the IAE trigger threshold(s). These lower trigger values are likely to be more appropriate where the solution is not part of a wider portfolio of assets and where the TRS is the primary or sole source of revenue. Section 4.1 applies in relation to Force Majeure. Comments on decommissioning are set out in Chapter 5 Section 11. Decommissioning will not necessarily follow the end of the revenue period. The successful bidder may be required to provide security against possible decommissioning costs. That security would be provided by a withholding of part of the availability payment in the final years of the revenue period. Pass through costs - certain specified upwards or downwards changes (e.g. business rates and licence fees) to be passed through fully, without deduction. The position on corporation tax changes is being considered.

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		Minimum financial thresholds will apply; the successful bidder will be expected to take the risk of changes below those thresholds occurring.	
1.12.1	Changes in system need or need disappearance	Depending on the nature of the system need, the Procurement Body may include some flexibility in the tender specification relating to the required outputs. An annual process will be included to review and address material changes in system need. This review will be part of the Network Options Assessment ("NOA") process or another suitable process. The need will also be subject to review by the Approver prior to financial close. **Preliminary Works Phase** Before financial close the reasonably incurred sunk costs would be recoverable if the project were terminated for a need disappearance. As no long term debt facilities are in place, no protection for this kind of debt would be required; however, there may be some debt costs to account for in the sunk costs, which if reasonably incurred, may be recoverable. **Post Preliminary Works Phase** If in the construction phase a change in system need delays commissioning then the successful bidder will be compensated for its loss of revenue arising directly from the delay in a similar manner to a 'non-fault' delay as per section 1.10 above. If the project is terminated for a need disappearance then the position set out in sections 4.6 and 4.7 below will apply.	The disappearance of the need prior to the award of the contract or the issuing of the relevant licence has not been addressed in these heads of terms, because that risk would result in the tender process being cancelled. So, the risk would be allocated under the tender process documents; in general, tender cancellation is a bidder risk. Although there are no formal checkpoints for reassessing network need during the operations phase, Ofgem will actively wish to review whether the project delivers value for money at any stage of the process. If a need change occurs because the forecasts made by the Network Planning Body on which the level of system need was calculated change, then this will not be a bidder risk, but will be a consumer risk.

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1.12.2	Change process	The change process would enable the relevant counterparty, on the direction of the Approver, to ask the successful bidder to price a change in scope or timetable. The relevant counterparty (on the direction of the Approver) could then either accept the successful bidder's proposal for accommodating the change, reject the proposal and allow the project to continue unchanged, or decide to terminate the relevant contract or licence as set out in section 4.5. If the project is terminated for a need change then the position set out in sections 4.6 and 4.7 below will apply.	For the purposes of these heads of terms, it has been assumed that bespoke procurement regulations, rather than the Utility Contract Regulations, will apply.
1.12.3	Change in Law	No compensation payable to the successful bidder where a change in law is reasonably foreseeable at the time the agreement is executed or licence is granted. Changes in law which are specific to the project/contractor/electricity transmission construction, operation or maintenance shall be covered by the IAE re-opener as above.	Change in law (not reasonably foreseeable) is outside the control of both the successful bidder and the consumer. Under the change in law IAE, the bidder would take the risk up to a given value and consumers beyond that trigger threshold.
1.13	Third Party Asset Holders	The successful bidder shall be responsible for identification of third party asset owners and for reaching agreement with those third parties. The successful bidder will be responsible for complying with all agreements with third party asset holders. An exception to this approach will be if the consenting process requires a change in the route, for example of a new network, which requires interaction with more, or fewer, third party asset holders. Whilst the successful bidder will still be responsible there could be some sharing of risk as per the above sections.	The incumbent TO may have identified a number of third party asset owners as part of the needs identification process. That information would be made available in the data room. As the successful bidder is charged with delivering the project, it is best placed to engage on the precise detail of interface with third party asset owners. The successful bidder performing this role gives certainty to third parties as to who is responsible for the relevant works, and also avoids any confused messaging as the successful bidder will be best placed to communicate its needs.

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		Any agreements reached with third parties must have an assignment/novation clause (where required) in the event of bidder default.	
1.14	Commissioning	The transmission standard process for determining whether commissioning has been achieved will be applied. The successful bidder will need to evidence that its solution has been commissioned to meet the system need in full.	The impact of delays during the construction phase are set out above in section 1.7 (Programme). Other than for these factors, commissioning is a bidder risk. The successful bidder will not be permitted to commission the solution in part and to claim that the full TRS should begin at that stage.
1.15	Long-stop date	If the commissioning of the solution is delayed beyond a specified long-stop date, then the relevant counterparty will need to have the right to terminate the contract and/or transmission licence. The financial impact on lenders to the project will need to be considered. The position of equity investors would likely not be protected against this risk if the delay had been caused by the successful bidder, or its sub-contractors. The position if a no-default event had caused the long-stop date to be missed has not been fully determined yet. Section 4.7 below sets out the current proposal on no-default termination compensation. The existence of the long-stop date does not mean that the TRS period will automatically be extended if the successful bidder does not achieve the anticipated commissioning date.	This remedy is typical in infrastructure agreements and guards against the risk that the solution is never going to be fully commissioned. The ESO is considering whether one extension to the long stop date where a delay is caused by force majeure should be permitted. The consequences of termination would depend on the circumstances causing the delay; this could be either a successful bidder default scenario, or a no default scenario.
1.16	Contractor Performance	The successful bidder shall be responsible for selecting, vetting and managing the performance of all sub-contractors.	The successful bidder and any sub-contractors may be subject to basic or advanced checks depending on which sites they will have access to.

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		Insolvency of any sub-contractors shall be a successful bidder risk.	
2.	**PAYMENT AND FINANCING**		
2.1	Preliminary works payments	There may be some revenue available for the preliminary works phase where the Procurement Body identifies this is beneficial to the process. This revenue may take the form of payments for achieving specified milestones.	Payments will be capped at the lesser of a fixed amount and evidence of actual costs incurred by the successful bidder. The maximum cap may be set at zero in cases where preliminary works would not deliver value to the consumer.
2.2	Tender Revenue Stream	TRS payments to the successful bidder will commence following successful commissioning of the solution. Payments during construction may be considered if they decrease the overall cost to the consumer.	Payments during the construction period are likely to be the exception rather than the standard approach. The successful bidder would need to provide compelling evidence that the overall cost to the consumer would be reduced and that the consumer would not be taking additional risk.
2.3	Payment (time and cost)	Subject to the re-openers set out above, a failure by the successful bidder to comply with the construction programme shall cause the overall revenue period to be reduced. If the re-openers apply, then the revenue may be adjusted to some extent to reflect the shorter revenue period.	
2.4	Revenue indexation	Part of the TRS payment shall be subject to annual indexation based on CPI-H. The basis for establishing the proportion of the TRS to be indexed will be specified during the tender process and confirmed as part of the cost assessment process.	The Procurement Body will define what is an acceptable level of natural hedge.
2.5	Equity return	The level of return to equity is to be fixed at the time of the final bid. The TRS will be updated at the end of the preliminary works phase to provide the same return to equity as at the time of the final bid.	

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2.6	Equity transfers	No transfers of equity will be permitted prior to commissioning. No equity gain share mechanism is being proposed at this stage, although this position is subject to review.	The initial investors may be able to sell equity after commissioning subject to oversight and controls.
2.7	Debt	A debt competition will be run by the successful bidder (with oversight from the Procurement Body) once the preliminary works have been completed and the cost of debt and gearing will be established at that point.	The licence/contract will include suitable provisions setting out bidder obligations in respect of the debt competition.
2.8	Refinancing	Refinancing during the construction phase would not be permitted. If the successful bidder refinances the debt following construction of the solution, the gains shall be shared with the consumer, on the basis of the prevailing approach at the time in other comparable regimes such as the OFTO regime.	Post construction refinancing is permitted subject to the financing gain share mechanism.
2.9	Availability incentive	The availability incentive will be the primary operational incentive (supported by the environmental and timely new connections incentive).	More detail on the availability incentive is included in section 3.1 below.
2.10	Environmental incentive and timely new connections incentive	Environmental Incentive (Reputational) We are proposing an obligation to provide an Environmental Action Plan and to publish an Annual Environmental Report. Environmental Incentive (Financial) This would be an obligation to minimise leakage of relevant gases. Timely New Connections Incentive We are proposing a penalty of up to 0.5% annual base revenue for relevant process failures in relation to the	The timely new connections incentive would replicate the RIIO-2 proposals. Any relevant process failures will be linked to expected obligations under licence and code for network solutions in relation to making competent connection offers in designated timescales. This incentive would only apply to network solutions as new connection obligations do not apply to non-network solutions.

	ACTIVITY/RISK ALLOCATION	TERM	NARRATIVE
		facilitation of new connections, on a comparable basis to incumbent TOs.	
2.11	Stakeholder engagement incentive	The successful bidder will be obligated in licence or contract (as appropriate) to publish a proportionate stakeholder engagement report within three months of the conclusion of the preliminary works phase.	The purpose of this report will be for the successful bidder to set out best practice and lessons learned in respect of the preliminary works phase.
2.12	Residual Asset Value & revenue stacking	Any assumptions as to residual asset value and/or revenue stacking will remain with bidders.	
3.	**OPERATIONS PERIOD**		
3.1	Asset availability (and availability incentive)	The required availability level shall be set out in the availability incentive. The liability regime for unavailability is likely to be based on the risk allocation that is used in the OFTO model), although there may be some flexibility in the approach for non-network solutions. Failure to achieve the availability level in a year shall result in a deduction of annual revenues, capped at a percentage of annual base revenue. Relief for deductions where availability negatively impacted by an exceptional event. In cases of significant underperformance the licence or service contract could be revoked or terminated.	Potential termination ties into the CATO of last resort process, which is discussed in section 3.6 below. The availability incentive will be a reward or penalty based on availability. The target performance and % range for revenue potential per annum are likely to follow a similar structure to the OFTO regime. The incentive will apply to network solutions and non-network solutions. Similar security requirements to the OFTO regime are proposed for the final years of the TRS period, allowing security to be called upon in respect of incentive underperformance (and for decommissioning security – see section 3.10 below).
3.2	Grid Connection	Bidders will be responsible for costs and timing related to grid connections.	
3.3	Network Compliance	The successful bidder will be responsible for ensuring compliant design and operation of their solution in	This is the standard position for any market participant.

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		accordance with relevant codes, standards and specifications.	
3.4	Licence and code changes	The successful bidder will take the risk for compliance with any licence or code changes.	This is the standard position for any market participant. Licence and code changes will be distinct from changes in law which are referenced in section 1.12.4 above.
3.5	Environmental, social or governance	The successful bidder will take the risk for compliance with any environmental, social or governance obligations.	If the environmental, social or governance obligations are introduced via a licence change or a code modification, then this would be a risk that all market participants would be expected to take.
3.6	Step-in and Provider of Last Resort	For network solutions, the CATO of last resort regime will apply. For non-network solutions, enhanced contractual provisions may apply, as step-in may not be appropriate for these types of projects.	Step-in for a non-network solution would present a number of difficulties for the ESO, including regulatory issues if the non-network solution is a generation asset. Step-in rights would need to be coordinated with lenders, likely through a direct agreement. Stepping in where a non-network asset is providing a number of services would also create issues. The enhanced contractual protections may involve additional credit support and financial reporting requirements on the successful bidder.
3.7	Transfer of asset	There will be no transfer of the asset throughout or at the end of the revenue period, other than in a CATO of last resort scenario. The successful bidder will be obliged to provide reasonable co-operation and support with any re-tender process relating to the system need following the end of the initial period.	Consideration will be given in each case at the end of the revenue period as to whether the system need will continue or not. However, there will not be a handover of the asset to the ESO or an incumbent TO.
3.8	Reporting/information requirements/interface	The minimum reporting requirements in the construction phase shall be quarterly and in the operational phase shall be monthly. Reports to include (but are not limited to) performance against milestones in the construction period, costs of	

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		construction/performance of the service, cost reopener events, availability, refinancing and service failures. Reporting will be on an open-book basis. For network solutions, the STC and Ofgem reporting requirements will apply. Application of elements of these requirements to non-network solutions will be considered. The successful bidder will be obliged to give notice of changes to its solution or if the solution is unlikely to be available for a period of time.	
3.9	Long-term asset condition	The successful bidder shall be responsible for maintaining the relevant assets to a satisfactory level. The principle requirements will be the availability payment/incentive mechanisms.	The successful bidder is expected to maintain their assets to a satisfactory level to allow them to meet availability performance targets.
3.10	Decommissioning	The successful bidder shall be responsible for solution decommissioning costs/timescales and no additional revenue will be available unless an IAE re-opener applies. The asset may not necessarily be decommissioned after the initial revenue period if further use can be made of the asset as set out in Contract Extension at 4.3 below. Decommissioning security may be required, as set out in section 11.1, Chapter 5.	A decommissioning plan should be provided and maintained. This risk would only be shared if changes in law impact on the costs of decommissioning. The proposed approach is to narrowly define the scope of the decommissioning security requirements to cover the decommissioning processes and obligations set out in industry codes. This will ensure that decommissioning activities and disconnection is sufficient to not adversely impact the Transmission System. To avoid the need for additional security to be provided, the suggested approach is to enable the security required towards the end of the TRS under the availability incentive to be extended to cover decommissioning (Section 10.3, Chapter 5).

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4.	**CONTRACT COMMERCIAL STRUCTURE/GENERAL TERMS**		
4.1	Contract Duration	For non-network solutions, the coming into effect of the key terms of the contract will be subject to a number of conditions precedent which will relate to issues such as the provision of security and required insurances having been obtained. The revenue period shall commence on the later of: • the actual service commencement date; or • the scheduled service commencement date, The duration of the revenue period shall be up to 45 years but depends in each case on the system need.	The revenue period will be reduced if the scheduled commencement date is missed. As discussed above, the payments may be adjusted if this is the case. Prior to setting the revenue period for a tender, issues that may lead to an adjustment to the length of the revenue period could include: • Evidence that there was no appropriate technical solution for the length of the need • Evidence that debt or equity finance would not be available on reasonable terms, or • Evidence that technological innovation may render any proposed solutions obsolete.
4.2	Contract End Date	The contract end date will be fixed in all cases, except where an extension applies.	The process for contract extension is set out below in section 4.3.
4.3	Contract Extension	In the circumstance that at the end of the revenue period there remains a system need for the solution (as determined by the Network Planning Body through the NOA process or another suitable process), an extension of the existing contract/licence may take place on existing terms. The alternative approach would be a retender of the need (subject to the prevailing procurement regime at the relevant time).	The proposed solution is to set out in the original contract (or stated as policy with regards the licence) the basis on which an extension would take place. This would include agreement on the basis for calculating the new TRS for the extension period. Relevant costs in calculating the TRS for the extension period may include: • Reasonable refurbishment expenditure;

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			• Reasonable operating and maintenance costs; and • A reasonable margin. A process for agreeing these costs would be set out in the tender and then included in the contract for non-network solutions.
4.4	Changes (other than changes in system need)	A change control mechanism shall be included to ensure value for money of the project. The change mechanism will set out what level of changes require approval (i.e. there may be a level of change that is priced into the successful bidder's price), the information to be provided to support the proposed change, and response times. Some tenders will require flexibility to have been included at the outset.	The tender process will need to be considered in the context of any changes that are requested. There is a question as to the point at which a re-tender may be required.
4.5	Termination	Termination rights shall be included as follows where appropriate with grace periods to remedy the failure on notice. Termination rights are divided into those which are considered bidder default termination and those which are considered non-default termination. Successful bidder default termination • the successful bidder commits a breach which adversely and materially affects the performance of its services; • the successful bidder commits a persistent breach of its obligations;	These termination rights are broader than those that would currently appear in the terms of a licence. In relation to licence holders, Ofgem has enforcement rights that enable Ofgem to influence behaviour and to raise material penalties that are not reflected in the contractual scenario. These termination rights are reflective of the rights that would usually be included in a long-term infrastructure services agreement.

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		• an insolvency event arises in respect of the successful bidder or its holding company; • to the extent there are limitations in the contract on the replacement of certain sub-contractors, if these are breached they should give rise to potential termination; • the successful bidder breaches the Bribery Act or the Modern Slavery Act; • the successful bidder commits a serious data breach; • the successful bidder breaches the rule against assignment/transfer of its rights/obligations without consent; • failure to achieve Completion/begin licence activity by a prescribed longstop date; • failure to refresh security in accordance with the terms of the agreement; • breach of the refinancing provisions of the agreement; • Ofgem directs the contract counterparty to terminate the agreement as a result of a need change or need disappearance;	

	ACTIVITY/RISK ALLOCATION	TERM	NARRATIVE
		• failure to make the services available for a specified period; • fraud; • assigning benefit of the agreement or transferring rights and obligations in breach of the assignment or transfer restrictions; and • health, safety and/or environmental concerns that are not addressed by the successful bidder. Non-default termination • system need ends; • successful legal challenge to tender process; and • extended force majeure.	
4.6	Compensation on termination	Compensation on termination for successful bidder default. If termination follows a successful bidder default, then third party debt is kept whole but there is no recovery for equity. The position on compensation for non- default termination is a complex area that the ESO is still considering. The ESO's initial view is that in the following circumstances compensation may be payable, but this is not an exhaustive list.	

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		If the project is cancelled because the system need ceases to exist, then the successful bidder would be put in "no better; no worse" position, i.e. reasonably incurred sunk costs and the costs of debt could be recovered. If the change only removes the system need in part, or delays the system need, or increases the system need, the TRS may need to be adjusted to allow for recovery of these amounts over the shorter period of the TRS or in the last case, the recovery of a higher amount. The change process set out in section 1.12.2. above would apply.	
4.7	Overage/gain share on equity sales	While no equity gain share is being proposed at present, that position is subject to review. Provisions may be included to ensure that the consumer benefits from any windfall gains that accrue to the successful bidder.	The position is subject to further consideration, as would the period of time to which this type of provision might apply. An appropriate definition of "windfall" would need to be included.
4.8	Asset Ownership and financier security	For network solutions, the licence provisions relating to granting security by way of a charge over the network assets will apply. For non-network solutions, consent will be needed for the successful bidder to charge the assets used in providing the solution.	
4.9	Dispute Resolution	A tiered dispute resolution procedure shall apply: • The first step will always be bilateral discussions with escalation to senior management; • alternative dispute resolutions (such as recourse to an expert/Independent	Referring disputes to Ofgem for determination would only apply to disputes associated with adjustments to the TRS post-award e.g. in relation to the post-preliminary works cost assessment or an IAE.

	ACTIVITY/RISK ALLOCATION	TERM	NARRATIVE
		Technical Advisor) could apply where appropriate; and • during the construction phase, a form of adjudication process would be used to prevent a dispute from delaying commissioning of the solution. For some disputes where the standard dispute resolution process is inappropriate an Ofgem referral could be possible and constitute a binding determination.	
4.10	Conditions Precedent	Conditions precedent will be considered in each case. If the successful bidder is a special purpose vehicle then board papers confirming that the agreement will be binding and authority to sign has been granted will be required for non-network solutions. Other potential conditions precedent include obtaining the relevant Electricity Act licences (e.g. generation licence, if required) and providing security.	
4.11	Insurance and uninsurability	The insurances to be placed by the successful bidder during the construction phase will include contractor's all risks, third party liability, environmental protection, delay in start-up, and business interruption insurances. During the revenue period, the successful bidder must take out insurances required by law and other insurances to cover losses caused by it. Key insurances will be placed by the successful bidder with financiers (to the extent relevant) co-insureds. There will be a provision within the IAE mechanism to deal with the unavailability of insurance where, through	The costs above the trigger threshold associated with the uninsurable risk would sit with consumers, whereas any other costs would sit with the successful bidder.

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		market events, insurances are no longer available or unavailable on reasonable terms.	
4.12	Community benefits	There will be an obligation on successful bidders to seek opportunities to provide community benefits to the extent appropriate for each type of project.	
4.13	Survival	Certain provisions of the agreement will continue after termination, including confidentiality, liability, audit rights and payment processes. Termination will be without prejudice to accrued rights.	
4.14	Audit	The successful bidder will have to provide access and co-operation in relation to audits of their systems, records and processes for up to 6 years after termination.	
4.15	New connection to CATO system	If the solution is a network solution then statutory obligations to provide a connection to third parties will exist. This obligation does not apply in the case of non-network solutions.	The successful bidder (for network solutions) should be responsible for new investment on their network to help facilitate new connections, as set out in the licence and industry codes. More detail on the timely connection incentive is set out in section 2.10 above.
4.16	Force Majeure	Force Majeure will be a shared risk, provided the developer complies with standard provisions on providing notice, mitigating the effect of the force majeure event and remedying any unavailability. If a force majeure event occurs then: (i) there will be relief from the obligation to provide the service; (ii) to the extent the force majeure event causes the commissioning of the project to be delayed, the TRS	If a force majeure event occurs, there will be relief from the obligation to perform the affected obligation and/or an adjustment to the TRS via either the post preliminary works costs assessment or an IAE.

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		will be adjusted to allow recovery of the IRR over a shorter period; and (iii) if there is a long-term force majeure event that leads to termination, section 4.5 applies. This would be a non-default termination event.	
4.17	Network Charge Bad Debt	The successful bidder will have a relationship with the financial counterparty and not the network charge bill payers and so any network charge bad debt will be managed by the financial counterparty and not be a risk to bidders.	A successful bidder will be protected from network charge bad debt with the financial counterparty being responsible for paying the TRS subject to any permitted adjustments e.g. availability incentive.
4.18	Data	The successful bidder will be subject to a number of obligations regarding the preserving of confidentiality and the provision of data.	The Procurement Body is subject to a number of obligations in relation to data; this may restrict the data that can be provided to the bidders during the procurement process. The STC includes data sharing provisions, but non-network solution providers will not be a party to the STC.
4.19	Assignment & novation	If the contract counterparty is the ESO, the contract counterparty will be able to assign or novate the contract without the consent of the successful bidder.	